The Arbitration Act, 194

CONTENTS

Sections

Preamble 1

CHAPTER I

Introductory.

1. Short title, extent and commencement 39
2. Definitions 44

CHAPTER II

Arbitration without intervention of a Court.

3. Provisions implied in arbitration agreement 128
4. Agreement that arbitrators be appointed by third party 130
5. Authority of appointed arbitrator or umpire irrevocable except by leave of Court 152
6. Arbitration agreement not to be discharged by death of party thereto ... 185
6. Provisions in case of insolvency 204
8. Power of Court to appoint arbitrator or umpire 209
9. Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator 242
10. Provisions as to appointment of three or more arbitrators 264
11. Power to Court to remove arbitrators or umpire in certain circumstances... 279
12. Power of Court where arbitrator is removed or his authority revoked ... 324
13. Powers of arbitrator 327
14. Awards to be signed and filed 377
15. Power of Court to modify award 454
16. Power to remit award... 466
17. Judgment in terms of award 500
18. Power of Court to pass interim orders 535
19. Power to supersede arbitration when award becomes void or is set aside... 536

CHAPTER III

Arbitration with intervention of a Court where there is no suit pending.

20. Application to file in Court arbitration agreement ... 589

CHAPTER IV

Arbitration in suits.

21. Parties to suit may apply for order of reference... ... 558
22. Appointment of arbitrator 586
23. Order of reference 587
25. Reference to arbitration by some of the parties 595
25. Provisions applicable to arbitrations under this Chapter 597

CHAPTE V

General

26. Application of Chapter 598
27. Power of arbitrators to make an interim award 599
28. Power to Court only to enlarge time for making award 602
29. Interest on awards 609
30. Grounds for setting aside award 610
31. Jurisdiction 690
32. Bar to suits contesting arbitration agreement or award 705
33. Arbitration agreement or award to be contested by application ... 718
34, Power to stay legal proceedings where there is an arbitration agreement... 730
35. Effect of legal proceedings on arbitration 801

		Page
	of Court, where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference ...	808
37.	Limitations...	810
38.	Disputes as to arbitrator's remuneration or costs	817

CHAPTER IV

Appeals

39.	Appealable orders	820

CHAPTER VII

Miscellaneons.

40.	Small Cause Court not to have jurisdiction over arbitration save arbitrations in suits before it	840
41.	Procedure and powers of Court	840
42.	Service of notice by party or arbitrator	842
43.	Power of Court to issue process for appearance before arbitrator ...	843
44.	Power to High Court to make rules	845
45.	Government to be bound	845
46.	Application of Act to Statutory arbitrations	846
47.	Act to apply to all arbitrations	848
48.	Saving for pending references	853
49.	Repeals and amendments	854
	THE FIRST SCHEDULE—Implied conditions of arbitration agreements ...	854
	THE SECOND SCHEDULE—Powers of Court	865
	THE THIRD SCHEDULE—Enactments repealed	866
	THE FOURTH SCHEDULE—Enactments amended	866
	THE ARBITRATION (Protocol and Convention) Act, 1937	869
APPENDIY	A—Statements of Objects and Reasons	i
APPENDIX	B—Report of the Select Committee	iv
APPENDIX	C—Civil Procedure Code (Act VIII of 1859)	vi
APPENDIX	D—Civil Procedure Code (Act XIV of 1882)	viii
APPENDIX	E—The Code of Civil Procedure of 1908	ix
APPENDIX	F—The Indian Arbitration Act, 1899	xvi
APPENDIX	G—The English Arbitration Act, 1889	xx
APPENDIX	H—The Arbitration Act, 1934	xxvi
APPENDIX	I—The Administration pf Justice Act, 1920	xxxi
APPENDIX	J—The Common Law Procedure Act, 1854	xxxii
APPENDIX	K—Arbitration Act. 1950	xxxiv
APPENDIX	L—Report of the Civil Justice Committee, 1924-25	xlvii
APPENDIX	M—Rules framed by High Courts	lv
	High Court of Judicature at Fort William in Bengal	lv
	Bombay High Court	lxi
	Madras High Court	lxv
APPENDIX	N—Sind Chief Court	lxvii
APPENDIX	O—Rules made by different Chambers of Commers	lxxiv
	London Court of Arbitration	lxxiv
	Bengal Chamber of Commerce	lxxxii
	Bombay Chamber of Commerce	lxxxviii
	Madras Chamber of Commerce	xeii
	Karachi Chamber of Commerce	xcvii
	Bengal National Chamber of Commerce	civ
APPENDIX	P—Rules of the High Court at Calcutta	cxx
SUBJECT	INDEX	cxxiii

Table of Cases

A

Abadi Jain v. Oriental 8
Abalakhee v. Ouden Singh 157, 552, 590
Abani Bhusan v. Hem Chandra 121, 562, 582
Abbott v. Middleton 5
Abdul v. Abdul 554, 807
Abdul v, Besant 833
Abdul v. Bora 7
Abdul v. India 729
Abdul v. M. U. R. S. & Sons 274, 384, 393, 664
Abdul v. Mohammad 141, 645
Abdul v. Thakur Prosad 439, 648, 863
Abdulla v. Ali Merdan 473, 480
Abdulla v. Sasson 785
Abdulla v. Bahram 310, 422, 645, 835
Abdul Ali v. Anwar Ali 517
Abdul Aziz v. Punjab Govt. 839
Abdul Ghani v. Sirajuddin 87, 136, 190, 573
Abdul Ghani v. Din Dayal 235
Abdul Ghani v. Golam Sarwar 382, 392, 664
Abdul Hakim v. Chairman 503, 538, 555, 556, 607, 859
Abdul Halim v. Abdul Gafur 560
Abdul Halim v. Ismail Momin 295, 307, 310, 367, 377, 651
Abdul Hamid v. Riyazuddin 237, 581
Abdul Kadir v. Madhab 545, 553
Abdul Karim v. Maniram 729 826
Abdul Karim v. Thakur Prosad 619
Abdul Karim v. Muhammad 594
Abdul Latif v. Dost Mahomed 742, 783
Abdul Majid v. Bahawal 619, 863
Abdul Majid v. Ali Ashraf 629, 664
Abdul Quddos v. Abdul Gani 557, 774
Abdul Rahaman v. Sahabuddin 391
Abdul Rahaman v. Yar Mnhammad 470, 497, 499, 850
Abdul Tahar v. Azmut Bibi 517
Abdur Beg v. Nathmal 570
Abdur Rahim v. Syed Abu 23
Abdus v. Mohammad 241, 248
Abdus Sakur v. Md. Yusof 144, 319, 285, 651, 652, 831
Abinash v. Parasuram 276, 292, 394
Aboobakar Latif v. Reception Committee Indian National Congress 174, 290, 303, 469, 475, 624, 629
Absalam v. Great Western 77, 368, 468, 490, 610
Achabar Pamdo v. Kuldip 507, 531
Achisam v. Babar Ali 593, 836, 839
Achraj Singh v. Achrajram 502, 534
Across v. London and Northern Rly. Co. 490
Actors Ltd. v. London 640
Achuthayya v Thimma 533
Addison v. Gray 418
Adams v. Baukhart 105
Adams v. Catley 773
Adams v. Great North of Scotland Ry. Co. 77, 117, 294, 450, 457, 493. 494, 662, 834
Adamji v. Samsuddin 342
Adhibai v. Gursam Das 280, 590, 591
Administrator-General v. Chandrakant 561
Administrator-General v. Premlal 192. 193
Administrator-General v. Lalit Mohan 194
Aftab Begam v. Abdul Majid 555, 593, 614
Aftab Ahmed v. Instrument Supply 606
Aghore Nath Banerjee v. The Calcutta Tramways 731, 750
Ahmed v. Bhagban 100
Ahmed v. Bhagabati 574
Ahmed v. Cassum 159, 169, 237, 560, 590
Ahmed v. Sardara 103
Ahmed Din v. Atlas Trading 529, 835
Ahmed Noor v. Abdur Rahaman 214, 554
Ahmedabad v. Rajivbhai 297
Ahmedullah v. Srinivas 62
Aisbai v. Essaji 367, 369
Aishan v. Abdulla 594
Aitcheson v. Cargey 411, 412
Aitken v. Batchere 54, 73
Ajit Kumar Sen v. State 12
Ajit Singh v. Fatehe Singh 625
Ajudhiya Prosad v. Badurul Hussain 681
Aka Aeyappa v. Nandula Peraiya 155
Akbari Bogum v. Rahamat 24, 25, 35
Akhiram v. Ram. 582
Akshay Kumar Nandi v. S. C. Das & Co. 117, 313, 397, 429, 618, 638. 670
Alagappa v. Chidambaran 303, 310, 315, 320, 454, 489, 492. 622, 646
Alagu v. Veluchamia 415, 478, 479, 602, 849
Alarkhia v. Jehangir 454
Albion Jute v. Jute and Gunny Brokers 64, 83
Albuquerque v. Catholic Bank 457, 502
Aldams v. Brown 95
Alder v. Savill 652
Ali Akbar v. Safir Khan 17
Ali Bakas v. Kadir 88, 552, 569 581
Alim v. Mahidino 516, 517, 624
Allahdin v. Badsha Begam 530, 540
Allen v. Francis 332
Allen v. Milner 414
Alopi Parshad v. Union of India 655
Alru v. Golam 312
Amara v. Aata 525
Amar Chand v. Banwari Lal 707, 849, 850
Amarchand v. Mooshabibi 687, 823
Amar Chand v. Premananda 192
Amaresh v. Bhagwati 554
Amarnath v. Uggar Sen 276, 496, 603, 606, 644
Amar Nath v. Ishar Singh 350
Amar Nath v. Echholz 260
Amar Singh v. Eichtola 519
Amarsi v. Dayal 419, 421
Ambika Charan v. Kalachand 193
Ambika v. Basawan 458, 459
Ambika Prosad v. Shiva Parsan 393
Amin Chand v. Kashiram 169
Amir Bibi v. Arokiam 2, 389. 396, 400
Amir Begam v. Badruddin 78, 290, 292, 296, 356, 357. 364, 372, 418, 425 426, 436, 459, 483, 502, 547. 618, 630, 650, 660, 697, 700
Amir Hussain v. Mohammed 89, 90
Amir Sha v. Abdul Aziz 101, 102, 103, 104, 574, 850
A. M. Mir v. Gordhandas 63, 725
Amod Kumar Verma v. Hari Prosed 431, 432, 461, 503, 535
Amolak v. Charan 459

Amravir Singh v. Punjab Ztminders Bank Ltd. 439
Amrit Ram v. Dasarat Ram 572
Amulya Charan v. Kalidas 194
Anand v. Hardil 198
Anand Das v. Rambhnsan Das 159, 318, 537, 582, 605
Ananda v. Jogendra 523
Ananda v. Jogesh 477, 499
Anandilal v. Singhal 718
Anandi Lal v. Keshabdeo 355, 425. 637, 682, 683, 701.
Anant v. Ratnagiri 11
Anant Lal v. Janada Sundari 277, 478, 620
Anant Ram v. Gurdit Mal 474, 486, 828
Anant Ram v. Lala Murlidhar 350, 420, 427, 665
Anarkali v. Jai Gopal 110
Anath Nath v. Manmatha Nath 502, 533
Anbert v. Marze 293, 812
Anderson v. Moran 739, 740, 741
Anderson v. Wallance 298, 374, 375, 376, 650
Andhra Co-operative v. Srinivasam 266, 748. 782, 784
Andrews v. Palmer 204
Andrews v. Mitchell 58, 295, 299, 301, 303, 327, 352, 353, 626
Anglo-Newfoundland Development Co. v. Regina 50, 51, 52, 53, 72, 83, 251, 793
Anglo-Persion oil v. Panchapakesa Ayyar 781, 784, 787, 793
Angus v. Redford 405
Angus v. Smythies 357, 649
Annamalai v. Ramaswamy 471
Annamalai v. Annamalai 478, 523 531
Anning v. Hartley 390, 473 630.
Anno Krishna v. Jogendra 94
Antarijami v. Ketaki 524
Antony v. Makis 193
Anwar Ali v. State 12
Anwar Lal v. Ali Mohammed 542
Appa Rao v. E. I. Ry 481
Apparao v. Mohammed 451
Apparee Rowther v. Seeni 735, 738, 805
Appayya v. Venkataswami 464, 498
Appollo Mills v. Babubhai 457, 465, 515, 854
Arbitration, In re, 298, 301, 302, 305
Ardesar Hormasrji v. Secretary of State 319
Ariff v. Bengal Silk 117, 583, 584, 604, 620, 702, 723
Arjuna v. Nakula Chowdhury 674
Armani v. Armani 528
Armitage v. Walker 418
Armstrong v. Marshall 302, 368
Armutt v. Breame 665
Arthur v. Owden 406
Arthur Andrew v. Macdonald Burnett 751
Arunachala v. Louis Dreyfus 105, 275, 323, 336, 430, 589, 666, 667, 672
Arumuga v. Balasubramnia 543, 558
Arumugam v. Arunachalam 117, 592, 607 670
Arya Vidya v. Hash 733
Asa v. Bhuram 606. 721
Asa Nand v. Ganesh Ram 545, 547, 699
Asa-dullah v. Muhammed 117. 396, 592, 607 670
Ashbury Ry. Carriage and Iron Co. v. Riche 112
Ashland v. Paynter 76
Ashrafilal v. Ramdeo 646
Ashutosh Deb v. Apurbakumar 164, 581
Ashutosh Ghosh v. Sudhansu Bhusan 415, 460
Asis Begum v. Badruddin Hassain 353
Askaram Choutmal v. E. I. Ry. 101
Asmat ali v. Mujahar Ali 729
Asmatulla v. Forbes 698
Aspell v. Seymour 85
Assudamal v. Jessmal 227, 231
Aston v. George 152
Aswinikumar Ghosh v. Arabinda Bose 13
Atchayya v. Dhooli Peddenti 278
Alkensons v. Abbott 102
Atlas Assurance Co. v. Ahemedbhoy 580
Atlantic Shipping v. Louis Dreyfus & Co. 746, 762, 815, 816
Atmaram v. State of Bihar 10
Atmaram v. State of Punjab 21
Atmaram v. Bhila Ganapat 92, 575
Atmaram v. Gajanmal 758
Atma Rai v. Sheo Baran 280, 704
Attar Singh v. Bishan Singh 588, 891
Attock Oil Co. v. Abdul Majid 110, 548
Att.—Gen. for Manitoba v, Kelly 77, 162, 275, 355, 457, 494, 639, 640
Att.—Gen. v. Fea 76
Att.—Gen. v. Great Eastern Ry. Co. 112
Att.—Gen. v. Davison 302
Att.—Gen. v. Hewit 567
Atulkrishna v. Lala Nandaji 196
Atulannanda v. Tusharkanti 742
Auriol v. Smith 411, 459
Australion Lloyd Steamship v. Gresham Life 38, 43, 143, 731, 760
Autar Singh v. Jogindra 124
Autram v. Chance 105
Avaram v. Subhden 785
Ayyamal v. Naranappa 291, 628
Ayyaswami v. Appadurai 277, 394
Ayyanamma v. Ram Swami 849
Ayodhya v. Badar Hussain 573
Azad Hind v. Ramlal 333
Azaj Ali v Md. Zohora 528
Azimat Singh v. Kalwant Singh 421
Aziz v. Motram 103, 104

B

Babo Ghulam v. Ghulam 653
Baboo Surubjeet Narain Singh v. Baboo Goure Prosad Narain Singh 385
Babua v. Badri 312
Babubhai v. Madhoji 287, 321, 460, 779.
Babubhai v. Nanulal 200.
Babubhai v. Probhod 282, 861.
Babuji v. Ganapatrao 477.
Babu Kriparam v. Jawhar Singh 359.
Babulal v. Badrilal 277, 350, 383, 658, 664.
Babuldas v. Khanchand, In re, 244.
Babulal v. Ramswarup 817.
Babu Prosad v. Mahabir 95.
Babu Ram v. Lala Ram 630.
Babu Sakharam v. Lahoo Sombhuji 21.
(Bac. Ab. Arle. A. R ;) v. Bardel 86.

Bachchanlal v. Narottam Dutt 418, 419, 425, 459, 683
Bachan Lal v. Amar Singh 561
Bacha Sahib v. Abdul Gani 576
Bachana Ramu v. State of Punjub 37
Bache v. Billiugham 285, 367
Bachnbhai v. Mohanlal 618, 696
Bacon v. Craustons 189
Baddall v. Page 274
Badri v. Ram 522, 830
Badri v. Raj Narain 274
Badri v. Chaman 422, 614
Badrilal v. Lakshya 307, 310, 312, 645, 663, 664
Badri Narayan v. Union of India 746
Badruddin Hussain v Amir Begam 287, 296, 364, 372, 470. 493, 502 653
Bagaya v. Paduma 254, 392. 663
Baguly v. Markwick 336
Bahadur v. Nagar Mal 177
Bahadur v. Ramnarain 704
Bahadur Singh v. Puran Singh 516
Bahar v. Inyat 532
Baharuddin v. Muhamed 117
Bahirdas v. Nabin 584
Baidaya Nath v. Panchanan 625
Baijnath v. Dhani Ram 38, 526
Baijnath v. Narain 441, 523, 583
Baijnath v. Bajrang Lal 311. 316
Baijnath v Ahmed Musaji 132, 433, 434, 845
Baijnath v. Chhatulal Sethia 708. 711, 714. 722
Baijjuri v. Bhoopati 622
Bai Laxmi v. Shridhar 396, 428, 442, 665,
Bailey v. Curling 403
Baikunta v. Sitanath 37, 144
Baittie v. Edinburgh Oil Gaslight Co. 480, 482
Bajabai v. Shiva Ram 131, 133
Bajrang v. Commissioner 871, 872
Bajranglal v. Laduram 35
Bajranglal v. Ganosh Commercial 278, 626, 644, 650. 657
Baijranglal v. Agarwal:594, 691, 707, 714,721, 722
Baker, In re 233
Baker v. Townsend 86
Baker v. Cotteril 408, 417
Baker v. Hunter 403, 409
Baker v. Stephens 272. 278, 282, 861
Baker v. Yorkshire Fire & Life Assurance Co. 50, 52, 62, 72. 251
Bakhtawar v. Issardas 567
Baksh Ilahi v. Abdul Rahaman 128
Baklawar v. Keshar Singh·92
Bala v. Sethrama 554, 587
Balabux v. Luchminarain 745
Balaji v. Nana 92, 96, 512
Balakrishna v. Karumutha 332
Balaud Baksh v. Ramchandra 499
Balaram v. Budhram Marvadi Ramkrishna 419
Balaram v. Dudhnath 568
Balakram v. Ramjiwan 530, 654,:680
Balak Puri v. Durga 198
Baldeo Sahai v. Abdul Rahim 509, 523, 528, 578, 624
Baldey v. Kolagin 337
Balika Debi v. Kedar Nath 46, 108, 188, 197 214, 217, 838
Balkrishna v. Sohan Singh 136, 522. 578
Bal Krishna v. Sukdie 334
Balkissen v. Brij Mohan 502, 517
Ballasty v. Army 753
Ballav v. Udit Narain 796
Ballav das v. Halwaisya 786, 795
Bal Chand v. Thakurdas 589
Balmukund v. Punjab National 110
Balmukund v. Uttamchand 65, 244, 247
Balwant Singh v. Ramchandra 719, 729
Banarasi Dass v. Om Prakash 379, 432
Banarasidass v. Murlimal 779
Bangaraya v. Ramabhudrerajn 727
Bank v. Chapel 80, 83, 161
Banke Lal v. Sant Sharan 21
Banking Corporation v. Durgesh Nandi 567
Banker v. Yorkshire 52, 53, 55
Bankers, Shippers v. Liverpool Marine 41
Bankey v. Jhingam 10
Banks v. Banks 333
Bankulal v. Chhotey Mian 507, 508, 531, 570 592
Bansidhar v. Sukhia 778
Bansidhar v. Babulal 54
Bansidhar v. Sital Prosad 157, 158, 159, 176, 545, 552. 591
Bansilal v. Gopal Lal 462, 521, 594, 827
Banwarilal v. State of Bihar 11
Banwarilal v. Jogannath 649
Banwarilal v. Joylal 617, 647, 661, 802, 803
Banwarilal v. Board of Trustees 711, 713, 743, 836
Bapumal v. Nathumal 574
Baranagore Jute v. Hulas Das 37, 47, 60. 126 130, 405, 538, 817, 862
Baranashi Daf v. Ram Kishan 405
Bari Bahu v. Protap Singh 306, 645
Barindra v. Bainu 604
Baring Gould v. Sharpinton 861
Baritania Bulding v. Govinda 121
Barnes v. Young 783, 787, 800
Barnes v. Haywood 323
Barradeo v. D' Souza 236, 556
Barry v. Gragan 77
Barton v. Blacksmith 468, 490, 640
Basantalal v. Surendra 532, 612, 675, 690, 720, 723
Basantalal v. Dominfon of India 68, 787
Basantrai v. Giridhari 383
Basant Chandra v. Damegee 818
Basanti Cotton v. Dhingra Bros. 772 880
Basanti v. Amir Chand 695
Basaoo v. Jagan 849
Basappa v. Chanabasappa 445, 845
Basdeo v. Jagannath 580
Basdeo v. Kanhaiya 214, 228, 231, 353 537
Basdeo v. Saraswati 552, 569
Basheshar Nath v. C. I. T. 20
Basiro v. Mahomed 62, 366
Basiruddin v. Mansoor 636
Baslol v. Mayfire Property Co. 15
Basudeva v. Sundaraja 95
Batcha Sahib v. Abdul Gunny 517, 522
Batis v' Cook 270
Bates v, Townbey 267
Battee v. Edinburgh Oil Gaslight Co. 417
Batnwa v. Gonsheddappa 856
Batson v. Town 626
Battom'ey v. Ambbor 366
Bawa Chattagir v. Matonammal 113, 125, 644 798

B

Bayne v. Morris 437
B. Das v, The Broach E. S. and D. Co. 368
Beach v. Beach 416
Beale v. Beale 485
Bealtie v. Bealtie 50
Beau v, Forman 107, 565
Beasant v. Wood 564
Beckett v. Ramsdale 203
Beddal v Page 387
Beddel v. Dowse 102
Beddow v. Beddow I45, 146, 631, 632
Beharani v. Dhorma 456
Beharee v. Doorga 383
Beharilal v, Khem Chand 831
Beharilal v. Official Receiver 770
Beharilal v. Dhalam Das 351
Beharilal v. Sirsa Trading 110
Beharilal v. Chunilal 523
Beith Stevenson v. Naromal 486
Bijoy Singh v. Bilas Roy 489, 614, 615. 626, 711
Belagodulal v. Kalyani 849
Belcher v. Rocdean School Site and Buildings Ltd. I67
Belli Gowder v. Joghi 72
Belvedere Jute Mills v. Haradwari 534
Benarosidas v. Murlimal 795
Beni v. Bhagana 7
Beni Dutt v, Baijnath 186, 190, 394
Beni Madhab v. Ram Autor 814
Benoy Madhab v, Hurry Mohan 433
Beni Prosad v. Krishna Kumar 520
Bengal Jute Mills v. Jewraj 445, 615, 654, 691 702, 717, 723, 788
Bengal Silk v. Aisha Ariff 157, 226, 593, 615, 667, 702, 707, 724
Bengal Theatres v. Guro Charan 839
Benode Lal v. Pran Ch. Pakrasi 383, 385, 390, 392, 395, 433, 664
Bennett v. Brighton Corp. 413
Bepin Behari Chowdhury v. Annada Prosad Mullick 222
Bepin Behari v. Krishna Behari 521
Besambar v. Radha 35
Betana v. Kedarnath 531
Bhagabati Devi v, Bholanath 108
Bhagat Ram v. Ambala 457
Bhagat Ram v. Parrs Ram 421, 454
Bhagat Ram v. Ganda Singh 396, 592, 593, 607
Bhagirath v, Ram Ghulam 332, 654
Bhagirath v. Shankar Lal 62, 63, 560
Bhagwan v. Bisheswar 604, 689
Bhawan v. Hiraji 573
Bhagwan v. Nandalal 100, 524. 581, 588
Bhagwan Das v. Shiv Dayal 391, 476, 477, 506
Bhagwan Das v. Atma Singh 707, 709, 713, 715, 717, 721, 722, 744
Bhagwan Das v. Gurdayal 541, 554
Bhagwan Das v. Fakir Singh 538, 592, 593
Bhagwan Singh v. Ram Keon 521
Bhagwant v Joti Sarup 198
Rhagwant v. Gangabisun 610
Bhagwate v. Bhagwandas 624
Bhagwati v. Kamala 769
Bhagva Manaji v. Hiraji Premji 105
Bhailal v. Amaratllal 256
Bhaiyalal v, Swami Singhal 184, 826
Bhaiya v. Jogeshwar 303, 307
Bhajahary Saha v. Beharilal Basack 398, 399, 400, 401, 413, 418, 420 551, 625
Bhalan Sha v. Mir Hossain 460
Bharasi v. Sarat 561
Bharat Construction v, Union of India 64, 221, 234, 379, 782, 842
Bharat Vegitable v. Lala Ram Saran 773
Bhalanshah v. Hussain 669
Bhatu Kuer v. Pirm Tarachand 524
Bhican v. Tagot 306
Bhikam Chand v. Chandan mal 48
Bhikari v. Gobind 517
Bhimram v. Bharat 543, 547, 551
Bhimraj v. Munio 559, 849
Bhim Sain v. Tarachand 418
Bhim Sain v. Muhammod 198
Bhinka v. Charau Singh 13
Bhiwimdiwala v. Lakshmandas 64, 379
Bhabo Sundari v. Makhamlal Dev 390, 391
Bhogilal v, Chimanlal 180, 183, 279, 280, 291, 297, 555, 628, 643
Bhojo Nath v. Shivanarain 394
Bholanath v. Prabhu 202
Bholanath v. Madhab 446
Bholanath Roy v. Batta Krishna 34, 441, 517
Bholanath v. Chandra Sekhar 833
Bholanath v. Raghunath 159, 169, 177, 531, 590, 608
Bhola Ram v. Hukum Chand 478, 479, 577,
Bhowani Das v. Harsukh Das 259, 314, 370, 609, 648
Bhowani Das v. Panna Chand 139, 772
Bhuboneswari v Secretary of State 108
Bhudarmall v. Uma Sankar 330
Bhudulal v. Jagannath 786
Bhutnath Sircar v. Ramlal Sircar 101
Bhuwalka Bros. v. Rajputana 162
Bhuwalka Bros. v. Fateh Chand 59, 137, 141, 142, 145, 166, 168, 173, 174, 176, 181
Bibi Hakiman v. Mohomed Waliduddin 632, 633
Biggs v. Hansell 332
Begnall v. Gale 298, 320, 621
Bihar Subai Sunni v. Sitaram 10
Bijai Cotton v. State of Rajasthan 11
Bijadhar Ram v. Rajkaran 415, 477, 506
Bikalal v. Acharat Lal 529, 531
Bilas Rani v. Tolaram 742, 797
Bithal Das v. Srinath 699
Binayak v. Sashi 188, 189, 190
Binayak Das v. Nalini 512, 595
Bindesri Naik v. Ganga Saran 422
Bindeswari v. Janku 69
Bipin Behari v. Abdul 561, 487
Biraj Mohini v. Chintamoni 94
Birla Jute v. Dulichand 741, 748, 767, 783.
Birsa Mal v. Kesar Singh 594
Bishambar v. Radha Kissen 184
Bishambar v. Ganga 574
Bishen v. Om Prakash 124
Bishen v. Bhag 231
Bishowar Dayal v. Bajrang Bahadur 194
Bishnu Prosad v. Gopal Das 724
Bissa Mal v- Kisar Singh 456
Biswas v. Balwant 280
Biswanath v. Sudhir 527
Bithal v. Sriuath 121, 846, 848
Black v. John Williams 308
Black house v. Taylor 270
Blackwell & Co. v. Derby Corp. 794

Blair v- Harradine 865
Bland v. Russian Bank 426
Blanchard v. Suu Fire Office 635
Blennerhasset v. Day 293
Blundell v. Brettargh 187, 196, 618
Blyth v. Floodgate 201
Blyth and Tyne Ry ; In re 270
Board of Trade v. Cayzer Irvine 647, 750, 811, 813
Bodachari v. Muniyachari 578
Bodge v. Hull 349, 437
Boligbroka v- Kur 202
Bollaram v. Kodpak 427
Bombay Burmah Trading Corp. Ltd. v. Aga Mahomefl 31, 634
Bombay Co. Ltd. v. National Jute Mills 132, 141, 270, 858
Bombay Fire Insurance Co. v. Ahmedbhoy 120, 287, 289, 337
Bonnia v, Neame 765
Boonjad Mathoor v. Nathoo Shaboo 231, 521
Borough Municipality v, Pratap 9
Bottomoley v. Amblar 305
Bourgeois v. Weddell & Co. 643
Bowker v. Evans 197
Bowes v. Shand 69
Bowes v, Fernie 410, 412, 477, 484, 683
Boynton v. Rechardson's Firme 27
Bradford v. Bravan 412
Bradford v- Bryan 479
Braddick v, Thompson 285, 367
Bradley v. Ibbotson 668
Bradlough v. Clark 15
Bradshaw v. L. & Y. Ry, 202
Bradshaw v. Air Council 865
Braham v. Wolfe 610
Brahm Nath v. Dhani Ram 60, 215
Brahma Swaroop v. Dewan Chand 472
Brain Smith Ltd, v. Wheat Sheaf Mills 142, 386
Brajaraj v. Bengal Jute 70
Branes v. Young 786, 787
Bransteen v. Accident Death 746
Brazir v. Bryant 864, 878
Brewer v. Drewry 43. 870
Bright v. Ricer Plate Construction Co. 147, 631
Bright v. Durnell 270
Brigton Marine Palace v..Woodhouse 777
Brijlal v. Govindaram 60, 114, 116
Brijlal v. Rosanlal 835
Brijlal v, State 545
Brij Mohan v. Shiam 620
Brij Nath v Lakshmi 200
Brij Ram v. Ramnath 592
Brindaban Chandra Dutta v. Bisheswar Lal 63, 250
Brindeswari Prosad v. Janke Prosad 527
Bristol v. Bird 33
Bristol Corporation v. John Aird & Co. 300, 786, 788, 789. 790, 791, 800
Britania Building v. Gobinda Chandra 122
British Metal Corporation v. Ludlow Bros. 226, 253, 266, 276
British India v. Shanti 839
British Westing Electric and Mfg. Co. v. Under ground Electric Ry. Co. of London 341, 342
Brodie v. Cardiff 289, 810
Brajendra Kumar v. Purna Chandra 151, 254, 300, 644, 664, 857
Brojolal v. Sharjubala 22
Broke v. Delcomym 626
Broker v. Evans 201
Brooke v. Gurdayal 554
Brooke v. Mitchell 348 350, 437
Bros v. Helsham 31, 32, 35, 218, 403
Brown v. Watson 76
Brown v. Craydon and Connal Co. 411
Brown v. Overbury 751
Brown v. Landover 429
Bruce Ltd. v. Strong 82
Bruce Ltd. v. Queen Anne Mansions Co. 481
Bueclench (Duke) v. Metropolitan Board of works 355, 426, 457, 480, 484, 618, 683
Budha v. Fakri 541
Budh Ram v. Chandra 306. 653
Budh Sen v. Nanak Chand 237, 238
Budh Singh v. Ramnath 825
Budhulal v. Jagannath 796, 801
Buerger v. Barnett 335. 490
Bulaki v. Pesvicha 610
Bulchand v. Thakurdas 323, 429, 844
Bulchand v. Shambardas 61
Bundi Municipal Board v. Bundi Electric Supply 121, 562
Burgers v. Morton 38, 144
Burjor v. Ellerman 61, 127. 251, 760
Burma Oil Co. v. Narain 33, 635
Burroughes v. Clarke 822
Burtto v. Musgrawe 865
Burton v. Knight 383
Bustwise v. White 38
Buston v. White 584
Butta v. Municipal Committee of Lahore 267 298, 375 418, 459, 470, 483, 547, 650, 700
Byars v. Thompson 349 437
Bykunt v. Preonath 150, 151, 569, 632

C

Calcraft v. Rolbuck 299
Caerlton Tinplate v. Hughes 50, 83, 250
Caerleon v. Hughes 54
Caledonian Ry. v. Toreans 118
Caledonian Ry. v. Co. v. North British Ry. Co. 6
Caledonian Ry. v. Lockhart 187. 188, 196, 374, 376, 459, 483, 650
Caledonian Insurance Co. v. Gilmore 683, 747, 750, 809, 813
Cambatta & Co. Ltd. v. Commissioners 8
Cambridge Ry.; In re, 408
Cameron v. Cuddy 277, 384, 385, 793
Camillo and Eitson and Jewson & Sons, In re 296, 307
Campbell v. Turlow 392, 368
Campbell v. Simpson 561, 565
Campbell & Co. v. Jeshraj 799, 824
Campbell v. Jeshraj 830
Caneswilson ; In re 32, 34, 35, 36
Cape Town (Bishop) v. Loug 210
Cargey v. Aitcheson 115, 413, 416, 417, 426, 509
Carter v. Oakoly Duncan 178

Carus Wilson and Greene ; In re 26
Catalina v. Norma 59,.630
Catholic Bank Ltd. v. Albuqeuerqeue 111. 573
Cavendish v. Cavendish 88
Cayor v. Board of Trade 750
Cepriane v Burnett 810
Central Govt v. Chootalal 757
Contral v. Brijnath 830
Central Meat Products Co. Ltd. v. Mc. Daniel (F. V.) Ltd. 55
Century Spinning Mfg, Co. Ltd. v. Motilal 790
Cf. Carlill v. Carbolic·Smoke Ball Company 404
Chabba Lal v. Kalulal 95, 575. 577
Chabildas v. Damodar 754
Chacko v. Chacko 857
Chagalal v. Weevan Lal 685
Chairman Purnia Municipality v. Shiv Sankar 516, 522
Chaitram v. Hardari Mal 501
Chaitram v. Bridhichand 67, 71, 276, 306
Chajjumal & Sons v. Dominion of India 145
Chajjumal v. Terloki 575, 576
Chalikani v. C. U. Rao 23I
Chambers v. Gold Thropo 27, 28, 29, 31, 66; 404
Champamani v. Tunus 10
Champsey v. Gill 67
Champsey Bhora v. Jivraj 287, 337, 355, 452, 457, 487, 489, 491, 495, 522. 656
Chambanappe v. Basalinga 586, 849
Chandan v. Bibi 615
Chandanmull v. Clive Mills 783, 788, 800
Chandanmull v. Donald 141, 601
Chandanmull v. Mohambai 812
Chandanmull v. Nippon 62
Chandra v. Unions 14
Chandralal v. Graham 110
Chandramani v. Bopin 123
Chandra Singh v. Executive Engineer 439
Chandrayya v. Appalamme 507
Chandrika Dutt v. Shyamlal 311,·315
Chandris v. Isbrandtsen 129, 610
Chandu v. Venugopal 523
Chandulal v. Graham 753, 754, 757
Chandulal v. Ram Autar 675, 676, 679, 681
Charaja Baksh v. Sri Narain 522
Charamudi v. Raghavalu 202
Charandas v. Harbhajai 796
Charandas v. Gur Saran 745, 839
Charles v. Cardiff Collieries 27, 119
Charles v. Gurditto 139
Charles v. Johnston 783
Chartarams v. Sajanmell 235
Charu v. Sambhu 421
Chatenay v. Brazalian Submarine 43
Chateram v. Bridhichand 140, 141
Chatturbhuj v. Baseodas 131, 240
Chatturbhuj v. Bhicam 704, 708, 709, 715, 722
Chatturbhuj v. Deokaram 365, 388, 621, 623
Chatturbhuj v. Ganesh 441
Chatturbhuj v. Raghubir 168, 590, 591
Chatturlal v, Chaitar 437
Chanbassappe v. Baslingyya 2
Chautemal v. Ramchandra 330
Chedilal v. Brit Overlid 841
Cheladuin v. English 15
Chelimi v. Subbana 198
Chemmanlal v. Phoolchand 770
Chenna v. Veeraswami 92, 94, 95, 207, 320, 576
Choshire v. Hobeley 750
Chetandas v. Radha Krishna 287, 321
Chesanram v. Kaushi 595
Chetan Singh v. Gulibai 594
Chetkunwar v. Puthu Singh 159, 160, 517, 522, 590
Chetumal v. Shankardas 251, 263
Chetumal v. Khismel 780
Chetti v. Raghvan 583
Chettya Eirm v. Ma Thaung Sheve 91
Chetty v. Chetty 193
Chhabba Lal v. Kalu Ram 673
Chhablal v. Parbati 294, 493, 580
Chhablal v. Swami 489
Chhabildas v. Damodar 68, 785
Chhedi v. Kiran 705, 706
Choonilal Madhoram 858
Chhajju v. Tarloki 92, 93
Chhayamal v. Kashiram 155
Chhogmal v. Sankelchand 641
Chottelal v. Jamnadas 442
Chhotey Lal v. Madho Bibi 696
Chootilal v. Ramcheritar 423, 663
Chidambaram v. Ayyappe 304, 366
Chidambaram v. Krishnaswami 192, 193
Chidambaram v. Subramaniam 43, 451, 509, 562, 564, 580, 620, 976, 683, 691
Chldambaran v. Swaminathan 123
Chiddu v. Kumar Sen 158
Chief Controlling Revenue Authority v. Maharastra Sugar 19
Chief Engineer v. Harbans 220
Chimanlal v. Dayabhai 683
Chiman Ram v. Vandarban 69, 789, 790, 797
Chimbhanbhai v. Neshavlal 92
Chimman v. Brijmohan 592. 604, 824
China v. Venkanna 849
China v. Venkateswami 849
Ching v. Ching 76,·565, 580
Chinna v. Ganga 97
Chinna v. Venkateswami 584. 667
Chinoy v. Anjali 126, 127, 627, 689
Chintamallaya v. Thadi 512, 519, 625, 695
Chintalapudi v. Chintalapudi 303, 645
Chintamani v. Haladhar 517, 532
Chiranjilal v. Jamna 581, 588
Chiranjilal v. Jata Sankar 753
Chiranjilal v. Union of India 790
Chirchandrai v. Panno 847
Chissa v. Bhawani Das 227
Christie v. Noble 187
Chogalal v. Dhapubai 381
Chohar Singh v. Geet Singh 472
Chohar Singh v. Jut Singh 499
Chohen v. Arthur 776
Chool Ram v. Lalchand 569
Chockalingam v. Kassuppan 123
Chokelingam v. Raman 486
Chokkappa v. Ahmedulla 594, 597, 607
Chokkappa v. Santhia 603
Chooher v. Jeet 574
Chooneymoney v. Ramkumar 26, 514
Choonilal v. Madhoram 269
Chooper Singh v. Jeet Singh 100
Chorchill v. Crease 854
Chotiram v. Labomal 423
Chotey Lal v. Keshwar 511
Chottey lal v. Mondoi 572
Chouthmel v. Ramchandra 48, 55, 122, 130,

206, 504, 514, 620, 636, 656, 688, 839, 854
Chowdhuri Murtaza v. Bibi Bechunnisa 318, 319
Chuhamal v. Hariram 496, 516
Chuma Kunwar v. Beharilal 519
Chumbel v. Haria Ram 591
Chundanmull v. Clive Mills 66, 71 801
Chundurn Punnaya v. Rajan 415
Chuni v. Dhandin 430, 521, 818
Chunilal v. Hiralal 101, 574
Chunnilal v. Tulsiram 195
Chunimony v. Nistarini 514
Chunna v. Behari 287, 718
Chunna v. Lala 460, 614
Chunna v. Venkata 526
Chunnnamall v, Moolchand 23
C. I. Engineering Co. v. Mallick Thakurdas 320
C. I. T. v. Indo Mercantile 9
C. I. T. v. Vazir Sultan 20
Cipriani v, Burdett 32
Cimeror v. Cuddy 175
C. Koeglar v. The Cormiga Oil Co. 155
Clapham v. Higham 152, 153
Clarke v. Crofts 188
Clarke v. Owan 864
Clegg v. Clegg 734
Clegg v. Dearden 394
Clemants v. Devon Insurance 61
Clements v. Rattan Singh 120
Clive mulls v. Swalal 335, 343, 450
Clough v. County Live Stock 789, 790. 791
Clout and Metropolitan Railway, In re 147
Cockson v. Harewood 32
Cogstad v. New Sum 344
Coley v. Da Corta 157, 180, 183, 238, 279, 280, 545, 554, 643
Collector of Custom v. Digvijoy
Collector of Dinapur v. Girijanath 22
Collector of Monghyer v. Keshav 11
Collins v. Collins 24, 26, 31, 32, 34, 36, 48, 218. 403, 514, 714
Commander v. Arungan 46, 164, 617, 637, 657, 688
Commander v. Amijan 719
Commongs v. Heard 398
Commissioner of Special Purposes v. Pensal 9
Compausi v. Woodburn 203
Continental v. Clumdids 759
Contumel v. Ramchandra 347
Coober v. Adams 4
Cooper v. Johnson 185, 187, 196, 201
Cooper v. Shuttleworth 181, 380
Co-operative v. Ganesh Suger 46. 379
Co-operative v. U. Kyard 641
Co-operative Hindusthan Bank Ltd. v. Bholanath 150, 605, 635
Co-operative Society v. Windy 689
Cordi Bai v. Thakurdas 481
Coninga Oil v. Koeglar 67, 731, 809
Corleyn v. French 192
Corporation of Calcutta v. Director 19
Cosbyn v. French 122
Costar v. Oakoley 289
Cottage Club v. Woodside 84, 85, 751
Council v. Middle Borough Council 346
Coulsa v. Desborough 317, 363
Couvela v. Volkat 288
Cox v. Hakes 15
C. Rai v. Union of India 542
Craven v. Craven 300, 365, 668
Crawford v. Northern Light House 59, 148
Crescent Insurance v. Maung Po 583
Creighton v. Law Car and General Insurance 328, 372
Crisp v. Adlard 541
Crofts v. Harris 417
Crompton v. Mohanlal 314, 357, 497, 630, 649
Cromptom v. Ridley 429
Cropper v. Smith 361
Cross v. Leeds Corporation 634
Crossby v. Clay 286
Cruse v. Ouctier 79
Cudliff v. Walters 272, 282, 858, 862
Curley v. Deam 398
Cursetji v. Crowdar 296, 303, 307, 319, 320, 620, 666
Cursetji v. Shivalu 114, 121, 696
Curtis v. Potts 280
Cyril Kirkpatrik In re 429
Cyzer Irvine v. Board of Trade 65
Czamikov v. Roth 139, 334, 337, 347

D

Dacca Co-operative v. Dacca Co-operative 614
Dadh Khan v. Abdul 121, 693
Dogdusa v. Bhukan 287, 430, 459
Dahyabhai v. Chunilal 203
Dakins v. Wagne 861
Dakojee v. Musti 194
Dakumal v. Khajumal 698
Dalal v. Jamnadas 582
Dolia Ram v. Nihali Rrm 695
Dalling v. Matchell 382, 660, 663
Damodar v. Basheswar 114, 116, 400, 475, 487
Damodar v. Bisheswar 501
Damodar v. Daya Sankar 460
Damodar v. Gopal 363
Damodar v. Saxena 649
Damodar v. Union 728
Damodarji v. Ramnath 370
Damodar Sheh v. Union of India 57, 719
Dandekar v. Dandekar 392, 393, 396, 410, 454, 478, 506, 650
Dangal Ram v. Jaimangal 96
Danmal Jain v. Calendonian Insurance 596
Darayo v. Ratan 392
Darbarilal v. Wasu Malik 479, 577, 663
Dargao v. Ratanlal 569
Darlington v. Harding 494, 657
Darnley v. London Chettan 320, 608, 621
Dartoobhoy v. Valli Mahomed 105
Daryanormal v. Karachi Race 32
Das v. Doyalal 508, 531
Das & Co. v. Broach Electric Supply 202
Das Bank v. Kali Kumar 19
Das Ram v. Secretary of State 119
Dasaratha v. Ramaswamy 392, 400, 655
Dasuram v. Balchand 565, 685
Dataram v. Forbes 33, 635
Datatraya v. Registrar 28
Datta v. Kedar 581
Datta v. Khedu 581, 583
Dattamal v. Lala Amarnath 554

Dattaram v. Harjimal 287, 289, 618, 654, 672
Daula v. Ganesh 614
Daulat v. Ratna 366
Daulatram v. Shivram 842
Daulatram v. State 7, 68, 75. 86, 631
Daulat Singh v. Ratan Anand 304, 305
Daulat v. Lazad 765
Davis v. Chauter 95
David v. Hood 202
Davis v. Page 88
Davis v. Prat 349, 403, 437
Davis v. Starr 81, 781
Davuluru v. Davuluru 93, 518, 529
Dawoodbhai v. Abdul 62, 579, 787
Dawshwe Thit v. Ma Thain 554
Dayajinomal v. Karachi 115
Dayakishen v. Dharmdas 206, 307, 308
Dayaram v. Narain 310, 321, 418, 535, 620, 651
Daya Singh v. Charuvdas 439
D. B. Das v. Dayalal 523
Dean of Steamship v. Mitsui 166, 167, 174, 18£
Debabrata v. Jnandra 719
Debendra v. Abhoy 516, 521, 664
Debendra v. Gauri Sankar 16
Devendra v. Sarbamangala 397, 516, 517, 592, 607, 670
Debiruddin v. Amina 529
Debidas v. Keshava 576, 613
Debi Charan v. Bipro Prosad 594
Debiruddin v. Amina Bibi 527, 529
Debnarain v. Rajmonee 521
Deb Singh v. Manchand 574
De Dica v. De Dica 564
Dehra Dun v. Nausraj 198
Deepnarain v. Dhaneshwari 68, 71, 509, 513
De La Grade v. Workshop & Co. 80, 83, 161, 163, 753, 758
Delhi and London Bank v. Orchard 233
Delhi Cloth v. Kedari 303, 315, 529, 531
Delhi Housing v. Brijmohan 60
Dekari Tea v. Assam Bengal 849
Dekari Tea v. Indian General Steam 860
Deogamber v. Rapprea 587
Dooki Nandan v. Basantalal 400, 401, 444, 623, 691, 706, 713, 715, 720. 722, 727
Dooki Nandan v. Rajkumar 290, 303, 314
Deomal v. Khanoomal 585
Deomal v. Thanoomal 542
Deo Narain v. Jaisri 516, 663
Deo Narain v. Sheoba 394
Deonarain v. Siabar 470
Deonarain v. Sugam Chand 572
Deoranjan v. Satyadhan 13
Denomoyee v, Chooney Money 197
Denis v. The Grand Junction Canal 635
Denmal v- Caledonian 540
Denmal v. Firm of Lalchand 534, 540
Denton v. Legge 785
Deputy Comm. v, Budhuram 6
Dernehy v. Bellany 809
Derohist v. Fieldren 16
Devram v, Secretary of State 27, 144
Devat Ram v. Lachu Ram 521
Devidas v. Mitha Shah 826
Devikanandan & Co. v. Union of India 644, 687
Development Co. Ltd. 458
Devnarain v. Rajimonee £97
Deutsche Springstaff v. Briscoe 186, 187, 552, 757
Dewanchand v. Hakim Rai 486
Dewanchand v. State of Jand K 48, 778, 782
Dewanram v, Harinarain 401, 712
D. Graham v. Kewelram 367
Dhan v. Noonital 603
Dhanarajmal v. Shamji 553, 724
Dhanendra v. Nihar 12
Dhanknasa v. Probodh 17
Dhanpat v. Khan 454
Dhanpatmal v. Kishinlal 125, 137, 252, 808
Dhanpat Rai v. Khan Devi 454
Dhan Singh v. Kalu Singh 547
Dhan Singh v. Ramchand 357, 388, 623
Dhansukh v. Nanitlal 444
Dharam Das v. Ajudhiya Prosad 416, 551
Dharama Gundas v. Ganapati 709
Dharma v, Krishna 664
Dharamsi v. Narotam 197
Dharam Singh v. Surat Singh 277, 385, 394
Dharanidhar v. Sukhram 87, 136, 519, 696
Dharmu v. Krishna 617, 620
Dharu v. Dildar 429, 430, 589, 818
Dharup Raj v. Ram Audesh 96
Dhirajlal v. Sir Jacob 794
Dholichand v. Mohanlal 170
Dhooli v. Dhooli 654
Dhoolychand v. Manuji 572
Dhunichand v. Premchand 549, 550
Dial Chand v. Khuda Buksh 517, 533,
Dialo Ram v. Nihali Bai 87, 136
Diboprokash v. Suprokash 655
Digly v. General Accident 765
Diggle v. Higgs 404
Dilipat v. Kashi 396
Dilipat Singh v. Kashinath 414
Dilsukhi Rai v. Badri chand 513
Dilworth v. Commissioner of Stamp 13
Dimes v. The Grand Junction Canal 150
Dina v. Kalika 504, 518, 665
Dinabandhu v. Chintamoni 294, 295, 493, 642
Dinabandhu v. Durga Prosad 734, 764, 768, 785, 796, 806
Dinasri v. Hussain Ali 757
Dinditta v. Babu Ram 508
Dines v. Wilfe 75I
Dinkarrao v. Narayan 202
Dinkarrai v. Yesvantrai 543, 547, 791
Dinny Mott v. Standard Export 143
Dinu v. Blake 470
Dinn v. Abdulla 563
Dominion v. Elahadut 122, 194
Dipchand v. Sahib 62, 511
District Co-operative v. Khub Chand 212
Dital v. Dhanraj 295,, 303, 332, 653
Diwan v. Punjab National 573
D. K. Casunn & Sons v. Sara Bibi 198
D. K. Sengupta v. Ananta 654
D. L. Mills v. Daluram 476, 643
Dobson v. Groves 285, 296, 298, 304, 306, 308, 309, 310, 321, 367, 376, 396, 621, 645
Dobson v. Morgan 383
Dodsley v. Dodsley 409
Dogdusa v. Bhuken 418
Doe v. Homer 477
Doe v. Homer 410
Doe y. Jessop 6
Doe D. Williams v. Richardson 411
Doe Narain v. Siabar Singh 491

Doleman v. Osset Corporation 4, 45, 139, 153, 165, 326, 541, 735, 737, 738, 764, 784, 793, 595, 802, 803, 805, 806
Dooly Chand v. Mamuji 522
Dooly Chand v. Mohanlal 593, 594
Dominion of India v. Kalyan Kumar 257
Donald v. Kewal 534
Doorga Parshad v. Tara Parshad 108
Dosaba v. Bari Bahu 552
Dosilal v. Lal Shiv 648
Doset v. Gingell 864
Dott v. Baidyanath 648
Dovilal v. Lall 685
Doulet v. State 771
Dowse v. Cox 88, 188, 410, 412, 413, 415, 477, 600
Dr. S. Dutta v. University of Delhi 488
Draupadi v. Vikram 17
Dreyfus v. Gurditta Mal 556
Drew v. Drew 147, 180, 296, 320, 367, 621, 632
Drummond v. Hammer 257, 260, 261
Drummond v, Homer 233
Dubruddin v. Amina Bibi 94
Duke of Bucclench v. Metropolitan 288, 418
Duke of Leeds v. Ahmerst 623
Dulan Bibi v. Suderrao 403, 663
Dulari Devi v. Rajendra 165, 371, 559, 647, 687, 690
Dular Koeri v, Payag Koeri 857
Dulichand v. Mamuji 677
Dundee Harbour v. Nicol 112
Dunichand v. Fort Gloster 730
Dunichand v. Pritam 456, 594
Duraiswammy v. Kishtappa 705
Durgabijai v. Rambilas 709
Durga v. Patlu 562
Durga v. Phulu 528
Durga Charan v. Debnath 522
Durgacharan v. Debendranath 677
Durga Charan v. Gangadhar 678
Durga Prosad v. Amardeyi 426, 542, 601, 640 641
Durga Prosad v. Baratilal 235
Durga Prosad v. Sewkishan 452, 640
Durham County Building Society, In re 37
Dettaram v. Harjimal 354, 480, 481
Dutton v. Jamnadas 78, 426
Dutto Singh v. Dosad 350
Dwarka v. Atul Chandra 560, 569
Dwarka v. Chain Roop 774
Dwarka v. Daluram 61
Dwarka v. Fanindra 103, 569. 574
Dworka v. Harihar 195
Dwarka v. Kedar 570, 613, 641
Dwarka v. Keshardeo 741
Dwarka v. Krishna 97, 294, 351, 641
Dwarka v. Peerylal 447
Dwarka v. Ram Jatan 732
Dwarka Prosad v, Firm of Dipchand 158, 165 223
Dwarkanath v. Haji Mahomed 106
Dwarka Singh v. Harihar Singh 202
Dwelling Co. Ltd. v. Finsbury Borough 14
Dwitar v. Dharanidhar 383, 384, 393, 664

E

Eads v. Williams 305, 356, 365, 374, 375, 390, 391, 650
Engleshams v. Mc. Master 810
Eardley v. Steer 375, 403
Earl v. Stockes 145, 364, 668
East and West v. Kirk 176, 178, 179, 183, 302
East Bengal Ltd. v. Jogesh Chunder 111
East India Film v. P. R. Mukherji 166
Eastern Countries v. Robertson 368, 717, 788
Easthan v. Tyler 358
Ebrahim v. Northern Indian Oil 667
Echholz v. Amar Nath 260, 519
Eckersley v. Mersey Docks 147, 152. 634, 636
E. D. Lewis, In re 50, 250
E. D. Sasson & Co. v. Ram Dutt 254, 256, 715
E. D. Sasson v. Randall 501
E. D. Sasson v, Shivaji 534
Eda Punnya v. Jangla Kama 439
Edajit v. Tulsidas 508
Edenburg Magistrate v. Lowino 149
Edgecombe v. Rodd 86
Edmunds v. Cox 187, 189, 196
Edwards v. Juggilal 773, 774. 778
Edwards v. Grace 201
Edwards v. G. W. Ry. 610
Edward v. Tolme 789
Elchee v. Hajoo 533
Electric Railways of London 457
Elliot and South Devon Ry., In re 273
Ellis v. Hooper 32, 33, 35, 145, 404
Ellison v. Ackroyd 274, 387, 859
Ellison v. Bray 308, 376
E. L. Price v. Ahmutty & Co. 605
Elsome v. Rolfe 413
E. Miller v. Dhane Singh 274. 365
Emery v. Wase 374, 375, 376, 650
Emmeson v. Stimpson 457
Emnabai v. Fakir 92, 98, 522, 528, 624
Emperor v. Narji 16
Emperor v. Naga Lun 21
Enoch and Zoratzky Beck & Co. In re 316
Estel Biber & Co. v. Rio Tinto Co. 163
Esup v. David 518
Evans v. Bartlam 783
Evans v. Cogan 88
Everad v. Paterson 267, 403
European and American Steam Shipping v. Crosskey 180, 181, 267, 269, 857
Ezra v. Senetary of State 22

F

Factor v. Beacon 140
Fagan v, Fagan 88, 407, 410, 412, 477
Fair Ali v. Ashraf 252, 563, 572
Fakuruddin v. Murlidhar 516
Fakir v. Jaimal 541
Fakirulla v. Thakur 562
Falkingham v. Victoria Railway's Commissioners 36
Falginhar v. Victorian Rly Commisioners 355

Fanindra Nath v, Dwaaka Nath 103, 522
Faquir v. Ramkishen 203
Faquir v. Amina 566
Faramkaran v. Volkart 754
Faridunissa v. Mukhtar 109
Fariell v. Eastern Countries 176, 179 368
Farrar v. Cooper 259
Fateh v. Gango 277
Fateh v. Amar 389
Fatehchand v. Juggilal 453
Fatehchand v, Debi Dutt 62
Fatehchand v. Lelumber Singh 338
Fatehchand v. Motiram 691
Fateh Khan v. Muhammad 203
Fateh Mohammad v. Amarnath 396
Fatimabai v. Collector of Surat 391
Fatima v. Shamwilayat 427, 436
Fatterstone v. Cooper 380
Fauzdar v. Emperor 572
Faviell Vie v. Eastern Countries 102
Fayazuddin v. Aminuddin 222, 587
Fazal v. Enayet 418, 654
Fazal Din v. Shah Nawaz 545, 547, 699, 700
Fazal Din v. Dial Singh 832
Fazal Ilahi v. Prag Narain 541
Fazal Ilahia v. Nazir Ahmad 567
Fazal Rahaman v, Zainab Bibi 564
Fazalully v. Khimji 38, 63, 128, 129, 141, 143, 249, 254, 262, 304, 381, 383, 384, 392, 438, 664
Fazilka v. Fazilka Electric 847
Fazlan v. Murad 566
Felherstone v. Cooper 358
Fenn v, Forbes 660
Ferguson v. Norman 339, 343, 344
Ferman Daz v. Jivatlal 757
Fernby v. Brauson 818
Ferrer v, Oken 134
Fatherstone v. Cooper 299, 660
Fida Husssain v. Faizal Hussain 571
Field v. Longcleon 62
Field v, Longdon 579
Fillwood v- Hurley 553
Financiers and Febra v. Sankulal Saudar 127
Finlay v.. Chirney 201
Finley Muir & Co. v. Gopi Kissen 132
Finnegale v. Allen 27, 119, 120
Firm Assandas v. Aildas 698
Firm Ayasam v, Sukhdev 756
Firm Chandralal v. Graham Trading 170
Firm Chunilal v. Amirchand 124
Firm Dhanapat v. Firm Kishinlal 158, 184
Firm Dhana Singh v. Firm of Ramchand 274 365
Firm Gopiram v. Pokhor Das 663
Firm Gulal v, Kishen Narain 73
Firm Hormusji v. District Local board 114, 119
Firm Jaidev v. Kanhaiyalal 555
Firm Kapur v. Rajkumar 54
Firm Karam Narain v. Volkart Bros. 17, 82, 171, 172
Firm Khetu Ram v. Kashmiri Lal 572
Firm Napen v. Rajkumar 704
Firm Narain v. Bhagwan 50, 54, 71
Firm Radhakissen v. Firm Ashamal 105
Firm Sitaram v. Sushil 274, 799
Firm Sukhomal v. Babulal 57
Firm Tata v. Varati 128, 133
Firm of Jaggi & Co. v. Firm of Gangaram 315
Firm of Jainarain Babulal v. Firm of Naraindas 340, 341
Firm of Khalsa Bros, v. Hariram 211, 219
Firm of Motharam v. Firm of Mayadas 149, 151, 376
Firm of Sardarmal v. Sheo Baksh 273
Firm of Tarachand v. Louis Drey fus 133
Firm Kahur v. Rajkumar 843
First National Bank v. Devi Brothers 632
Fitmeerr v. Dober 102
Fitzerald, In re 42
Flage Lane v. Sunderland 274, 387, 859
Fleming v. Doig 47, 50, 250
Flora Edvige v. Rustamji 81
Forbes v. Gul Manamed 247
Forbes v. Versimal 783
Ford v. Jones 269, 857
Ford's Hotel Co. v. Bartelt 777
Fordyee v. Bridges 6
Fory v. Eagle 753
Foster v. Bates 202
Fox v. Ry. Passengor's Insurance 785
Framji v. Adavji 194
Francisco v. Goraldhram 869, 871, 874
Fraser v. Eliens Perger 186, 187
Freeman & Sons v. Chester Rural Council 783, 800
French Governmont v. Tsurushima Marh 367
Freshwater v. West Austrila 757
Frro Alloys v. A. K. Ghosh 704
Fruma v. Ringa 590
Frusser v. Prowd 417
Fry v. Moore 772
Fuller v. Fenwick 494
Fumley v. Bramson 427
Fuzulbhay v. Tle Bombay and Persian Steam Navigation 134
Fyazuddin v. Aminuddin 353

G

Gabriel v. Laugton 345, 417
Gadadhar v. Ganga Prosad 231
Gaderaju v. Gultemukkule 727
Gadagi v, Firm of Mawari 199
Gafferey v. Killer 204
Gainda v. Rameshwar 731
Gainer & Co. v. Turpin 776
Gaitun v. Nabi 554
Gajadhar v. Chunilal 236
Gaja Sinha v. Sujat Ali 476, 676, 682
Gajendra v. Durga Kumari 849
Gajanand v. Phulchand 59, 227, 253, 256,299 380, 383, 635
Galleway v. Kenyworth 408
Ganapat v. Ramgopal 497
Ganapat Rai v. Bhagwat 96, 97, 114, 517
Ganapat Rai v. Moody 69, 71
Ganapathi v. Swamalai 192, 193
Gandharp Singh v. Nirmal Singh 421, 422
Ganesh v. Banwari 598, 854
Ganesh v. Bhikam 426
Ganesh v. Damodar 593

Ganesh v. Harihar 22
Ganesh v. Kishan 522
Ganesh v. Mulchand 92, 576
Ganesh Das v. Damodar 594
Ganesh Das v. Durga Dutt 785
Ganeshmal v. Keshoram 442, 503, 516, 518
Ganeshnarain v. Malida 206, 303, 311, 409, 412, 415, 418, 476, 474, 506, 600 830
Ganesh Prosad v. Damodrr 169, 237, 593
Ganesh Rao v. Tuljaram 97, 575
Ganesh Singh v. Bhiknam Singh 454, 532, 610
Ganesh Singh v. Kashi Singh 511, 512
Ganga v. Baldeo 645
Ganga v. Lakraj 38
Ganga v. Radhe 430, 451, 845
Ganga v. Sokhi 307
Ganga v. Thakur 849
Ganga Charan v. Sasti Mandal 533
Ganga Gobinda v. Kale 591
Gangadhar v. Balkrishna 568
Gangadhar v. Dattatriya 418, 697
Gangadhar v. Indar Siagh 414, 599
Gangadhar v. Lakshman 697
Ganga narain v. Ramchand 507, 521
Ganga Prosad v. Banespati 513
Gangaprosad v. Bendeshwari 701
Gangaprosad v. Kora 532
Gangaprosad v. Thakur 863
Gangaprosad v. Upendra 415
Gangaram v. Jogu 584
Gangaram v. Keshabdas 459, 566
Gangaram v. Narayan 131, 132
Gangaram v. Sumangal 57, 591,
Ganga Sahai v. Baldeo Singh 306, 309
Ganga Prosad v. Nagarmal 646
Gangaram v. Sumangal 181, 122
Ganga Sahai v. Karim 619, 657
Ganga Sahai v. Lekraj 203, 289, 291, 297, 307, 356, 363, 364, 435, 668
Ganga Singh v. Jitwan 614, 618, 681
Ganesh Manufacturing v. Indra chand 56, 67, 139, 140, 276, 646, 731, 809
Ganguram v. Radho Kishan 448
Ganoba v. Narayan 566
Gannon Dunkeley v. Uuion Carbide 30, 544, 547
Gannu Rao v. Telugaraja 773
Garan Ditta v. Pokar Ram 522
Garimella v. Gade 15
Gatiliff v. Dunu 403
Gandamal v. Fateh Ali 383
Gaudi v. Puramsotti 197
Gauri v. Ramlochan 49, 71, 540, 599, 713, 722
Gauri Sankar v. Behari 226, 640, 651
Gauri Sankar v. Union of India 749, 782
Gaya Electric v. State of Bihar 740, 747, 757, 761, 767, 796
Gaya Prosad v. Firn Muthulal 168, 176, 181
Gaya Singh v. Harbilas 508
Gaw v. British Land Fire 746, 747
Gendivi v. Mohammad 328
General Electric v. Siemons 212, 217, 244, 265
George v. Guffer 6
George v. Lousoloy 409
George v. Vestian 411, 480, 502
Ghafoor v. Abdul 571
Ghafooram v. 521, 569
Gangalzaya v. Raghasa 521
Ghajooram v. Abdul Hamid 503
Ghansham v. Tek Chand 548
Ghanshamdas v. Tek Chand 738, 802, 806
Gharilal v. Biswanath 861
Ghastiamal v. Jamiat 621
Ghella Bhai v. Nandubhai 106, 505
Ghewar chand v. Shiva Jute 742, 783, 801
Ghissa v. Bhawani Das 231
Ghisalal v. Ramprosad 581
Ghisaram v. Bhiwani Grisa 546
Ghora v. Mulchand 718
Ghulebhai v. Keshadev 289
Ghulab Khatun v. Chaudhuri 517
Ghulam v. Begum 406
Ghulam v. Halima 830
Ghulam v. Gopal 591
Ghulam v. Ghulam 733
Ghulam v. Shehbal 94
Ghulam Ahmed v. Abu Bakar 589
Ghullamallah v. Papeer bai 620
Ghulam Fatima v. Ghulam Mahammad 421
Ghulam Hussain v. Sakina bai 88. 128
Ghulam Jilani v. Mohammed 490, 528, 625, 641, 790, 827
Ghulam Khan v. Muhammod 76, 118, 294. 334, 411, 480. 493, 502, 508, 516, 521, 544, 557, 565, 569, 575, 580, 618, 662, 672, 678, 837
Ghulam Mahammed v. Gopal 151, 160, 552, 633, 634
Ghulam Mustaju v. Holima 507
Ghulam Muztazu v. Changumal 519
Ghumanmal v. Doyal Kanji 830
Ghuria v. Bhawani 353
Gianchand v. Kishan 801
Gibban v. Paker 386
Ginder v. Curtes 358
Gindor v, Gurtis 660
G. I. P. Ry. v. Bhikaji 721
Girdhari v. Gobardhan 553
Girdhari v. Hrishikesh 12
Girdhari v. Rambaran 519
Girdhari v. Surendranath 322, 589, 818, 820
Girdharilal v. Banwari 619
Girijanath v. Kanai 522
Giscome v, Hart 412
Gitaram v. Keshoram 399, 622
Gizarnikow v. Roth 640
Gladstone Wyllis v. Joosop 533, 822
Gladwins v. Chilcote 261, 262, 314, 370, 648 649
Glass v. Patteson 7
Glazebrook v. Davis 300, 365
Glisa v. Bhawani 587
Gobardhan v. Jaikishan 241, 479, 577, 663
Gobardhan v. Lachmi 616
Gobinda v. Rameshwar 809
Gobind v. Srinivas 6
Gobind Das v. Induvati 538
Gobindram v. Deokabai 620
Govindrao v. Ambulal 519
Gobind Singh v. Bhirgunath 366
Govind Singh v. Phumel 820
Gobind Singh v. Pohumal 865
Gobindlal v. Court of Wards 196
Godhumal v. Gangu 540
Gohram v. Jumo 585
Gokarannath v. Gurprosad 581
Gokul chand v. Giridharilal 370
Gokul chand v. Rehman 592

C

Golner Bibi v. Abdus Samad 90, 93, 94, 95, 521, 576, 677. 836,
Goodall v. Ray 864
Gulab Singh v. Dhunichand 855
Goude Municipality v. Bachchu 23
Goudi Baj v. Thakurdas 521
Goor Ghunder v. Joogat 574
Goodipoodi v. Seshayya 581
Goodman v. Sayers 390 660
Goodson v. Broke 100
Goodson v. Forbes 132
Gopal v. Baijunath 573
Gopal v. Baiju 800
Gopal v. Brajendra 519
Gopal v. Ganesh 594
Gopal v. Ramchandra 198
Gopal v. Kedar 598
Gopal v. Khetra 470
Gepel v. Lakshmi 567
Gopal v. Sundari 510, 523, 655, 838
Gopal v. Suresh 594
Gopalam v. Mynemi 289, 580, 645
Gopalam v. Sankaraunui 195
Gopal Chandra v Krishnamohan 477
Gopal Chandra v. Kshetramohan 669
Gopaldas v. Baijnath 51, 528, 570, 681
Gopal Dinker v. Ganesh Narayan 462, 464
Gopal Prosad v. Kedar Prosad 326
Gopalji v. Chaganlal 506, 623, 717
Gopalji v. Morarji 212, 223, 224, 244, 264, 265, 380
Gopal Lal v. Suresh Chandra 597
Gopalram v. Bankey Lal 159
Gopochand v. Khazam chand 698
Gopi v. Jest 202
Gopirai v. Baijnath 565
Gopichand v. Lalchand 532
Gopinath v. Naresh 441, 528
Gopinath v. Salil 640
Gopiram v. Baijnath 565
Gopiram v. Palchar 548
Gopiram v. Pokhardas 795
Gordashi v. Gujarmal 850
Gordhandas v. Natvarlal 724
Gordhandas v. Hussain 25
Gorman v. Hamid 751
Goorpa v. Narayan 503
Goran Ditte v. Pokhar Ram 521
Gorumuthy v. Narasingha 685
Gosho v'Mulchand 503
Goscoyno v. Edwards 155
Gosho v. Mulchand 519
Gossain v. Birossur 582
Gotha v. Thatho 389, 396, 432
Goverdhan v. Ramchand 181, 795
Government of Gibraltor v. Kenny 185
Government of Kalantior v. Duff 77, 641
Government v. Jumnadhar 702, 706, 708
Governor General v. Associated Live Stock – 752, 753, 797
Governor General v. Bilash 227, 235
Governor General v. Simla Banking 28, 75, 544, 769, 797
Govinda v, Nihal 573 -
Govind v. Ramkisen 605
Govind Chandra v. Gurudahmal 517
Govindlal v. Munnilal 547
Govind Singh v. Bhirgunath 513. 630
Golud v. Staffordshire 414, 599, 600
Gour Chandra v. Secretary 516
Gouri v. Ramlochan 378
Gourditta v. Basantamal 441
G. P. Gunnis v Amanma Tulsidas 830
G. P. Modi v. N. Modi 646
Grafton v. Eastern Countreis 635
Graham Trading v. Chandulal 37, 314. 408 427, 481, 646, 792, 807
Graham & Co. v. Kewalram 481
Grahms v. Chandulal 370, 405
Graze brook v. Davis 668
Gray v. Ashburton 865
Gray v. Wilsa 375
Grant v. Bangeshee Deo 230
Great American v. Bodhraj 62, 330, 544,
Great American v. Dinnath 70, 542, 544
Great American v. Hindusthan 291
Great Western Ry. Co. and Postmaster General, In re 349
Gregson and Armstrong, In re 295
Green v. Howell 787
Green v. Polo 152, 153
Greenwood, In re 269, 270
Grey v. Peason 5, 60
Grey &. Co. v. Tolme 801
Gridharilal v. Surendranath 429
Griffith v. Tower Publishing Co, 203
Gross Sherwood v. Essex County 231
G. Subbaraya v. K. Seshayya 560
Guardian Assurance v. Thakur Shiva 63, 579
Guardian Assurance v. Shibmangal 549
Guimmi v. Tariui 849, 850
Gujrat University v. Shri Krishna 14
Gulab chand v. Chamber 685
Gulab Khatun v. Chaudhuri 529
Gulab rai v. Banilal 536
Gulabrao v. Deorao 200
Gulab Singh v. Dharampat 538
Gulamali v. Vishwambhar 51, 521, 714, 716, 726
Gulzarilal v. Buri 77, 338, 505, 613, 655, 676,
Gulzarilal v. Ramesh chandra 708, 710, 711, 719, 725
Gulzarilal v. Sarjubai 124
Gulam Mahommed v. Gopal Das 551
Gulam Sarwar v' Abdul Sakoor 117
Gulzar v. Sandar Ali 203
Gumin v. Hallett 244. 245, 263. 264
Gunavantibai v. Official Assignee 722
Gunawa v. Pyinuyadipa 321,
Gundalal v. Mathuradas 447
Gundalal v. Motilal 443
Gundny v, Pinnigar 6
Gungaram v. Radha 503
Gunnis v. Amanamal 289, 628, 639
Gunomal v. Gurdinomal 93
Gunn Meah v. Kalewan 622
Gunnwa v. Pyinuyadipa 621
Guran Delta v. Pokhar Ram 104, 518, 525, 574, 577, 827
Gunbaksh v. Chitta 384- 664
Gurbaksh v. Santaram 551
Guru Charan v. Umacharau 519. 695, 701
Gudarshan Singh v. Sardalal Singh 700
Gurdas v. Garul 591, 605
Gurdinomel v Wadhumet 429, 819
Gurdit Mal v. Basant Mal 531
Gurmukh v. Lalu 566
Gurmurty v. Narasinha 332. 642, 579, 642, 702, 709

Gurro Chum v. Ram Dhun 659
Gurupetteppa v. Narasingappa 383
Gutta v. Punno 709
Guurai v. Sogmal 400
Gyan Datt v, Sadanand Lal 124

H

Habibo Khatun v. Nawab Lal 397
Hadida v. Fordhan 95
Hafizzur v. Taslin-un-nissa 825
Haggar v. Baker 302, 332, 368
Haggett v. Welsh 153
Haider v. Alladita 17
Haig & London In re 147,359, 363, 376
Haigh v. Haigh 58, 292, 295, 312, 321, 352, 353, 621, 661
Haigh v. G. W. Ry. Co. 301
Hail and Hinds In re 349
Haji v. Dwarka 105
Haji v. Piroj Shaw 63
Haji v. Bikhan 474, 488
Haji Abdullah v. Sasson 639
Haji Abdullah v. Stamp 143
Haji Abdullah v. Staul 38
Haji Ahmed v. Essanji 289, 290, 291, 307, 668
Hrzi Ebrahim v. Norther India Oil 436, 633, 657
Haji Ebrahim v. Pannalal 505, 621, 711
Haji Habib v. Bhikamchand 46
Haji Hussain v. Firm of Lochandas 306, 335
Haji Umar v. Shivaldas 542, 585, 849
Hakimulla v. Karim Bux 470, 477, 479
Haldar v. Bulaki 568
Hale v. Bradbury 203
Half v. Lawrence 365
Halmbhai v. Shanka 169, 237, 590, 593, 595
Hall and Hinds, In re 289
Hall v. Anderson 262, 370 648
Hall v. Lawrence 274
Hallen v. Spaeth 746
Hammidul v. Atwat 568
Hamilton v. Mackie 61, 131
Hamlin v. Tilisker 746
Hamlyn v. Bettley 321
Hamond aud Waterton, In re 33, 35
Hampden v. Walsh 404
Hamram v. Dharam Singh 459
Hamamatram v. Shivnarayan 95
Hancock v. Reid 100
Haney v. Shelton 353
Hanmanta Gonda v. Shivappa 424
Hanning v. Porker 364
Hansraj v. Amarchand 426, 695
Hansraj v. Gangaram 531
Hansraj v. Surjit Singh 52, 573
Hansraj v. Sundarlal 516
Hanuman v. Bahulal 700
Hanuman v. Jagadish 93
Hanuman v. Jesaram 641
Hanuman v. Ramlekhan 89, 576
Hanuman Chamber v. Jessaram 801
Hanuman Chamber v. Parmesharilal 798
Hanuman Chamber v, Parmesharlal 794
Hanuman Chander v. Jaisram 836
Hanuman Rai v. Jagadish Rao 575
Hanumanram v. Seth Jena Ram 106
Hanutmull Boid v. Fatch chand 384, 616, 644
Happy India. v. Kumud Bandhu 743, 753 754
Haradhan v. Radhenath 271, 276, 594
Haradhan Dutt v. Ladhi Saran 500
Hrrakh Ram v. Lakshmi Ram 241, 479
Hara Krishna v. Ramgopal 187, 188, 196, 496 594
Haranand v. Dayalchand 516
Haranarain v, Sajjan 545
Harra Prosanna v. Arab 569
Hara Shankan v. Raghuraj 579, 718
Harasraj v. Tekchand 557, 758
Harbans v. Union of India 704, 705
Harbhajans v Mewa Singh 607, 831
Harbhajan v. Mina 592
Harbhaj Mal v. Diwan chand 399
Harbhan Dat v. Ladhi Saran 434, 489, 529
Harchand Rai v. Chuttan Lal 350
Harcharan v. Mohan 630, 653
Harcourt v. Ramsattan 649
Harcules Insurance v. Hunter 747
Hardeo Sahai v. Gouri Sankar 91, 576
Hardhyan v. Mehor chand 276
Hardwary Mall v. Ahmed Musaji Seleji 519
Hare Shankar v. Amraoti 566
Hargolal v. Sodhi 589
Hargopal v. Kartar 430, 818
Hari v. Inder 175
Hari v. Lakshmi 476, 479
Hari v. Skoda 788
Hari chand v. Inder Sen 523, 670, 680
Hari chand v. Lachman 258, 442, 446
Hari charan v. Manmotha 561
Haridas v. Badhu 525,
Haridas v. Baidya 277, 300, 301, 314, 371, 644, 859
Haridas v. Ramadas 199
Harides v. Utoomal 395
Hari Kumar v. Lakshmi Ram 241, 830
Harinarayan Sugar Mills v. Skoda 753
Harinath v. Mathura Mohan 108
Hariprosad v. Sewak 568
Hariprosad v. Soogini 850
Hariram v. Gobindram 216, 243
Hariram v. Ramditta 546
Harisankar v. Amraoti 104, 530, 839
Harisankar v. Ram Piari 517, 522
Harisankar v. Shambhunath 861
Hari Singh v. Allah Baksh 533
Haritmal v. Hiralal 612
Hari Singh v, Kankinarah 253, 295, 301, 303, 306 307, 364, 483, 626
Hari Singh v. Lachmi 100, 574
Harlow v. Read 409
Harman v. Kishan 408
Harman Singh v. Harman Singh 517
Harman Singh v. State 10
Harmukh v. Japan Cotton 453
Harman Singh v. Harman Singh 236
Harnarain v. Bhagwant 214, 230, 231, 353, 496
Harman Singh v. Parsram 25, 30
Harinarain Singh v, Chaudhurani 509
Harphool v. Prabhu 395, 613, 658, 665,
Harsrasad v. Bhagwati 530, 573

Harpsosad v. Raghubir 464, 519
Harrey v. Shalton 626
Harris v. Mitchell 269, 857
Harris v. Johnsen 398
Harris v. Taylor 772
Harris v. Social M. Co. 398
Harris v. Reynolds 735
Harrison v. Wright 38, 144, 584
Harrison v. Greswick 426
Hart v. Hart 564, 758
Hart v. Duke 159, 180, 630
Harvey v. Shelton 295, 297, 302, 306, 307, 309 311, 367, 666
Hasan Banu v. Wasi Ali 232, 235
Hashan Ali v. Hosdar Ali 157
Hasmat v. Siddia 413, 567, 572, 574
Hasky v. Windham 594
Hassanand v. Jodhmal 422
Hassonal v. Kondanmal 569, 571, 596
Hassonal v. Kishinchand 524, 531
Hastinal v. Hiralal 446, 509, 526, 729
Haswa v. Mahbub 569, 570
Hatcherd v. Mogo 201
Hatimal v. Hiralal 503
Hatton v. Rayal 105
Hawkesworth v. Bramwell 407
Hawkins v. Colclough 426
Hawley v. North Staffordshire 388
Hawsworth v. Brammalt 480
Hayath Sub v. Mahomed Sadik 304
Hayman v. Darwins 734, 754
Hayward v. Mors 865
Hayward v. Phillips 410
Hazi v. Northern Indian 644
Hazi Abdulla v. G. R. Stamp 760
Hazi Ebrahim v. Pannalal 722
Hazi Ebrahim v. Northern Indian Oil 642
Hazi Rahamatulla v. Chaudhuri Vidya 453
Hazi Umar v. Slivlal 541
H. C. Gauti v. F. L. Harcourt 374
Heaven v. Seven 408, 440
Heeral v. Joakin 130, 141, 276, 381, 387, 438, 855, 858
Hemanta Kumari v. The Midnapur Zamindari 423, 483
Hemchandra v. Janendra 314, 370, 647
Hemchandra v. Saratchandra 106
Hemlata v. Jamboo 104
Hemsworth v. Brain 204
Henderson v. Williamson 403
Henfree v. Bromlley 348, 437
Het Lal Upendranath 423
Hewit v. Hewit 412
Hewitt v. Penny 269, 659
Hewitt v. Hewitt 410, 478
Hewlet v. Laycock 621
Heyman v. Darwin Ltd. 5, 17, 63, 64, 70, 76, 78, 79, 80, 81, 83, 161, 162, 163, 165, 173, 616, 725, 749, 750, 752, 762, 785, 809
Hickman v. Roberts 31, 148, 751, 794
Hickman v. Kent 50, 53, 55, 250, 251, 544
Hide v. Petil 153, 407, 480
Hide v. Coth 407
Higgins v. Wills 412, 416, 485
Higgins v. Long 375, 409
Higham v. Jessop 861
Higham v. Havant 864
Hill v. Marshall 273, 858
Hill v. Townsend 549
Hills v. Sookhee 197
Hills v. M' Rae 203
Himachal Singh v. Jatwar Singh 25, 35
Himalayan Assurance v. Assudamal 139, 603, 607
Hind Constructions v. Dwarkanath 833
Hindusthan Flash Light v. Great American Insurance Co. 221
Hira v. Dina 563, 566
Hira v. Gaya 595, 820
Hiralal v. Kalinath 335
Hiralal v. Keshrimal 833, 858
Hiralal v. Srikali 709
Hira Singh v. Ganga Salai 519
Hirji Moolji v. Cheong Yue 17, 64, 66, 70, 78, 79, 80, 83, 163, 170, 172, 753, 754
Hisst v. West Riding 138
Hitchons v. British Coal 495
Hithal v. Upendra 698
Hobbs v. Farran 649
Hodgkuison v. Formor 78, 294, 342, 405, 452, 467, 468, 469, 487, 488, 489, 491, 639, 640
Hoagoon v. Ry. Passengers Assurence 734, 781, 785
Hodson v. Wilde and Wire 330
Hoffer In re 33, 35
Hogge v. Borgess 457, 490
Hoggins v. Gordon 322
Hopcroft v. Hickman 374, 375, 376, 417, 485, 650
Hopper In re 268, 269, 291, 564
Holaram v. Governor General 442
Holgate v. Killick 406, 494
Holland Bombay v. Essardas 339, 789, 781
Holmes Oil v. Pumperston 77, 494
Holloway v. Francis 336
Holt v. Meddow Croft 621
Holuram v. Governor General 825
Homminarayan v. Venkata 852
Honnusji v. District Local Board 26, 27, 28, 48, 63, 69, 127, 775
Hortern v. Sayar 139, 750
Hoosein v. State 8
Hotel Co. Bartleth 772
Hotels Co. v. Knowells 776
Hotchand v. Kishanchand 421, 551
Hoswa v. Mahbub 572
Howard v. Badington 12
Howard v. Wilson 301, 302, 350, 367
Howrah Oil Mill v. B. Kishanlal 771
Hriday Narayrn v. Jang Bahadur 11
Hrishikesh v. Lalmohan 605, 607
Hrishskesh v. Mohan 597
Htranarain v. Bhawant Kuar 228
Hubback v, Helms 361
Huddersffeld Banking v. Henry Lister 200
Hughes v. Jones 140
Hukumchand v. Kamelanand 463
Hukumchand v. Toyo Monka 743, 757, 795, 806
Humtaz Ali v. Farhet Ali 459
Hunt, In re 205
Hunt v. Hunt 410
Hant v. Ralling 145, 368
Huntoolah v. Hurun 433
Hunnman Rai v. Jagadis 575
Hurbhan Dat v. Ladli Singh 472
Hurchand v. Chuttanlal 588
Hardeo v. Thano 574
Hurdie v. Bhagwan 108

Hurduary v. Ahmed 132, 133, 353, 356, 364, 366, 369, 614, 668
Hure Sundaree v. Sridhar 516
Hurmukhroy v. Japan Cotton 459, 460
Hurroneth v. Kasheenath 587
Hurrysuy v. Jahurnath 620
Hussain v. Vijayanagram 731
Hussain Baksh v. Lachmandas 210
Husiem v. Kasardeo 64, 646
Hussain bhai v. Bansilal 103, 574
Hassain Kasam v. Vidyanagaram 64, 352
Hussait Mahomed v. Ismail 567
Hutchinson v. Eaton 143
Hutchinson v. Hayward 146
Hutchinson v. Sheperton 241
Hyder Sahib v. Giria Chettiar 456, 461, 464, 498
Hydrabad (Sindh) Electric v. Union of India 16
Hysin v. Kisadao 685

I

Ibrahim Ali v. Mohsin Ali 514, 515, 670
Imambandi v. Mustadoi 89, 90
Imamuddin v. Alleh Baksh 441, 445
Imamdin v. Jawabari 287, 594
Imperial Loan Co. v. Stove 98
Imtaz v. Dost Mahomed 522, 570, 571
Income Tax Commissioner v. Ahmedbhai 13
Indar Singh v. Pooran Chand 712
Inder v. Kande Das 521
Inder Chand v. Pooranchand 725
Indermoni v. Nilmoni 852
India Electric v. General Electric 753, 758
India and General Puvests Trust Ltd. v. Ramchandra 8
India Hosiery v. Bharat Woollen Mills 188, 210, 543, 855
Indian Iron Steel v. Ramrichpat 7
Indian Mineral v. Northern India 688, 832, 842
Indian National Congress 174, 177
Indian Steel v. Deviprosad 785
Indigo Co. v. Ogilvy 361, 362
Indo Persian Trading v. Purnanand 794, 839
Indramoni v. Nilmoni 732, 733, 851
Indramani v. Bijoychandra 545
Indur Subbrami v. Kandadai 575, 576
Indurthi Srinivas v. Indurthi Venkata 420
Ingram v. Milners 652
Ingram v. Milney 408
Inland Revenue v, Hunter 384, 349
International v. Naigara 68, 407, 654
Intraz N. Dest Mohammed 569
Iasifoglu v. Commantaras 273, 278
Iarni v. Chidambaran 13
Irrutalla v. Bhikhari 477
Irvine v. Elron 343, 437
Ishan chandra v. Bani Madhab 122
Ishar v. Keshab 596
Ishardas v. Keshabdeo 579
Ishardas v. Visan Bai 563
Ishwar Dei v. Chhitdu 524, 613
Ismail v. Hansraj 158, 523, 612, 624, 857
Isribai v. Peribai 76, 252, 563, 614
Iswari Prosad v. N. R. Sen 13
Ives v. William 33, 634
Ives & Barker v. Williams 147, 637, 776, 792

J

Jackson v. Barry Rail 147, 148, 151, 152, 177, 184, 634, 635, 636, 637
Jacobs v. Credit Lyonnais 43
Jacobs v. Harachand 740
Jadubani v. Mahaboo 197
Jadunath v. Kailash 136, 696
Jafar v. Abdul 545, 529
Jafri Begam v. Ali Reja 294
Jafri Begam v. Syed Ali 642
Jagadish v. Sundar 401, 447, 722, 826, 833
Jagamandeo v. Piarilal 516
Jaganath v. Nanak chand 557, 830
Jagannath v. Dinanath 581
Jagannath v. Jaswanti 12
Jagannath v. Madho Singh 581
Jagannath v. Manulal 96, 577
Jagannath v. Rambux 404, 421
Jagannath Pd. v. Hazarilal 823
Jagannath Sahu v. Chedi Sahu 236
Jagapati Mudaliar v. Ekambara Mudaliar 103
Jagat Hari v. Moran 480, 654
Jagat Pando v. Sarwan Pando 830, 832
Jagat Sundari v. Sanatan 432
Jagar v. Jolma 812
Jageshwar v. Kritartha 581
Jageshwar Singh v. Thaher Jawala 839
Jagilal v. General Fire 647
Jagjivan v. Doshi 562, 853
Jogmohan v. Surajnarain 580
Jagroop v. Bankateswar 406, 506
Jagrup v. Kashi 59, 146, 569, 570, 596, 632, 633
Jaharmal v. Birinchi 461
Jai Dayal v. Chunnilal 170, 254, 258, 386
Jaider v. Kanhayalal 643
Jai Kali v. Baldoo Singh 197, 202
Jai Kaur v. Sher Singh 21
Jaikishan v. Ramgopal 502
Jaikishen v. Ramlal 447, 530
Jai Kumar v. Gaurinath 567
Jailal v. Tapeswari 574
Jainahuddin v. Sarfarar 562
Jainarain v. Narain Das 548, 738, 793, 795, 799, 802, 803, 824, 830, 850, 873
Jainath v. Kamala 92, 97, 512
Jaipal v. Tapeshwari 133
Jaisri Sahu v. Rajdewan Dubey 22
Jai Singh v. Mangloo 121
Jaldhari Rai v. Muhammad Abdul 454
Jaman v. Narain 844
Jamburdo v. Annappa 195
Jamdevi v. Allah Rakha 434
James v. Arudamal 429
James v. Att. wood 166, 167, 180, 269, 857
James v. Crane 188
Jamas v. James 178, 179
James v. James and Bendall 166, 167
James Clark Ltd. v. Carters Ltd. 495

James Finlay. v. Asudamal 365, 388, 417, 486
James Finlay v. Behari Singh 307
James Finlay v. E. Paymond 789
James Finlay v. Gurdayal 78, 125. 137, 223, 251 252, 303
James Fackintosh v. Scindia Steam 128, 212. 372, 844
James White v. Duke of Buccleach 584
Jamieson, In re 269. 270
Jamnabai v. Jothamal 123
Jamna Koer v. Nasib 375, 605
Jamshedji v, Sorabji 101
Jamuna v. Hanumat 568
JSnakbati v. Gajanand 565
Janaki v. Dhanu 123
Janandra v Annapurna 487, 501
Janauendra v. Jitendra 512
Janardan v. Shambhu 477, 497
Janardan Prosad v. Chandra Sekhar 117, 385, 392, 402, 615
Janendra Mohan v. Bhabani charan 502
Janandra Nath v. Jitendra 105. 136
Janendra Nath v, Suresh Chandra 170, 477, 478. 565
Jameshwar Das v. Tliok chand 534
Jang Bahadur v. Shankar Rai 101
Jani Durlabh v. Jani Lajja 461
Janki Prosad v. Balmukund 825, 829
Jaskaran v. Ramchand 105, 573
Jasoda v. Kirtibasb 533
Jatindra v. Jetu 7
Jatindra Mohan v. Manindra Nath 527
Jatindra Nath v. Manindra Nath 579
Jawharlal v. Jagadish 211, 598
Jawharlal v. Union of India 609
Jawahar Singh v. Mulraj 462, 515, 521, 525, 594
Jawala Prosad v. Amarnath 586. 856
Jawala Shah v. Nihal 547, 548. 699
Jaimangal v. Mohan 214, 256, 525
Jayanti Lal v. Chhanganlal 444, 447
Jayantilal v. Surendra 628
Jayasankara v. Naggoundra 581
J. Bolli v. Jogli 44, 78
Jegannath v. Dinanath 573
Jenkins v. Betham 403
Jenkins v. Heggs 859
Jenkins v. Robertson 518
Jenkins v. Leggo 365, 386
Jonkins In re 274
Jenkins v. Ward 286
Jenkins v. Bettaradon 31, 35
Jeokaram Lal v. Mathura Pershad 155
Jeramdas v. Emperor 14
Jethabhai v. Chapsey 456
Jethalal v. Amritlal 603, 607
Jethanad v. Mirabai 549, 697
J. G. Smith v. Ludha 156, 858
Jhandaram v. Musa 479
Jhanessburg Municipal Council v. Stewart 753, 755
Jhangi Ram v. Budho Rai 521
Jhino Singh v. Brahmdat 562
Jhirighat Native Tea v. Gupta 110, 438
Jhonson v. Lathan 474
Jhonston v. Cheape 364
Jhuri Singh v. Dwarka Singh 629
Jiaul Hussain Khan v. Sitaram 203
Jiban Prosad v. Secy of State 839
Jinahuddin v. Sarafraz 561
Jinmat Bibi v. Abdul Aziz 275
Jiphson v. Hawkins 339
Jivanand v. Ramkishan 838
Jita Singh v. Nan Singh 94
Jitendra v. Nagendra 422
Jivanmal v. Shahzada 779
Jivansmal v. Shahzadahaud 824
Jivraj v. Thakam Das 754
Jivraj Baloo Spinning v. Chamsoy Bhara 639
Jivaraj bhai v. Chintamanroo 322
Jiwan Mall v. Paras Ram 573
J. Lonz v. Lalchand 51, 53, 73
Jnanendra v. Jitendra 88, 548, 565, 652
Joala v. Narain 454
Jol Leo Ltd. v. Lord Dalmony 50, 83, 86
Jogat Sundari v. Sonatan 593
Jogendra v. Apurma 194
Jogendra v. Askarulla 17
Jogesur v. Kulyanee 559
Jogeswar v. Kirtarthee 588
Joggessur v. Kubjani 581
Joggi v. Ganga 290, 630
Jogodishary v. Kailash 6
Jogrup v. Kashi 313
Johan Bato & Co. v. Kanoolal 52, 53
Johannesburgh v. Stewarat 81
Joharimal v. Fatechand 771
John v. Soomar 447, 820
John v, R. 846
John Batt v. Kanoolal 44, 49, 50, 433, 533
John Botte & Co. v. Kanoolal 250
John Bolt & Co. v. Kanoolal 72
John Mohd v. Hezi 455
Johnson v. Barry Railway 637
Johnson v. Latham 375, 487
Johnson v. Latharn 651
Johnston v. Cheape 147, 305, 365, 482, 484, 684
Johora Bibi v. Md. Sadik 392
Johorimal v. Fatechand 730
Johriram Kaya v. Ghanshamdas Kedarnath 805
Johur Mull v. Kashi Prosad 508
Joi Kishen v. Karimuddin 124
Jokiram v. Ghanshamdas 174, 263, 738, 800, 806, 808
Joman v. Miyabus 852
Jones v. Merionethsire 567
Jones v. James 166
Joosulo v. Peer 822
Jophin v. Pottethwaiti 783
Jordeson & Co. v. Kopparbergs 69, 366
Joredoni v. National British 753
Joseph v. Imperial 163
Joseph v. Kedarnath 603
Joseph v. Sreekar 231
Joshi v. Joshi 303
Josia v. Kenkata 189
Jotindra v. Munni Lal 699
Jot Singh v. Hotchand 571
Jowahir Singh v. Fleming Shaw 736, 757. 769, 806, 808
Joyantilal v. Surendra 500
Joylal v. Manmatha 74
Joylal v. Goperam 773
Joy Mangal v. Govindaram 516
Joy Mungal v. Mohan 230, 231, 353, 383. 390, 391, 415, 593
Joyprakash v. Sheo Gholam 516, 521, 522

Jyoti Bros v. Shree Durga 214
Jubille Chamber v. Lala Amrit 50, 52, 131, 141, 144, 250, 251, 545, 785
Jubilee Mills v. Commissioner 19
Jugobandhan v. Chandmohan 374, 375
Jugal Das v. Purusottam 513, 541. 561, 586. 720, 733, 852
Jugal Kishore v. Goolbai 702
Jugal Kishore v. Goolbox 53
Jugal Kishore v. Jolendra 108
Juger v. Zolne 293
Juggobandhu v. Chandmohan 287, 409, 457, 480, 654
Jugghat v. N. U. International 55
Juggilal v. General Fibre 371, 537
Juggilal v. N. V. 330, 686
Jumna v. Nasile 237, 267
Jumaa v. Mubarik 274, 855
Jumnamal v. Gurdinomal 94, 575
Junghoim v. Fonkelmam 621, 623
Junglee Ram v. Ramheet 385
Jupiter v. Corporation 120, 615, 640, 642
Jupp v. Grayson 76
Jureidiue v. National 79, 81, 758
Jute Factory v. Hulaschand 158
Jwarani v. Tapkundas 82
Jyothi v, Sree Durga 50

K

K. C. Mehra v. Union of India 122, 388
K. P. Dajal v. Jamadar 667
Kachari Kalyan Mal v. Walli Md, 799, 824. 831, 845
Kahan Singh v. Mohan Lal 581, 603
Kaikabad v, Khambatta 456, 458, 461,:462, 465, 525, 593, 594, 657, 827
Kailash v. Sheo Ranjan 124
Kakaee v- Hajoodeen 569
Kalabatu v. Prabh Dial 563, 566
Kalachand v. Wahi 780
Kalananda v. Rameshwar 568
Kalatpu v. Ranga 202
Kali v. Gupt 684
Kalia Kolam v. Narayanamurthi 517
Kalian v. Lekhraj 594
Kalian v. Rochan Bai 508
Kalicharan v. Mani Mohan 131, 135, 369
Kalicharan v. Gopi Nath 383
Kalicharan v. Saratchandor 297, 527
Kalidas v. Tribhandas 419
Kalihar v. Lachminarain 37, 405
Kalipalli v. Kalipalli 488
Kaliprosanno v. Rajanikanta 147, 149, 151, 177, 313, 521, 552, 632, 633
Kalka v. Indra Deo 727
Kalhapalli v. Kuzza Venkatadri 623, 670
Kallooram v. Gangadas 505
Kalu v. Ram 32
Kalu v. Kahir 456, 525
Kalu v. Aisha 563
Kalumal v. Ahmed 620
KaluNagabushanam v. Soshachalam 392
Kaluram v. Ram Dayal 34, 403, 659
Kalu Singh v. Parasmal 526
Kalyan v. Pyarelal 532
Kamala Mills v. Ganapati 68, 216
Kamal Brothers Hansraj 745
Kamal Kumar v. Narendra Nath 96
Kamal Singh v. Sankarchand 704
Kamani Engineering v. Madhya Prodesh Electricity Board 743
Kamoswaramma v. Thammanna 460
Kamini v. Birondra 567, 672
Kammuthin v. Thos Smith 790
Kammutha v. Krishnaswamy 504
Kamta Prosad v. Ram Dayal 129
Kamta Prosad v. Jodda Singh 277, 385, 393, 664
Kamta Prosad v. Uma Prosad 504, 508
Kanhaya Lal v. Jagaannath 681
Kanaichand v. Ramchandra 668
Kanaka v. Nagalinga 522, 523
Kanatolo v. Kandala 661, 663
Kancheddamad v. Ganga Prosad 230, 231
Kandi Bai v. Thakurdas 521
Kanhailal v. Narain Singh 337, 839
Kanhaiya v. Peoples Bank 502, 534
Kanhaiya v. Shoaial 311, 646
Kanhaiya v. Khairati 307
Kanhaiya v. Seth 394
Kanhaiya v. Sheokaran 178, 303
Kanhayalal v. Ram Kumar 220, 598
Kanhayalal v. Ramchandra 708, 712
Kanhayalal v. Aviharan 604
Kanhaihalal v. Narain Singh 531
Kanowar v. Hindusthan 165
Kanshi Ram v. Harman Das 292, 372, 399, 622
Kanshiram v. Sampuran 444
Kanshi Ram v. Emperor 16
Kapila Textile v. Madhave Co. 490
Kappuswami v. Amantharamier 723
Kapur v. Rajkumar 453
Kapurchand v. Jewaraj 271
Karam v. Jasochhan 357, 365
Karam Bibi v. Muhammod Alan 571
Karamchand v. Jesodhan 316, 388, 506
Karamchand v. Sant Ram 222, 553, 556, 557
Karamdin v. Mohammad 177, 582
Karanatak Bank v. Singarayaa 111
Karanji v. Indo China 68, 175, 381 783
Kardha v. Venmavarapu 566
Karim v. Mohammad 591
Karim v. Subhan Ali 275
Karan Singh v. Gambibai 424, 426, 701
Kartar Singh v. Mohar Singh 73, 773
Karumutha v. Thossmith 793
Kashibat v. Ramkrishna 238
Kashinath v. Gangabai 698
Kashinath v. Ganguraj 418
Kashinath v Narsingha 326, 714
Kashi Prosad v. Gupteswar 217, 235
Kashmiri v. Lal Khan 256, 592
Kashmiai v. Mussamat 237
Kashmiri v. Khan 231
Kasi v. Lakshmi 616
Kasireju v. Vondukari 450
Kaswasji v. Sasini Bai 564
Katam v. Irmik 400
Katama Nachir v. Rajah of Shivaganga 108
Katha Appa Ram v. Mohammed 503
Kathihar v. Lachminarayan 538, 627, 638
Kattam v. Irrinki 834
Katumal v. Adam Haji 63
Katumal v. Joyram 418

Kausalla v. Gopal 203
Kanta Prosad v. Ram Dayal 657
Kanta Prosad v. Jodha Singh 516, 523
Kawal Singh v. Baldeo 379, 690, 843
Kazee v. Hajooddeen 587
Kazee v. Tinno Dossia 392
Kazee v. Musammat 382
Kazu v. Hajoo Adeeny 88
Kedar v. Basanta 93
Kedarnath v. Basant Lal 92, 575
Kedarnath v. Sumpatram 339, 757..780, 791, 800
Kedarnath v. Secretary State 145
Keighley & Co. In re 139, 140
Kelantan v. Duff 640
Kelantan v. Duff Development 342, 452, 493, 495, 640
Keli v. Frazer 552, 697
Keluram v. Kashmiri 596
Kemp v. Rose 146, 149, 151, 631, 635
Kendal v. Symonds 417
Kennard v. Harris 620
Kennedy v. Barrow-in Furness Corporation 27
Kent v. Elstab 406
Kerr v. Jeston 272, 861
Kesanna v. Vengamma 666
Keshale v. Jyoti Prosad 125
Keshav v. Luxmi 214, 229, 350
Keshava v. Rudram 518
Kesho v. Peare 35
Kesholal v. Laxman Rao 279, 297, 530, 643, 880
Keshomal v. Gianchand 424
Keshoram v. Kanhyalal 51, 131 250, 758, 781
Kesho Ram v. Pearee Lal 158
Keshore v. Kishore 278
Keshrimal v. Ganesh 840
Keshrimul v. Megh Raj Basdeo 447
Kewalram v. Donald 248, 254, 830,
Khairam v. Lalchand 661
Khanchand v. Mulchand 531
Khanchand v. Kadumul 410, 480, 514, 517, 522
Khan Singh v. Mohanlal 511, 670
Kharag Nath v. Nakheddin 517, 522
Khardah & Co. Ltd. v. Rayman & Co. 709, 722
Khatiza v. Abowatu 433, 434
Khatun v. Addul 499
Khazanchand v. Hamir chand 421
Khola v. Chet Ram 565
Khelut v. Tarachand 665
Khemchand v. Udhavdas 240
Kherodamony v, Doorgamony 194
Khetranath v. Ushabati 830
Khet Singh v. Mahmod Singh 421
Kheta Ram v. Kashmiri 559, 571
Khewalram v. Diwanchand 167
Khillaram v. Louis Dreyui fus 591, 738, 779, 805
Khilluram v. Jaichand 230, 275
Khimchand v. Udhavdas 780, 781
Khimchand v. Bhogilal 589
Khimo v. Cotara 477
Khimji v. Nathubai 625
Khirajimal v. Dain 191
Khobhari v. Jhamman 36
Khodadad v. Bai Jerbhai 123
Khoka v. Shamboo 557
Khublal v. Bishambar 478
Khudeja v. Ghulam 549
Khudiram v. Chandi 393, 395, 511, 522, 618
Khudiram v. Gandhi 517
Khumbha v. Dominion 703
Khumblad v. Dominion 432
Khuni v. Gobinda 96, 108
Khusiram v. Hanumutmal 63, 745, 783
Khusiram v. Mathura 62, 630, 646
Khusiram v. Kiran 637
Khusiram v. Hanutmat 747
Kidar Nath v. Secretary of State 659
Kilburn v. Kilburn 410
Kimberby v. Dick 146, 631
Kine v. Atkinson 480
King v. Bowen 409
King v. Ploenix 746
King v. B. C. Fir 14
King and Buveen inre 77
King v. Fines 417
Kirchner v. Gurban 143, 731, 760
Kirkwood v. Maungsin 88, 596, 873
Kiroti v. Behari 464, 498
Kirparam v Jowahar 480, 481
Kirtha Lal v. Bhusan Dasi 191
Kischar v. Grueban 38
Kishan v. Gangabai 17
Kishan v. Rumlal 400, 459
Kishanch v. Rochaldas 257, 260
Kishandas v. Meghraj 621, 623
Kishanlal v. Kanhailal 193
Kishanlal v. Birchand 585
Kishanram v. Jawahor 487
Kishengopal v. Sukalal 206
Kishinchand v. Ramchand 795
Kishinchand v. Takhitram 677
Kishin Das v. Munghraj 51
Kishnomal v. Waparimal 224, 236
Kishori v. Laxman 180
Kishori v. Kumarchandra 108
Kishori v. Mercantisle Corporation 736
Kisil Micheff v. Constant Smith 468
Kissengopal v. Murlidhar 570, 572
Kitchen v. Turnbull 785
Kitts v. Moore 184
Kleine v. Cotora 410
Knight v. Quarles 201, 202
Knight and Tubernacle Permanent Building Scoiety, Inre 350, 342, 346
Knowels v. Boltan Corporation 603, 608
Knox v. Symonds 77, 301, 457, 493, 619
Kochu v. Corlin 10
Kodali v. Kodali 251
Kodumal v. Volcart 334, 829
Koeglar v. Covingaoil 541
Kokil Singh v. Ramasray 543, 546, 594
Kolava Kolana v. Poddri Narayana 514, 515
Kombi v. Panni 516, 523
Koramuthu v. Tlos Smith 789
Kotamma v. Mangamma 524
Kothandarama v. Sivaganga 232
Kotumal v. Jayramdas 483
Kotumal v. Adam Haji 51, 54, 514
Kover Parvathamma v. Kover Subbamma 637
Kresham v. Muthu 521
Kreshna v. Ramaswami 200
Kreshna v. Lakshmi 502
Kripal v. Harkishan 523, 839
Krishan v. Narain 399

Krishna v. Bani 476
Krishna v. Baidya 303
Krishna v. Banwari 597
Krishna v. Corporation of Calcutta 199
Krinhna Behari v. Meohammad 530, 531
Krishnagopal v. Chandiprosad 353. 626, 642
Krishnagopal v. Lakshmi 517
Krishna Iyer v. Subbmat 691
Krishna Kamal v. Haripada 751, 753
Krishnakanta v. Bidya Sundari 287 354, 459
Kishna Kishore v. Banwarilal 594
Krishnakumar v. Haripada 757
Krishnamma v. Chennayya 516
Krishnamurthy v. Ethirajalu 837
Krishnan v. Mathu Palandi 532
Krishna Panda v. Balaram 401, 418
Krolapalli v. Mynerie 354
Krottapali v. Myeni 480
Kruse v. Questier 64, 161
Kula v. Kula 396, 650
Kulsam v. Ali 516, 581, 588
Kumaraswami v. Karppuswami 14
Kumar Saradindu v. Bhagabati 37
Kumbakonam v. Abba 112
Kumbha v. Dominion of India 431, 691
Kumbhu v. Kumtripathumma 585, 852
Kumvilla v. Kumvilla 656
Kundanlal v. Chainulal 594, 597
Kunheen v. Kunhipathamma 571, 586
Kuuhin v. Kunhika 593
Kunjilal v. Banwarilal 159, 180, 477, 555, 643
Kunthi v. Sarangapani 244, 265
Kunti v. Bholanath 563
Kunwar Bahal Kunwar 359, 560
Kunwar v. Mabe 75
Kuppuswami v. Anantharamier 394, 608
Kuppuswami v. Pavanambad 851
Kareshi v. Soonar 760
Kunsell v. Timber operators 329, 351, 360
Kuruvilla v. Kuruvilla 393, 413
Kutli Ammal v. Sarangapani 212
Kwanin v. Bendentu 517
Kya Hala v. Mapan 424
Kyankesna v. Apparna 7
Kyd v. Mahomed 133

L

L. M. Das v. State of W. Bengal 653
L. & N. W. Rly v. Billington 62, 787
L. W. Farnandaz v. Jivatlal 71, 72
Lababgul v. Badsha 428
Lachhu v. Ganesh 507
Lachman v. Prannath 278 384, 664
Lachman v. Moghal 181, 582, 591
Lachman v. Moghanman 551
Lachman v. Jamini 699
Lachman v Makar 39, 54, 131, 189, 381, 701, 704, 709, 718
Lachman v. Parmeshri 871, 873
Lachman v. Aprokash 591
Lachman v. Naman 572
Lachman v. Channamal 547
Lachman v. Pyle 483
Lachmi v. Sheonath 291, 306, 366, 830
Lachmi v. Gobardhan 401, 447, 723
Lachmi v. Khairati 271, 277
Lachminarain v. Ma Madhi 23
Lachminarain v. Hoare Miiler 758
Lachminarain v. Rajaram 556
Ladgard v. Butt 144
Ladhamal v. Sardari 418, 419, 422, 424
Ladhuram v. Nandalal 569, 571, 596
Ladha Singh v. Jyoti 733, 737
Ladha Singh v. Bhagsingh 562
Laka Singh v. Bodil Singh 664
Lakha Singh v. Has Bhajan 573
Lakhman v. Ramchandra 337, 338,
Lakshmamma v. Goole Appada 530, 664, 665
Lakshman v. Ramchandra 450, 507
Lakshmana v. Raghubir 570
Lakshmania v. Chinna Thambi 92, 575, 576
Lakshmania v. Appadu 254
Lakshmi v. Krishna 60
Lakshmi v. Raghubir 561, 596,
LaLshmi v. Urion 113, 126, 604, 610, 646
Lakshmi v. Ram 25, 33, 315, 562, 661, 681, 853
Lakshmi v. Venkatasami 532
Lakshmi v. Nagamma 577
Lakshmi v. Bhatchayya 463
Lakshmi v. Sama Sundaram 606
Lala v. Abdus 276, 277, 384, 396, 445, 607
Lala Bhugat v. Ambala Bank 501
LaLa Bihari v. Jagat 701
Lalchand a. Megh Ram 557
Lalchand v. Kishori 500
Lalchand v. Basanta Mal 723
Lalchand v. Sri Ram 543, 546
Lalchand v. Dev Raj 629, 822
Lal Das v. Bailal 426
Laldas v. Lakshmi 788
Lal Jagroop v. Barkateshwar 484
Laljee Jai Singh v. Tewari 389, 396
Laljee Serang v. Chander 849
Lalkhan v. Kasmirilal 214, 229, 231, 353
Lallubhai v. Jomnadas 603, 608
Lati Dai v. Baldeo 497
Lalu Jela v. State 20
Lamont v. Hayland 241
Lancaster v. Hamington 406
Landaner v. Asser 294, 491, 639
Sandrindod v. Hawkshy 322, 323
Lang v. Hollad 430, 455, 646
Lang v. Brown 273
Lanpur Nagar v. Narain 833
Larchin v. Ellis 358, 660
Larrinaga v. Socioty 343
Lasa Din v. Gulab Kunwar 23
La Schin v. Ellish 293
La Society v. Shipping controller 359
Lathman v. Moghal 537
Lathman v. Mohat 159
Latufulla v. Muhammad 418, 706
Lauxmi v. Wodina 574
Lauza v. Winner 328, 372
Law v. Garret 38, 143, 594, 731, 760, 785
Lawrence v. Hodgson 345, 417
Lawrence v. Hill 408
Laxman v. Ram 73, 115, 339, 854
Laxman v. Manjunath 554, 796, 798
Laxminarain v. Sheonath 645
Laxminarain v. Manesman 38
Laxminaraina v. Venkatasubbiah 585
Layan v. L. P. T. P 468
Lee v. Hemingwoy 31, 34, 403

D

Lee v. Page 139
Leeds v. Burrows 26, 31, 32, 34, 403
Leeson v. General Council 310
Leggo v. Young 406
Leggott v. G. N. Rly 202
Leisearch v. Sohabit 618
Lekha v. Bodil 254, 383
Lekhraj v. Vishindas 489
Lekhraj v. Dulhma 158
Lelx Kala v. Kelchalappa 663
Lenka v. Karim 645
Lenkhapoli v. Kassi 89
Lenz v, Lalchand 240
Lewis v. Halbrook 188
Lewis v. Hughes 854
Lewis v. Rossiter 412, 418, 652
Lewis v. Jibatlal 52
Liladhar v. Radha Kishan 720, 721, 728
Lilashah v, Bholanath 450, 460, 642
Lingam v. Kanuri 726
Lingood v. Eade 374, 375, 650
Lissenden v. Bosch 346
Little v. Newton 140, 253, 276, 285, 312, 374, 375, 383, 385, 391, 650
Liverpol v. Turner 12
Livingstone v. Ralli 155, 210
Llandrimdod v. Hawksley 429, 589, 818, 819
Llayed Ltd v. Sturvgeon Falls pulpco 360, 361
Lloyd v. Board of trade 430, 865
Labitos oil Fields Ltd v. Admiralty commissioners 56
Lochman v. Parmoshri
Lock v. Army 789
Lock v. Vullimy 403
Locke v. Army 789, 790
Lodharam v. Rala Ram 548, 579
Logan v. Courtown 6
London and Blackwell Ry v. Cross 184
London and N. W. Rly v. Bellington 63, 758
London Export corporation v. Jubilee Coffee 684
London Sack and Bag v. Dixon 61
Long v. Hall 370
Lankaram v. Prakash 805
Lord v. Lord 253, 266, 268, 304, 385, 390
Lord v, Hawkins 472
Lord v. Lee 603, 607
Lord Selkrik v. Nasmeth Morison 188
Louis Drey Fus v. Purusottam 297, 370, 487, 534
Lomis Drey Fus v, Palabbarayyot 617
Louis Drey Fus v. Araromat 303, 366, 669, 698
Louis Drey Fus v. Taradant 630, 665, 859
Louis Drey Fus v. Rajagopata 274, 496
Louis Dry Fus v. Arunachata 240, 308, 334, 377, 651
Louis Drey Fus v. Basapp 540
Louis Drey Fus v. Doulatram 699
Lomis Drey Lus v. Rahubir 499
Louis Drey Fus v. Meharchand 260
Louis Drey Fus v. Hemandas 144, 157, 226, 228, 270, 380, 855, 856, 858
Loung Tahir v. Ram Singh 92, 575
Lovelock & Lewis v. Malabar Timber Yeards 22
Lucas Ralli v. Noor Md 773
Luchman Singh v. Makar Singh 128
Ludhmee v. Pyle 513
Luchmee Narain v. Pyle 480
Luchminarain v. Hoare Miller 176, 177
Lucs v. Livington 201
Luds v. Burrows 514
Lufulallah v. Mahomed 727
Lutaman v. Lachya 680
Lutamar v. Lachiya 529, 532, 533, 576, 614, 624
Lutawen v. Lachya 91, 522, 672
Luthfallah v. Khudur Baksh 114
Luthfullah v. Mahomed 400
Luxmibai v. Sridhan 428
Lyon v. Johnson 734, 785 790
Lyon v. Haddock 345
Lyon Lord & Co. v. Champaid Umersi 51, 250

M

Ma Bu v. Maung Pe 504
Maccarna v. Northern Assurance 355, 726
Macanlay v. Polley 102
Macdonald v. Narsindas 223, 224
Macdonald v. George 672
Macdougall v. Robertson 188, 280
Machung v. Ma Aing 454
Maclean v. Worker's Union 152, 320
Maclin v. Bennet 795
Mackey v. Aure 510
Mackey v. Dick 415
Machin Bennet 795
Macnaghten v. Ramoswar 24, 62, 514, 519
Macrae v. Lumay 494
Madan v. Munnalal 39, 584, 667
Madan v. Nabibuksh 445, 510, 575, 801, 834
Madan v. Narain 519, 624
Madan v. Sauwaldas 105
Madapalli v. Madapalli 492, 693
Madhab Das v. Vithaldas 836
Madhab Reddy v. Rajaram 534
Madho v. Kanhaiya 574
Madho Kashinath v. Sambhsiva 180. 555
Madhomal v. Firm Gurdial 149, 313, 613
Madhoram v. Mitsui Bhusan 78, 488, 493
Madhoram v. Sitaram 679
Madhusudan v. Bamacharan 6
Mafihusudan v. Odoito Chunder 518
Madhusudan v. Raja Mohesh 6
Madras Central Union v. Corporation 14
Madura Mills v. Krishna 111, 176, 184, 527, 591, 605, 606
Mafizuddin v. Alimuddin 443
Magyi v. Maung Po 89
Mahabir v. Udit 21
Mahabir v. Lala Ambika 835, 838
Mahadeo v. Badri 214, 228 238, 353, 680
Mahadeo v. Bindeshri 566
Mahadeo Jagannath 16, 21
Mahadeo v. Kamala 596, 641. 719
Mahadeo v. Narayan 569
Mahadev v. Administrator Genoral 21
Mahadev v. Duttaraya 571
Ma Hale v. Maung Pyin 194
Mahemmad v. Alam Khan 294
Mahammad v. Mahammad 455

Mahammad v. Osman Ali 36
Mahammad v. Valli Asmela 517
Maharaj v. Balchand 202
Maharaj Bhagat Harihar Bhagat 594
Maharaj of Jeypore v. Jaya Kota 96
Maharajah Sir Joy Mungal v. Mohan 432. 436
Mahasukram v, Keshavdev 66
Mahatab Singh u. Hub Lal 199
Mahdeo v. Kamala 570
Mahendra v Suresh 455
Maheswari Khetan v. Narendra 606
Mahideen v. Pathuma 683
Mahkud v, Kakipasha 238
Mahmud v. Kakinara 241, 285, 312, 618
Mahomed v. Abdul 830
Mahomed v. Attar Singh 655
Mahomed v. Azim 614
Mahomed v, Ghulam 554
Mahomed v. Hakiman 146, 177, 512
Mahomed v. Nauha 572, 575
Mahomed v, Piroj Shaw 84, 460
Mahomed v. Sirajul Huq 530
Mahomed v. Subramauyan 690, 831
Mahomed v. Thanumat 637
Mahomed v. Valli 522, 523, 624, 680
Mahomed Abdul v. Ahmad 564
Mahomed Afzal v. Abdul Hamid 315
Mahomed Ali v- Charat Singh 578, 641
Mahomed Ali v. Secretary of State 277
Mahomed Ibrahim v. Ahmed 145, 564
Mahommad Khalil v. Abdul Rahim 547, 652, 700
Mahomed Mia v. Osman 144
Mahomed Mohideen z. Md. Naina 770
Mahomed Syedol v. Yeonool 14
Mahomed Wahiduddin v. Hakiman 151
Mahomed Yasin v. Allah 581
Ma Huine Le v. Ma Nyin Bwin 292
Mais v. Gordhan 617
Mairanjan v. Asaraddi 428, 441
Manindra v. Mahanando 665
Majeti Subbiah v. Tettlay 787, 792
Major Jogendra v. Bibi Raj 11
Makhan Lakshmi v. Makhan 464
Makhan Lal v- Abhai Ram 540, 544, 549, 550, 552, 553
Makundaram v. Naubat 514
Makundaram v. Salig Ram 412, 415
Ma Kyan v. Ma Thera 547
Makyang v. Shwe Thin 835
Malak Sorab v, Anokh Rai 92
Malka v. Sardar 252, 562, 567
Malkarjun v. Narhari 795
Malmeshbury Ry. Co. v. Budd 146, 632
Malotra v. Sukhdayal 807
Malsankar v. Narsidas 515
Mamack Chand v. Ram Sarup 129
Maman Thu v. Ma Shurz Mi 194
Mamidi v. Vedam 312, 465
Mamidi v. Yedan 383, 664
Mammya v. Ko Pora 396
Mam Raj v. Mt. Kishin 399
Manak Chand v. Shiv Kishan 800
Manasaran v. Mangal Sain 511
Manvikram v. Mallichary 454
Manchester Ship v. Pearson 157. 264, 780
Mangaimal v. Akbari 534
Mangal Prosad v. Lachman Prasad 543
Mangal v, Prag Das 489
Mangal Chand v. Pyara Lal 51, 72
Manganlal v. Lalchand 625
Manger v. Bhatoo 238, 590, 594, 597, 607
Manghammal v. Thawardas 585, 849
Mangha Ram v. Johardas 700
Mangilal v. Devi charan 121, 562
Ma Ngwa v. N. Mein Shin 592
Ma Ngwe v. U. Min 408, 522, 825
Manicklal v. Shiva Jute 714
Manilal v. Bharat 105
Manilal v. Gokuldas 541, 849
Manilal v. Prahlad 555, 590
Manilal v. Saiyad 465
Maniklal v. Shiva Jute 707, 708, 722
Manindra v. Mohananda 188, 189, 191, 197, 298, 300, 303, 312, 375, 416 484, 594, 622, 657, 668
Manindra Chandra v. H. V. Low 784, 787, 792
Maniram v. Ram Asray 441. 531
Maniram v. Chettibai 198, 200
Manitoba v. Kelly 490
Manjee Premji v, Mallayket 606
Manji v. Mehta 849
Manmatha v. Gobinda 108
Manni v, Ram charan 663
Mannilal v. Pahled 592
Manraj v. Mt. Kishui 824, 836
Mansa v. Karto 459, 481, 483, 664
Mansfield v. Pariington 332
Mansfield v. Robinson 865
Mansingh v. Lal 852
Manufacturing Co. v. Under ground Electric 294, 380
Manulal v. Vannal 512
Mardue v. Palmer 349, 350
Margulies v. Dafuis 465
Marian v Amina 95. 575, 576, 616, 679, 681
Marithima v. Burjore 760
Maritime Insurance v. Asscaranz Union 369
Marsh, In re 300
Marsh v. Wood 204, 205, 207
Marshall v. Broadhust 203
Marston v. Tower 303
Marten v. Burge 402
Marten v. Tharnton 413
Martirosi v. Subramanian 496, 603, 608, 653
Marttimme v. Burjor 61
Maruli v. Akram 656
Ma Sat Kyi v. Maung Tun Gye 303
Maston v. Tower 353
Maung Shwe v. Maung Tok 441
Ma Shwe Thit v. Maung Po 198, 199
Masian v. Anima 614
Masin v. Ma Pu 253, 312, 384, 393
Mason v. Haddan 785
Masun Mya v. Swami 657, 668
Massey v. Aubery 417
Mata Badal v. Shoo Mangal 419, 422, 424
Mata Prosad v. Nageswar Sahai 17
Ma That v. Ma Saw 254, 402
Matherd v. Davis 76, 565, 580
Mathew v. Ottarton 37, 635
Mathews v. Munster 101
Mathubai v. Joran 455
Mathukutty v. Varnkutty 745
Mathula v. Thomas 427, 646
Mathunny v. Mathunny 617, 645
Mathura v. Gokul 192, 193,
Mathura v. Makanlal 47
Mathura v. Maganlal 4, 46, 49, 120, 396
Mathura v. Khusiram 63
Mathura v. Sukhdayal 624

Matson v. Turner 295
Matson v. Tower 367, 403
Mattison v. Hart 6
Matubai v. Jeram 619
Matumal v Haji Ibrāhim 672
Manghan Mal v. Thakurdas 696, 701
Maule v. Manle 299, 380
Maungar Sahu v. Bhatoo 163
Maung Hlay v. U. Ge 849
Maung Kalu v. Maung Milk 38. 584
Maung Lu Gyi v. Maung Lu Ngwe 313
Maung Myin v. Maung Yan Aung 511, 620
Maung Po v. Ma Bu 114, 413
Maung Shwe Hpu v. U. Min Nyum 291, 292
Maung Tha Aung v. Maung Tha Sun 521
Maung Tui v. Maung Payu 454
Maung Tun v. Maung Partiok 511
Maung Tun v. Maung Po 835
Maung Tun v. Maung Tun 522
Maunilal v. Pokhardas 591
Manphool v. Sahi Ram 392
Mausell v. Medland G. W. Ry. 83
Mauser v, Heaver 412, 484
May v. Mills 259, 767
Mayanamal v. Sanday Patrick 128
Mayappo Chettiar v- Venkato chellan 418
Mayawanti v. Tulsi 528
Mayo v. Williams 561, 565
Mazaffar Khan v. Ghulam Muhammed 198
Mazhar Ali v. Fateh Din 456, 465, 525, 835
M. Appayya v. Venkataswami 278
Mcdonald Co. v. Naraindas 125, 260
Mckenzies Ltd. v. Sulleman 223, 229, 240, 545, 637
M'Connel and Reid v. Smith 55
M. D. Cruz v. Secretary of State 750
Md. Ishaq v. Balmukund 526
Md. Newaz v. Alam Khan 642
M, Dougal v. Robertson 201
Medapatti v. Guruma 489
Mediterranean & Co. v. Fortress 290
Meenakshi v. Velambat 426
Meghraj v. Krishna Chandra 192, 193
Mehar chand v. Magan 616
Meher Ali v. Muhammad 663
Mehgharaj v, Firm of Langley 799
Mehtab Singh v. National Fire and General Insurance 545
Mehta Kashiram v. Dadabhoy 507
Menghraj v. Langley 824
Mengoram v. Gurbachand 756
Merali v. Sheriff 578
Meerifield v. Liverpool Cotton 41, 870
Metropoliton District v. Sharpe 375
Metropolitan v. London 786, 789, 790
Metzner v. Bolton 143
Mayappa v. Venkate Chellan 459, 620
Meyer v. Drosser 143
Mga Po v. Ma Daung 512
Mga Tok v. Nga Kasim 506
Mian Nathe v. Abdul 618
Mian Nathu v. Abdul Ghani 358
Mian Rahmatulla v. Syed Alam 569
Micharaya v. Sadasiva 512
Michel v. Serajuddin 68, 216, 760. 782
Middle East Trading v. New National 758, 759
Middleton v. Weeks 480
Milawaram v. Tolaram 816, 817
Miller v. Dhana Singh 388. 623
Miller. In re 239
Miller v. Shuttleworth 336
Miller v. Smith 100, 136, 218, 219, 239
Mille v. Baley 153 :
Mills v. Bawyers 310 621
Mills v, The Master 622
Milne v. Gratix 152
Minifie v. Ry. Passengers Assurance 787
Mir v. Khairum 430, 878
Miran v. Rahim 459, 483
Miran Baksh v. Sher Muhamad 569, 575
Mir Miyan v, Hadayet 92
Mir Sarwazain v. Fakhruddin 91
Mirza v. Bundali 581
Mirza Sardik v. Kaniz Tohra 229
Misrilal v. Bhagwati 613, 644, 659, 686
Mitchel v. Stanley 410, 477
Mitchell v. Governor of Ceylon 153
Mitchell v, Harris 735
Mitchell v. Simpson 4
Mithamal v. Shiv Ram 97
Mitharam v. Mayadas 634
Mitsui Bussan v. Hogarth 796
Mitsui Bussan v. Totaram 738, 806
Moazam Ali v. Raja Ali 567
Modi Bros. v. Mahabir 62
Moffat v. Comelius 758
Mofizuddin v. Alimuddin 833
Mohabir v. Monohar 581
Mohahel v. Konomulty 450
Mohammad v. Abdul 274
Mohammad v. Ahmed 24, 54
Mohammad v. Amina 549
Mehammad v. Dwarka 573
Mohammad v. Hakiman 521
Mohammad v. Mohammad 413, 422, 487, 572
Mohammad v, Orajju 530
Mohammad v. S. Hajee 615
Mohammad v. Wilayet 294
Mohammad Afzal v. Abdul Hamid 367, 454
Mohammad Ali v. Charat Singh 58, 129, 459 480, 654
Mohamed Ali v. Secretary of State 394
Mohammad Azizulla v. Md. Noorulla 396
Mohammad Ejaz v. Mohammad Iftiker 89
Mohammad Khalil v. Abdul Rahim 418
Mohammad Khan v. Co-operative 515
Mohammad Mumtaz v. Farhut 418
Mohammad Mumtaz v. Sakhwat 480
Mohammad Solaiman v. Mazhar 51
Mohandas v. Kessumal 729
Mohan Kishen v. Bhoobun 497
Mohanlal v. Bisseswarlal 71, 72
Mohanlal v. Baz Khan 496, 591, 592
Mohanlal v. Bisseswarlal 71, 72
Mehanlal v. Commissioner 15
Mohanlal v. Damodar 554
Mohanlal v. Joynarain 514
Mohanlal v. Nathuram 373, 424
Mohon Shah v. Dewan Chand 519
Mohan Singh v, Bhulan 713
Mohan Singh v. Gur Devi 91, 92
Mohant Saligram v. Charan Das 198
Mohd v. Rouraffic 874
Mohd. Akbar v. Attar Singh 373
Mohendra v. Motilal 373
Mohendra Lal v. Fakir Chandra 588
Mohendra Nath v. Suresh Chandra 462
Mohharram v. Mayadas 605
Mohiuddin v. Ramaswami 320, 521, 529, 620

Mohiudin v. G. G. in Conncil 802, 803, 837
Mohinder v. Raminder 654
Mohinder v. Suresh 594
Mohim v. Atul 66
Mohor Singh v. Amar Singh 581
Mohsiruddin v. Khabiruddin 544
Mohunlal v. Bazkkhan 607
Muhuulal v. Joynarain 521
Mohunlal v. Nathuram 429
Mohun Kishen v. Bhoolrun 470, 474
Monilal v. Gokuldas 585
Monmohini v. Bangachandra 106, 107
Monmohini v. Ganga chandra 565
Monmouth Shire v, New port 610
Monro v. Bognor Urban 27, 119, 753, 764, 792 793
Monstreal Street Ry. v. Normandin 11
Moolchand v. Rashid 400, 401, 704, 706, 712, 713
Moolji v. Ranjan 374
Moormpudi v. Achant 611
Moore v. Butler 624
Moradhwaj v, Bhudas 121
Moradhwaj v Bhudar 852
Moran v. Wright 747
Mordure v Palmer 347. 437, 472
Morgan v. Bolt 356, 857
Morgan v. Boult 253, 269, 273, 304, 312, 383, 384
Morgan v. Khardah 158, 175
Morgan v. Morgan 146, 632
Morgan v. Rovey 202
Morgan v. Smith 865
Morgan v. Wiliiam 251
Moriam v. Amina 675
Morris v. Rosses 76
Morriston Tinplate v. Brooker 780
Mosalal Singh v. Konomutty 654
Moseley v. Simpson 286, 638
Moshahet v. Konomutty 483
Moshal v. Konomutty 459, 580
Moshinuddin v. Khabiruddin 552
Moshiruddin v. Kabiruddin 89, 90
Motharam v. Maya Das 552, 633
Mothoram v. Mayaram 844
Motibela v. Satyananda 125
Motichand v. Balaram 439
Motilal v. Girish 375, 651
Motilal v. Harnarayan 199
Motilal v. Lalchand 813, 814
Motimohal v. Babulal 453
Motumal v. Haji Ibrahim 380, 450, 509, 677
Mount & Co. v. Khologar 205
Mountain v. Parr 349, 437
Moxby v. Simpson 622
M/s Sese Oil v. M/s Gorakran 875, 876
Mst. Phulo v. Kansam Singh 482
Mt. Murium v. Mt. Amina 93
Mr. Surajbansi v. Larho 14
Mudoosoodan v. Koylas 429
Mudy v. Osam 512
Mudy v. Osman 104
Muhammnd v. Abdul 375, 418, 848
Muhammad v. Allah Baksh 92
Muhammad v. Ahmad 567
Muhammad v. Basanti 606
Muhammad v. Hassamuddin 548
Muhammad v. Lallu 441
Muhammad v. Muhammad 389, 508, 739
Muhammad v. Najju 528, 622
Muhammod v. Osman 850
Muhammad v. Shakir 602, 581
Muhammad v. Sardar 89
Muhammad Abid v. Mahommed Asghar 383
Muhammad Afzal v. Abdul Hamid 303
Muhammad Fakhruddin v. Muralidhar 650
Muhammad Husain v. Khushato 198
Muhammad Ibrahim v. Ahmad 76, 566
Muhammad Ibrahim v. Allah Boksh 576
Muhammad Kabriul v. Hassamuddin 564
Muhammad Khalil v. Abdul Rahim 570, 650
Muhammad Mohidean v. Muhammad Naino 795
Muhammad Newaz v. Alam 304, 352, 406, 625, 641
Muhammad Sayed v. Abdul Gafar 592
Muhammad Yusuf v. Karim Baksh 136
Mukundalal v. Prokash 601
Mukund Ram v. Saligram 170, 478, 600, 601, 651
Mulchand v. Mukund 9
Mulchand v. Niranjan 323, 589
Mulchand v. Radhekissen 51, 61, 82, 250, 639
Mulchand v. Sungachand 22
Mulchand v. Uttamchand 577
Mulji v. Ramsi 67, 738
Mulraj v, Kishorilal 499
Mulraj v. Tulsiram 824
Mumtaz Ali v. Allah Banda 835
Mumtaz Ali v. Fahat Ali 483
Mumtaz Ali v. Mohammad Sadat 456, 463
Municipel Board v. Eastern U. P. Electric 19, 70, 78, 161, 720, 729
Municipel Board v. S. C. Das 23
Municipel Committee v. Electric Supply 544
Municipel Commitsee v. Fazilka Electric supply 742, 746
Municipel Commissioner v. Jesrup 669
Municipality of Ahmedabad v. Ravijbhai 279, 319, 621, 629
Munday v. Black 356
Munshilal v. Modi 400, 619, 713
Munshilal v. Moor Bros. 504
Munshi Ram v. Banwarilal 455
Munnilal v. Kishen 562, 566
Munro v. Bagnorlerban 711, 747
Murian v. Amina 95
Muray Exportation v. Khaitan 60. 116, 215, 379, 803, 873, 874, 875
Muralidhar v. Mulchand 481
Murlimal v. Benarsidas 773, 778, 785, 788. 791, 794
Murlimal u. Sant Ram 697
Murtyay v. Bibi 664
Musafir v. Md. Raysul 673. 824
Musalo Reddi v. Ramayya 123
Mushi Kutty v. Varo Kotty 723
Mussoric Steamship Co. In re 42
Mussamet Husan v. Fazal 96
Mustafa Khan v. Phulja Bibi 454, 455
Muthu Kuta v. Varu Kutty 717
Muthu Kutte v. Acha Nayakan 390, 391
Muthu Karuppa v. Beerabhadra 332, 653
Muthiah v. Karuppan 101
Mutuk Lal v. Drawpati 472
Mutulal v. Ramkishendas 715
M. V. v. Mounickels 42
Muzaffardin v. Gulam 314

N

Nabin v. Mahmud 530
Nabin v. Rajani 202
Nachiappa v. Muthu Karuppan 564
Nachiappa v. Subramaniam 120, 121, 560, 561
Nadarjan v. Chandrasekera 5
Nadir Chandra v. Gobinda 254, 664
Nadir Shaw v. Gajraj 487, 501, 502
Nagabhusanam v- Seshachalam 653
Nagapetha v. Balabhadra 61
Nagar Chand v. Surendra 536, 547, 842
Nagaswamy v. Rangaswami 187, 197, 590
Nagendra v. Rabindra 197
Nagendra v. Haran 124
Nagendra v. Harendra 519
Nagendra v. Hara Chandra 124
Nagendra v. Hemendra 562
Nahalal v. Singhai 706
Nainsukh v. Gajanand 798, 831, 845
Nainsukh v. Umadi 159, 160, 514. 590
Naiz Ahmad v. Abdul Hamid 271
Najuf Ali v. Patterson 200
Nabin Ch. v. Sinclair 646
Nalinakhya v. Shyam Sundar 13
Nalini mohan v. Malda Co-operative 685
Nalini Ranjan v. Union of India 232, 236, 397, 398
Nallar v. King 648
Namadhar Khan v. Narhoo·847
Nambi v. Narayan 566
Nanak chand v, Banarshi 486
Nanak chand v. Lala Pannalal 619, 662
Nanak chand v. Ram Kishen 445, 456, 458, 465, 525.
Nanak chand v. Ram Narayan 292, 493
Nanak Ram v. Mihir Lal 6
Nanakwaku v. Nana Sir Ofori 504, 657
Nand Kishore v. Bally Co-operative 36, 847, 848, 860
Nand Kishore v. International Mercantile 567, 604, 617, 620, 658
Nand Kishore v. Kishorilal 383
Nandlal v. Ambalal 378, 385, 642
Nandalal v. Alexander Atkuison 139
Nandolal v. Nistarini 100
Nandram v. Fakir Chand 228, 237, 253, 312, 382. 393, 581, 665
Nandram v. Hanumant 579
Nandram v. Nem chand 521
Nandram v. Raghunath 46, 164, 380
Nanda Prosad v. Jagdambi Sirgh 631
Nanhelal v. Singhai 444, 702, 840
Nanibala v. Gopal 644
Nanibala v. Ramgopal 422, 425, 488, 603
Nanjappa v. Nanjappa 375. 376, 409, 667, 849
Nanjappa v. Nanjarao 351, 405, 406, 623, 650
Napaswamy Naik v. Rungaswamy Naik 153, 156, 183
Naushod Ali v. Mohd 38
Narain v. Balaram 540
Narain v. Kanta 483
Narain v. Madal Lal 517
Narain v. Ramlakhan 235. 566
Narain Das v. Co-operative Society 122, 823
Narain Das v. Kanpur Nagar 490, 595
Narain Das v. Kewalram 510, 578, 514
Narain Das v. Narain Das 192, 193
Narain Das v. Ram Prosad 532
Narain Das v. Vallabh Das 547, 548, 579
Naraini v. Thirpat 159
Naranjan v. Gujraj 533
Narapat Rai v, Debi Das 831
Narasinhadu v. Subramania 429, 638
Narasingnarain v. Ajodhya 327
Narasingadas v. Siva Ram 138
Naraswami v. Rangaswami 552
Narayan v. Devaji 431. 432, 439, 444, 451
Narayan v. Dewapibhawan 820
Narayan v. Dhomiba 562
Narayan v. Mohanlal 451, 504, 826
Narayan v. Savitri 238, 605
Narayan v. Kaluani 177
Narain Singh v. Malida Kore 296
Narayan v. Kalyanji 840
Narayan v. Tripayya 597
Narayanppa v. Ram chandra 554 556
Narayan Prosad v. Kalawati 598
Naravanswami v. Emperor 6
Farayanswami v. Manika 588, 590
Narbadubai v. Natverlal 114, 115, 379, 381, 398, 399
Narendra v. Brojeswari 230, 277
Narendra v. Horan 554
Narpat Rai v. Devi Das 351, 406, 411, 480, 517, 528, 621, 669
Narottamdas v. Philips 16
Narsidas v, Dosa Kalin 50 51
Narsing v. Gagan Ram 559, 596
Narsing Das v. Bishandayal 603,604, 605, 618 644
Narsingh Narain v. Ajodhya 287, 297, 428, 434, 459, 480, 624, 656
Narsing Prosad v. Dhanraj 743, 755, 784
Natesa Iyer v. Rama Iyer 96
Natha v. Menta 452
Natha Subqamanyam v. Murla 449
Nathan v. Samson 698
Nath Ram v. Alliance Bank 194
Nathu v. Abdul 484
Nathu v. Samson 418
Nathu v. Sarnum 563, 564
Nathumal v. Beharilal 704
Nathumal v. Mushammad 551 552
Nathumal v. Shafi 552
Nathuni v. Paras 714
National Electric v. Punjab State 645, 666, 669
National Fire v. Union of India 620
Nathin v. Abdul 487
Nauhad Ali v. Mohammad 667
Nauhalal v. Singhari 713
Naung Shwe v. U. Niu Nyum 645
Naurang v. Sadapel 532
Nausad Ali v. Mohammad 584
Nawab v. Ahmed 532
Nawab v. Nawab 451, 834, 860
Nawab Syed v. Nawab Askari 180, 833
Nawabuddin v. Mussamet Kauin 197
Nawabzada v. Nawabzada 834
Nawal Kishhre v. Sardar Singh 96
Naylor Bunzan v. Kraiuische 163
Nazamuddin v. Ghulam 493
Nazimuddin v. Ghulam Ahmed 619
Nazimuddin Ahmed v. Alberi 515
Nazir v. Mehedi 461
N. D. Jaggi v. Gangarnm 473
Neale v. Gordon Lenon 101

Neale v. Ledger 257, 267
Neale v. Richardson 29, 140, 751
Neba Ram v. Khoteram 307, 310
Negi v. Hira Singh 591
Neittal v. Manchestar Cor. 177
Neji Puran v. Hera Singh 514
Nemi chand v. Kesarimall 390, 395, 415, 607
Nem Ray v. Bharat Roy 277. 385
Nemuram v. Ramchander 682
Netesa v. Alam lu 125
Newgate v. Degelda 152
Newgate Ins. v. Biharilal 443, 648
New Great Ins. v. Aktisoskaleat 872
New India Suger v. Commissioner of Sales Tax 15
New Krishna v. C. T. O. 20
New Shorrock Spg. v. N. R. Raval 15, 16
New Zeland v. Naghel 782
New Zeland Ins. v. Nagpol 731
N. F. Insurance v. Union of India 60. 676, 685, 865
Ngattle v. Miyo 370
Nagatok v. Nga Kasin 294, 454, 641
Nga Tha v. Nga Kaya 552
Nickells v. Warren 364, 366
Nickels v. Hancock 412
Nidamurthi v. Garigipatti 523, 581, 588
Nidamurthi v. Ramayya 584
Nidamurthi v. Thammano 37, 526, 584
Nihal chand v. Shanti Lal 313, 320, 409, 632, 650, 658
Nihal chand v. Jairam 548, 557, 828
Nihal Singh v. Astawater 567, 850, 853
Nilkanta v. Kasinath 833
Nilmoni v. Dakhineswar 459, 525, 827
Nilmoni v. Kedarnath 101
Nilmoni v. Mohine 157, 159
Nilkanta v. Kasinath 833
Nilmoni v. Mohim Chandra 590
Nimmogadda, In re 38, 144
Nirmal v. Sudhendu 550
Nisa Ali v. Tinu 394
Nisa Ali v. Muhammad 697
Nitish v. Promoda 15
Nizam Khan v. Hukum Chand 23
N. K. Jain v. Sugar Mills 767
Nordhingir v. Chandumall 479
Norke v. London General Insurance 870
Normadabai v. Natvarlal 709
Norpat Rai v. Devi Das 557
Norske Atlas v. London 41, 43
North and South Western Junction v. Assessment 339, 343, 344
North British Ry. v. New burgh 289, 790
North Eastern Railway v. Lord Hastings 639
North London Ry. v. Northern Ry. 184
North Riding of Yorkshire County
North Western Rubber Co. v. Hutton laeach 143
Norting Hill Electric Co. 343
Nursingh v. Nutte 352, 432, 436, 593
Nuruddin v. Abu Ahmed 772
Nurul Anwar v, Golenur 575, 576
Nusserwanjee v. Mer Mynoodeen 281, 569, 591
Nuttal v. Manchester Corp. 149
Nuttul v. Mayor of Manchester 636
N. V. Meyer v. Anna 386

O

Oakey v. Dalton 201
O Brien v. Pemy and Daw 27
Odlum v. Vancauvor City 473, 630
Official Assignee v. Chandulal 14
Official Assignee v, Chindalubara 206
Official Receiver v. Imperial Bank 192
Official Receiver v. Karsondas 65, 176, 192, 205, 206, 239, 251, 261
Odgens v. Nelson 23
Oliver v. Collins 269, 270, 271
Oliver v. Collings 858
Oliver v. Mian Dost 605
Olympic Oil v. Mae Andrew 345
Olympia Oil v. Produce Brokers 640
Oman Hene v. Chief of Obnng 352
Omenheme Kabuna v. Chief Obeng 654
O. Mohamed v. Haji Mohammad 128
O. Mohamed v. S. Hafez 449
O. Mohamed v. S. Haji 709
Om Prokash v. United Provinces 17
Om Prokash v. Union of India 221, 675, 860
O' Neill v. Clark 332
Onkermal v. Conur 19
Oppenhein v. Mahomed 433
Oppenhein & Co, v. Hajee Md. 44, 533
O. R. Coley v. A. Dacosta 177, 632
Ormo ve Burghton 201
Ormelade v. Coko 479, 602
Osmand v. Wortley 457
O. S. Wald v. Early Grey 299. 306, 307, 367
Oulad Hussain v. Ahmed Khan 310, 476
Oxley v. Link 348

P

Padambati v. Pannalal 397, 457, 536, 591, 689
Pagansmal v. Kashi 852
Page v. Kattaring 343
Pakhordas Jasirmal v. Forbes 511
Pakhordas v. Radha Kissen 534
Palaniappa v. Rajah of Ramnand 198
Palaniyandi v. Kandappa 543, 558, 851
Palavesan v. Narayana 306, 315, 645
Palmer & Co. In re 343
Palut Bhagut v. Monohar Bhagut 471
Pamandass v. Nagappa 392, 706
Pamanwal v. Hunandas 605
Pamurdurthi v. Pamurdurthi 707
Panchanan v. Nanigopal 718, 724, 811
Panchanan v, Union 434, 449
Panchapagesa v. Kalyansundaram 159, 172
Pandit Sankara v. Jaggannath 650
Pandit Sankata v. Jagannath 315
Pandurag v. Amrit Rao 442 503
Panmal v, Soman 531
Pannalal v. Chaman 501
Pannalal v Fate chand 614
Pannalal v. Lachmichand 824
Pannalal v. Rupa 518, 662
Pannalal Poul v. Padmabati 655

Pannaya v. Suppamal 89
Pappe v, Rose 27. 29
Paperchand v. Jewary 236
Parasuram v. Topandas 510, 578, 624
Parbatamma v. Subbamma 169
Parbati v. Baikunta 37, 38
Parbati v. Durga Debi 350, 541
Parbati Kuar v. Vaikunta 144
Parbhoo v. Emperor 23
Parbutty v. Higgin 197
Park v. Winteringham 32
Parke v. Luis 152
Parke v. Burroughes 145, 149, 631
Parm Dat v. Bipju 455, 462, 531, 894
Parmeswar v. Hari Nani 383
Parshottam das v. Kekhushru 349, 391, 396, 420, 436, 456, 650
Parshid v. Ghanashyam 522, 575
Partab Singh v. Din Singh 700
Parrathamma v. Subbamma 159, 181, 537
Parry v. Liverpool 755, 781
Pascoe v. Pascoe 480
Pashpet v. Udai Bhan 424
Pasumarthi v. Bollan 571
Patel v. Menakshi 396, 663
Patel Bros v. Shree Minakshi 141
Patarandson v. Corporation of Glasgow 296
Paterson v. Ayre 383
Patita Parana v. Narasinga 569. 571, 573
Patti Kumari v. Upendra 605, 606
Patto Kumari v. Upendra 603, 670, 862
Paull v. Paull 409
Paull v. Simpson 196
Paut v. Joseph 446
Pawathamma v. Subamma 591
Pay Yavalu v. Kesamma 645
Peary Lal v. Mahesh Chandra 476
Peason v. Dublin Corp. 510
Pedler v. Hardy 348
Pedley v. Goddard 284
Pena v. Rio 128
Pennell v. Walker 206
Penn Konlu v. Balasubramania 673
Penvice v. Williams 360
People Bank v. Lakshan Ram 502
People Bank v. Padamlal 110, 502
Peoples Bank v. Deshraj 198, 200
Peoples Bank v. Kanhyalal 623, 672
Peoples Bank v. Lakhu Ram 443
Peoples Bank v. Northern India 110
Pepper v. Gorham 364
Perayya v. Chenchu Suba 516
Perriman v. Steggal 302
Perring v. Keymer 663
Perryman v. Steggal 368
Pershad Singh v. Ram Partab Roy 22
Pertap v, Cechan 618
Perumal v. John Dearn 475
Perumal v. John Deavis 520
Perumal v. Perumal 156, 187, 189, 196, 197, 552
Peruri Suryanarayan v. Gallapudi 738
Pescod v. Pescod 269, 380
Pestonji v. Maneckjee 155, 156, 159, 186, 187, 196, 278, 514, 545, 552, 590, 643
Pharmacutical Sons v. London Supply Associate 138
Phatt v. Hall 412
Phillips v. Evans 492
Philpot v. St. George's Hospital 6
Phipps v. Ingram 364, 367, 668
Phiran v. Bahuram 381
Phool Narain v. Madangopal 852
Phuku v. Bhinak 587
Phulchand v. India United 472
Pickaud Sheral Syndicate 282
Pieray v. Young 187, 354, 757, 787
Pierey v. Roung 767
Pinnock Bros, v. Lewis 737, 763, 815
Pioneer Engineering v. Union of India 622
Pir Baksh v, Nihal 303
Piri v. Roncororni 594
Pitambar v. Chhabi Narain 276
Pitam Mal v. Sidiq Ali 569
Pitam Singh v. Ujgar Singh 96
Pitt v. Darka 668
P. L. M. Firm v. Dassy M. Stracey 194
Platt v. Hale 417
Pleamer & Co. etc. In:re 335, 337
Plews v, Meddleton 285
Plummer v. Lee 417
Podar Trading Co. v. Tagher 346
Pohkar v. Punchum 497
Pokardas v. Forbes 672
Pokerdas v. Kisshanji 553
Polipillai v Ammane 277
Pompee v. Fuchs 763
Ponmayyce v. Suppammet 576
Ponnamme v. Kotamma 47, 49
Ponnamme v. Marampudi 51
Ponrmaya v. Suphanmal 718
Poppella v. Nagadi 838
Poppat Lal v. State of Madras 12
Puran lal v. Rupchand 235, 236
Poreshneti v. Nobin chandra 532
Pormaya v. Supammat 542
Portab Singh v. Devi Singh 547
Porter v. Porter 288
Porsumarti v. Bolan 569, 570
Potter v. Newman 274, 397
Potts v. Ward 187, 196
Prabartak Commercial v. Ram Sahaimull 638
Phabhuram v. Firm Shes Dayal 51
Probodh Kumar v. Eidpolse Taading Co. 590
Prafulla v. Nagidi 445
Prafulla v. Panchanan 158, 169, 172, 175, 176, 182, 588, 593, 595, 841
Pragdas v. Girdhari Das 92, 576
Prahlad v. Shyam Singh 706
Prakktri Parkum v. Korain 96
Pramoda v. Sagar 69, 790
Pramatha v, Sagarmal 787
Pranal Anni v. Lakshmi Anni 421
Praraman Chetty v. Sundaraja 198
Prasanna v. Muthswami 571
Prashar v. Vasant Sen 13
Pratabmul v. K. C. Sethia 629, 873
Pratap v. Bechan 613, 691
Pratap v. Narain 33, 35
Pratap v. Union 507, 525
Prataprai v. Sheonarain 58, 379
Pratap Singh v. Devi Singh 545, 700
Pratap Singh v. Krishna Prasad 356, 370
Prem Chand v. Fort Gloster 371, 647, 832
Premchand v. Mithabhoy 800
Premdas v. Brij 124
Premiar Dairies v. Garlick 754
Premmoy v. Preonath 197

Premmoyi v. Preonath 123
Premnath v. Union of India 625
Premnath v. Amba Prasad 763, 774
Premnath v. Om Prokash 644, 646
Premnath v. Premnath 562
Prescord v. Prescord 857
President v. Van Runen 196
President of Orphans Board v. Van Reenen 187
Prestige & Co. Ltd. v. Prettle 484, 684
Prestwick v. Poley 102
Price v. Popkin 409, 480
Price v. Strange 122, 192
Prince v. G. G. in Council 226, 655, 822
Printing Machinery v. Linotype and Machinary 789
Printers (Mysore) P. Ltd. v. Pothan Joseph 56, 782, 800
Prior v. Hombrow 567
Pristol Corporation v. John Bird 31
Priyabala v. Phani Bhusan 230
Priyabrata v. Phani 227
Probodh v. Union of India 157, 209, 210, 212 226, 239, 241, 242, 863
Proctor v. Williamson 376
Produce Broker v. Olympia 63, 143, 355, 786
Produce Brokers v. Wevis 343
Profulla v. Panchanaon 327
Promode Ranjan v, R. N. Mullick 15
Prosad v. Chamaria 511
Prosanno v. Kristo 123, 194
Protapmull v. Shethia 869
Protap Chandra v. Huromonee 516
Protap Singh v. Kishan Prosad 293, 647
Proudfoot v. Boyle 88
Province of Bengal v S. M. Hingal Kumari 14, 16
Punjab Province v. Lakshmi Das 126
Pugardin v. Moidinsu 222, 587
Phulchand v. Thakurdas 668
Puna Bibee v. Khoda Baksh 582
Punia v. Sree Uenergopela 105
Punjabi v. Shyamrao 20
Punjab Marwari Chamber v. Ram Mal 829
Punjab National v. Keval Krishna 110
Punjab Province v. Lakshmi Das 619, 651, 660
Punjab Singh v. Ramautar 198
Punjab State v. Meher chand 16
Punjab State v. Moji 70, 229, 778, 780
Punna Lal v. Sofau 517
Punno Ram v. Nebhraj 441
Punuswami v. Veeramuthu 91
Puppalle v. Nagidi 825
Puptalla v. Nagidi 430
Puramasivam v. Ramaswami 837
Puran Chand v. Md. Latif 11
Puran Chand v. Ramnath 404, 529, 658
Puran Singh v. Bahel Kunwar 579
Puran Singh v. Behal Singh 581
Purna Chandra v. Jagat Bandhu 510
Purna Chandra v. Kunj Behari 478, 526
Purna Chandra v. Ramnath 275
Purshottamdas v. Girdhari Lal 499
Purshottamdas v. Implex 816
Purshottamdas v. Jethabai 327, 405, 477, 479, 667
Purshottamdas v. Ramgopal 46, 451, 826
Purshottamdas v. Louis Dreyfus 356
Purushottamdas v. State of West Bengal 15
Pushraj v. Clive mills 388, 397, 689, 695
Purslaw v. Bailey 239
Pynda v. Chelle 123

Q

Quarban Ali v. Ashraf Ali 514
Queen Empress v. Abdullah 6
Queen Empress v. Narapat 16

R

R. A. Arunachala Iyah v. Louis Deyfus 308
Rabati Ranjan v. Suranjan 824
Rabindra v. Jogendra 590
Race Course Belting v, Secretary of State 38, 77, 342, 493
Rachanbai v. Motumal 519
Radha v. Daulat 222
Radha v. Lakshmi 22
Radha v. Sapttar 48
Radha v. Asha 573
Radha v. Jaffer 786
Radha v. Madho 604, 608
Radha v. Madhu 447
Radha v. Shattar 512
Radha Behari v. Diwan Singh 766
Radha Kanta v. Baerlin Bros 50, 52, 56, 72 131, 250, 758
Radha Kanta v. Jaladhar 592
Radha Kishan v. Madhokrishna 451
Radha Kishan v. Shattar 68, 164
Radha Kishen v. Bombay Co. 727, 745, 754
Radha Kishen v. Sapttar 75
Radha Kishin v. General Construction 80
Radha Kissen v. Lukhmi chand 22, 141
Radha Kissin v. Abramal 105
Radha Kishen v. Daulat Ram 234
Radha Kishen v. Gangaram 713
Radha Kisan v. Balmukunt 544
Radha Kisan v. Bombay 779
Radha Kissen v. Ashamal 511
Radha Krishna v. General Construction 754
Radha Krishna v. Liladhar 728, 729
Radha Krishna v. Madho Krishna 603
Radhanath v. Haiadhan 593
Radharani v. Sisir 19, 20
Radhey v. Kanhai Lal 34, 527, 579, 681
Radhi v. Bhagwan 7
Raghavendra v. Guru Rao 697, 699
Raghoonandan v. Bunwarilal 481, 483
Raghoobar v. Maina 203, 314, 532, 668
Raghubar v. Brijmohan 582, 606
Raghubir v. Haji 39. 121
Raghubir v. Kamaleswar 392
Raghubir v, Kuleswar 276
Raghubir v. Ramdas 584
Raghubir v. Umarao 75, 136
Raghunath v. Ahmad 670
Raghunath v. Bridhichand 514
Raghunath v. Gurdayal 740
Raghunath v. Ramrup 459, 483, 570, 572, 596
Raghnnandan v. Sukhlal 851, 852
Raghupati v, Ramgopal 471, 490, 545, 557, 641
Raghuraj v. Rajeswar 484

E

Rahatulla v. Ibadullak 545, 554
Rahim v. Shabon 429
Raicharan v. Amrita 522
Rai Gopendra v. Rai Harendra 96
Raji Bhai v. Daya Bhai 523
Rainarain v. Union 476
Rainforth v. Hamer 417
Raijuddin v. Shijauddin 470, 614
Raja v. Chinta 67
Raja Ali v. Fidar Ali 552
Raja Brojendra v. Buti Saha 520, 617, 651
Rala Gopala v. Ranghswami 529
Raja Harnarain v. Bhagwat Koer 168, 591, 592
Rajani v. Ramcharan 213, 235
Raja Ram v. Gopinath 96, 577
Rajendra v. Abdul 303, 634, 669
Rajendra v. Bijai Gobind 92
Rajendra v Pannalal 103, 105, 573, 574
Rajendra v. Upendra 822
Rajbalam v. Nawbakshi 568
Rajbans v. Soorja 827
Rajbahadur v. Jamna 94
Raj Kishore v. Jogeshar 310, 645
Rajkrishna v. Binod 15
Rajkumar v. Shivprosad 94, 96, 315, 662
Rajkumar v. Buliki 562
Rajmal v. Maruti 551, 625
Rajnarain v. Universal life 194
Rajnarain v Union 676
Rajnarain v. Jogaswar 477, 580
Rajputna Trading v. Jute and Gunny Brokers 688
Rajrajeswar v. Kuppaswami 108
Rakhal Moni v. Adwyta Prosad 94
Ralanji v. Vispal 713
Ralia Bai v. Rahima 844
Ralia Ram v. Dunichand 421
Ralla Ram v. Badhawamal 350, 588
Ralla Ram v. Bansilal 513, 517, 522, 678
Ralli Bros v. Noor Mohomad 779
Rallies v. M. Chetti 546
Rallis India v, Manickan 537
Ram v. Devi 557
Ram v. Dukhan 729
Ram v. Durgan 287, 459
Ram v. Gopal 525
Ram v. Pannat 552
Ram v. Peary 842, 843
Ram v. Ramzan 825
Rama v. Surya 545
Ramdas v. Chabil Das 96
Ramadayal v. Chandra 61
Rama Kistam v. Somelingan 441
Ram Koleswaro v. Suryanarayana 367
Ram Krishnamma v. Lakshmi 591
Ram Alam v. Dukhan 524
Ramnarain v. Atal Behari 92, 94
Ramnagina v. Bishwanath 21
Ramnandi v. Kalowati 23.
Ramnath v. Nanju 141
Ramnath v. Venkata 542
Ramnathan v. Kumaranpa 92
Ramnoja v. Vathapathra 415
Raman Kissen v. Hurolal 512
Ramanfal v. Langat 49
Raman Singh v. Ditta Sigh 618
Ramanuja v. Vatpathra 645
Rama Sahai v. Harish 813
Rama Santu v. Daji Naru 108
Ram Swami v. Venkatarama 48, 531
Ramaswami v. Subbir 303, 307
Ramaswami v. Muthurdlaya 446
Rama Swamy v. Salammal 453
Ramautar v. Langat Singh 47, 49, 89, 91, 251, 581
Ram Autar v. Deoki 592, 831
Ramaye v. Venkata Chettam 850, 852
Ramaya v, Berpayya 554, 556
Ramayya v. Katragadda 385
Rambakoh v. Rombay Cotton 51. 250, 251, 321, 846
Ram Balu v. Lakshmi Narain 523
Rambhai & Co. v. Yusuf 138
Rambhajan v. Sreekissen 516, 521
Rambhajan v. Udita 478
Rambharosa v. Kathu 573
Rambharosa v, Kalumal 105
Rambharosa v, Pearylal 381, 428
Rambilash v. Brinch 389, 396, 577
Rambilas v. Imperial oil 802
Rambahadur v. Thakurdas 734, 781, 784
Rambahadur v. Sreekant 34, 372. 659, 668
Rambahadur v. Ganesh 661
Ramchand v. Atmaram 356, 613
Ramchand v. Appellate 19
Ramchand v. Buta Ram 303, 311, 364. 375, 668
Ramchand v. Brooker Dore 248, 254
Ramchand v. G. Gincouncil 841
Ramchand v. Gobindram 113, 125, 366, 392, 413, 510, 578, :622, 630, 652, 653, 768, 805
Ramchand v. Gurudas 306
Ramchand v. Mazhar Hussain 351
Ramchandar v. Hans Ram 307, 310
Ramchandar v. Mohindor 351
Ramchandra v, Howrah Oil 53, 234, 248, 250, 262, 499
Ramchandra v. Jasoda 820
Ramchandra v. Munshi 400, 401, 707, 712
Ramchandra v. Kailashpati 675
Ramchandra v. Monohar 650, 651
Ramchandra v. Continental Stores 212
Ramchandrs v. Krishnalal 159, 545
Ramchandra v. Sripati 205
Ramchandra v. Narayanswami 34
Ramchandra v. Susajmal 586
Ramcharan v. Jasoda 429, 551
Ramchode v. Rukmoney 198
Ramcoomar v. Kolachand 280
Ramdas v. Abbas 100, 574
Ramdas v. Atlas Mills 753
Ramdas v. Chabildas 97
Ramdas v. Gobindram 481
Ramdas v. Judaji 384, 389, 390, 393, 395, 650
Ramdas v. Kodammal 620
Ramdas v. Orienpicture 791
Ramdas v. Ramsarup 830
Ramdayal v Chandra 759
Ramdayal v. Matiram 97
Ramdevi v. Ganeshlal 108, 209, 489, 849
Ramdhan v. Shankar 370, 433, 436
Ramdhar v. Santadar 383
Ramdhari v. Ramcharitar 405, 645, 660, 667
Ramdin v. Balabhadra 16
Ramdin v. Ganshilal 489
Ramdin v. Rajkani 197

Ramditti v. Amar Singh 830
Ramdvi v. Rajrani 192
Ramdutt v. E. D. Sasoon 74, 642, 812, 814
Ramondra v. Brojendra 22
Ramruddi v. Mummaraddi 516
Ramesh v. Karunamoyo 390, 393, 395, 522
Ramesh v. Dwarka 594
Rameshwar v. Ghulam 25, 35, 144
Rameshwar v. Dwarka 456
Ramgopal v. Ganeshilal 567
Ramgopal v. Ramsarup 176
Ramgopal v. Ram Sankar 828
Ramgopal v. Shantalal 98
Ramgutty v. Thakoor Das 392
Ram Harakh v. Mumtaj 570, 572, 597
Raminder v. Mohinder 406, 572, 654. 658, 662 667
Ram Jawya v. Devi 511, 547, 699, 824
Ramjivan v. Yusuf 223, 224
Ramjidas v. Howge 738, 757
Ramji Purshotam v. Hari Samla 212, 213
Ramji Ram v. Saligram 88, 91, 97, 115, 159 187, 189, 196, 197, 348, 363, 412, 415, 416, 418, 436, 467, 477, 479, 486, 623
Ramjiram v. Kalicharan 103, 574
Ramkhelwan v. Ram Nagina 526, 533
Ramkhilwan v. Basanti 825,
Ramkishan v. Susilch 614
Ram Krishna v. Rajnarain 857
Ramkishore v. Kallykanto 123
Ramkishore v. Paramshri 202
Ramkissen v. Sasson 129
Ram Kour v. Jiwan 198
Ramkrishamma v. Lakshmi bayamna 381, 442, 444, 689.
Ramkuar v. Muttamchand 594, 605
Ramkuber v. Mussammat 96
Ramkumar v. Khushal chand 420, 441
Ramkumar v. Jagomohan 174, 175, 280, 552, 794
Ramlabhaya v. Pannalal 548
Ram Lachmi v. Narasingh 573
Ramlagan v. Phatangam 234, 235, 272, 863
Ram Lal v. Haribux 51, 52, 131, 758, 773
Ramlal v. Mahadeo 306, 366, 645
Ramlal v. Emperor 14
Ramlal v. Kishen Chandra 697, 838
Ramnarain v. Babu Singh 158
Ramnarain v. Pati Ram 276 392, 393, 394, 517, 522
Ramnarain v. Lalji 384, 395, 433, 665
Ramnarain v. Phula 123
Bamnarain v. Shrimati 512
Ramnarain v. Lourjee 49, 352
Ramnarain v. Liladhar 50, 54, 139, 250, 252, 370. 646
Ramnarain v. Volkart 79
Ramnath v. Nanju 352, 603, 608, 860
Ramnath v. Ramranjan 665
Ramnath v. Ramnarain 321
Ramnath v. Narain 726
Ramnath v. Audhbehari 488, 610
Ramon Kissen v. Hurrolal 89
Rampartab v. Durga 46, 49, 578, 580
Ramprosad v. Mohanlal 738, 764, 802, 805
Ramprosad v. Jamna prosad 123
Ramprotap v. Durga 480, 482, 483, 585, 593, 654, 658, 673
Ramratan v. Basakha 552
Ram Sahai v. Harish 325, 379, 624, 653, 861
Ram Sahai v. Jaylal 501
Ram Saran v. Md. Nawaz 517, 839
Ram Sarup v. Bindra 462, 465, 481, 515, 526, 594
Ramsarup v. Hardwari 530
Ramsarup v. Mohalal 531
Ramsarup v. Keshavdeo 176
Ramsarup v. Raghubir 496
Ramsdeh v. Jacob 319, 364, 367
Ramsumran v. Shyam 108
Ram Sundar v. Kulwanti 276, 383, 385, 392, 395
Ramswami v. Venkatarama 291
Ramswaroop v. Phoolchand 428
Ramtatan v. Adhar 428, 436, 441, 471, 617, 649, 676
Ramuddamma v. Kashi 566
Ram Ugah v. Achrajnath 350,, 540
Ramzani v. Nur Ahmadi 271, 275, 858
Ramchodds v. Ratanji 838
Ramdall v. Randall 410, 412, 477, 479, 601
Randall v. Thompson 153, 154, 186. 757, 758
Ramdegger v. Holmes 790
Ranegunj Coal v. Tata 783, 785, 786, 790
Ramganathan v. Krishnaya 847
Rangaram v. Saligram 577, 595
Rangareddi v. Chinsadda 570, 573
Rangaswami v.Muthu Swami 441
Ranger v. G. W. Rly. 145, 147, 635
Rani v. Amrit 93
Rani Bahadur v. Sreekant 471
Ranindar v. Mohindar 589, 645
Ranjan v. Union 843
Ranjan v. Moolji 374
Ranjit v. Bissayram 441
Ranjit v. Bisheswar 527
Ranmal Singh v. Raha Sankar 199
Raoji v. Kunja 108
Raoshiva v. State 10
Rash Behari v. Anand 668
Rashin v. Moolchand 443, 444, 681, 702, 706. 715
Rasidun v. Mohammad 90
Rasul v. Emperor 6
Ratan v. Sobha 425
Ratanchand v. Municipal Committee 198
Ratan chand v. Sahiram 775, 779, 780, 792
Ratan chand v. Ramchand 783
Ratanchand v. Garitamal 419, 421:
Ratanji v. Dhirajlal 400, 401. 615, 702, 703, 706, 723
Ratan Kar v. Sabbaram 418, 419, 424, 459, 698
Ratan Mudaliar v. Vigiranga 337
Ratan Pillai v. Nataraja 125
Rithakrishna v. Chengalaraja 602, 683
Rathakrishnamorthy v. Bala Subramania 488, 496, 814
Ratanlal v. Heshardas 619
Rathven Parish v. Elgin 141
Rathram v. Parish 622
Ratnagiri v. Syed Vava 697
Rattkyany v. Walford 202
Rangiah v. Govind 507, 510
Rungta v. Jugometal 782
Ravibhai v. Dahejabhai 503. 507
Rawji v. Hathabhai 779
Raza Ali v. Fida Ali 541
Rean v. Faman 87
Rechar v. North British 618

Red v. Harvey 207
Reddell v. Sutton 364
Reeday v. Puddo Lovichun 321
Reg v. Jones 140
Reg v. Judge Time 233
Reg v. The Archbishop of Canterbury 389
Regal Theatre v. Gurucharan 788, 824
Rahman v. Gulam Kadir 404
Reliance v. Union of India 159, 165, 168
Renshaw v. Queen Anne 781
Ren v. Waters 410, 413 484
Rethamali v. Ramasami 622, 698
Revershaw v. Queen 755
Rewa Chand v. K. C. Kappor 829, 838
Rewa Chand v. Veshomet 630
Rex v. Horman 16
Rex v. Keshaw 16
Rex v. Mitchell 233
Rex v. Northumber Land 452
Rex v. Wait 152
Reynold v. Gray 223
Rhodes v. Haigh 185, 187, 196, 201
Rhodes v. Southern Bank 98
Rhodes v. Sarithin Bank 315
Rhoders v. Rhoders 5
Rizuddin v. Shujauddin 506
Rice Mills v. State 604, 609
Richard v, Browne 407
Richardson v. Army Navy 755
Richardson v. La Maitre 775, 776
Richardson v. Worseley 865
Ridout v. Pye 332
Rikhab Kumar v. Trivedi 163, 758
Rekhaledes v. Ballaledas 489
Ringland v. Lowndes 33, 35, 36, 132, 223, 270, 287, 321, 353, 386, 344, 587, 858
Rio Tinto Co. v. Ertelbiber 163
Ripley v. Nahapiel 499, 823, 831
Risal Singh v. Bhola 582
Risden v. Inglat 479, 602
Rivar weer Commissioneas v. Adamson 7
Rlahannan v. Variathers 15
R. K. Misra v. Kundanlal 439, 529
R. N. Rice Mills v. State 838
Roberts v. Eberhardt 427, 818, 819
Roberts v. Harrison 433, 592
Robindua v. Jagendra 168, 591, 604
Robins v. Goddard 809
Robinson v. Daris 159, 179
Robinson v. Evans 23
Robinson v. Waddingtion 260
Robson v. Premier Oil 163
Rochanbai v. Moluinal 616, 672
Roff v. British French Chemical 299
Rohini v. Rajani 543, 849
Rolland v. Casindy 298, 621
Rolliers v. Chetti 628
Romesh v. Nagendra 7
Romen Kissen v. Hursolal 91, 92
Roof v. U. P. 723
Rooji v. Dayabhai 507
Rooji v. Ratansi 624
Rooper v. London 749, 751
Roop Kishore v. U. P. Govt. 774, 779
Roshanlal v. Barket Ram 377
Ross v. Boards 410, 411, 478
Ross v. Clifton 76
Roulstone v. Alliance 865
Routledge v. Thorntors 132, 269
Rowe v. Crossby 76, 789
Royal Calcutta Turf v. Kishenchand 32
Royal Commission v. Trading Society 367
Ruby General v. Pearylal 711, 725, 729
Ruddaraju v. Rudderaju 509
Rudragouda v. Basangouda 398
Rudston v. Yates 88
Ruija v. Gulamally 66
Rukhanbai v. Adamji 47
Ruldo Singh v. Samual Singh 837
Rumnuaya v. Reffyya 276
Rungaih v. Govind Swami 503
Rungel v. Kedarnath 132, 134, 135
Rungte v. J. T. Republic 740
Rungte v. Jugametal 47, 251, 439, 550, 748
Rnpchand v. Pannalal 730, 755, 762, 853
Rupchand v. Premlal 788
Ruplal v. Dhansar Coal 110
Rupnarain v. Nundrani 530, 563, 614
Rungbaud v. Lowndes 226
Rus v. Waters 480
Russel v. Harris 787
Russel v. Russel 784, 787
Russol Bibee v. Jan Ali 581. 589, 605
Rustomji v. Sarabji 16
Rustom v. Dunwoody 189
Rustomjee v. Nurse 198, 200
Ruther v. Chapman 140
Rutaven v. Elgin 139
Ruttonsey v. Bombay United 305
Rymond v. Fiteh 201
R. v. Arch Bishop 846
R. v. Bradell 86
R. v. Blackmore 86
R. v. Harday 86
R. v. Hill 102
R. v. Northumberland 78, 342, 493
R. v. Steavens 861
R. v. Vardne 138
R. v. Vreoner 374
R. T. Perumal v. John 505, 518, 833
R. & W. Paul Ltd v. The wheat Commissioners 40, 43

S

Sabitri v. Promoda 287, 418, 830
Sabitri v. Gayetri 456
Sabta v. Dharam 572
Sadak Ali v. Indro Ali 521
Sadasiv v. Maruti 103
Sadasiv v, Ramchandra 512
Sadasiv v. Trimbak 91, 92
Sadasiva v. Bhikamchand 704
Sadasivappa v. Sungappa 92, 93, 575, 576
Sadhan v. Sushil 773
Sadhu v, Mahommed 568
Sadhu v. Ramdeo 630, 823
Sadiq v. Nazir 159, 222, 224, 229, 537
Sadiq v. Imdad 477, 557
Sadiq v. Kaniz 169, 235, 238,
Sagar v. Hira 93, 517, 522, 533
Sahasrabudha v. Gadre 687, 689
Sahdeo v. Modhu 515
Sahile Rai v. Chait 507
Sadi-un-nissa v. Rukya 90
Sailendra v. Chillar 782
Sailesh v. Bejoy 625

Sainditta v. Lyallpur 438
Sainik v. State 11
Sajjad v. Wazir 109
Sakh Md. v. Nathomal 656
Sakona v. Damodai 587
Saleh Md. v. Nathomal 452, 489
Sales Tax Offices v. Kanhaia 23
Salig v. Kishen Singh 213, 554
Saligram v. Jhumna 541, 543
Salle Singh v. Mullo 582 597, 605
Salkad and Slater In re 274
Saltere v, Yeates 280
Salyanarana Murthi v. Venkataramana 213
Samad v. Md. Ramzan 92
Samal v. Jaishankar 512
Sambu v. Paiki 526, 584
Samjeevappa v. Venkatavarappa 278
Sampat v. Kisan 435, 523
Samuel v. Cooper 303, 364, 410, 412, 477, 601
Samways v. Eldsley 288
Sanat v. Jiwan 481
Sanday v. Shivalal 218, 219
Sanday v. Ramrattan 185, 188, 196
Sanday v. Mayamal 260
Sander Son v. Armour 81, 752, 755
Sangapye v. Kunclinnya 824
Sanjivappa v. Venkatanaroppa 393, 664
Sankar v. Mohibule 15
Sankar v. Ramchaadra 544
Sankar v. Chunilal 593
Sankarappa v. Shivappa 91, 92
Sankat Prosad v. Jagonnath 664
Santa Singh v. Kahan Singh 476, 477, 498
Sant Singh v, Jiwan 473
Santlal v. Kedar 624
Sanwalal v. Clive 617
Sanyasi v. Venkata 89, 91, 304, 306, 307, 309, 315
Sapt Textile v. Raghubar Das 794
Sarabjit v. Indarjit 96
Sarfat Ali v. Bhagwati 572
Sarde v. Golinda 107 526
Sarfuddin v. Jibanessa 460, 721
Saraju v. Brijnarain 585
Saraswati v. Jogon 96
Sarat v. Rajkumar 738, 785, 806, 808
Sarat v. Bhupendra 194
Sarati v. Fatima 493
Sarat K. Ray v. Corporation 770, 773, 775
Saratkumari v. Amullydhan 104
Sabati v. Zamin Pal 547
Sarbeswar v. Maharajah 7
Sarpda v. Triguna 565
Sardar Ali v. Gholam 522
Sardar Khan v. Muradal 103
Sardarmal v. Sheo Baksh 281, 863
Sardarmull v. Agarchand 753
Sardar Singh v. Nawal Kishore 673
Sarju v. Sukhdeo 562
Sarju v. Civil Jud ge 832
Sarkar v. Amritlal 504. 506, 677
Saroda v. Govinda 565
Saroj v. Jatindra 441
Saroj v. Pholkumari 522
Sartaj Fatima v. Jawad 489
Sartaj v. Muhammed 294
Sarwat v. State 551
Sashi v. Lalit 515, 695
Sashikanta v. Nasipad 839
Sashimukhi v. Nabin 477
Sashimukhi v. Purboty 798
Sasisekhareswar v. Lalit 519
Sasson v. Ramdutt 141, 244, 246, 247, 511, 519, 534, 721
Sasti v. Tarak 517
Satagopa v. Mahabir 199
Sathehari v. Jabmial 517
Sat & Co. v. Ishar 611, 719
Satibhusan v. Corporation 111
Satish v. Paliram 350, 541, 551
Satish v. P. N. Das 105, 471, 467, 491,
Satish v. Ram Dayal 7
Satkumar v. Atmtram 217
Satrujit v. Dulhir 100, 522, 574
Sattarunnissa v. Muhammad 562
Satumai v. Khundan 474, 477, 487
Saterjit v. Golab 520
Satyabrata v. Mugneeram 160, 161, 173
Satynarain v. Venkata 691
Satynarain v. Jugal 58, 252, 534
Satynarain v. Harakchand 263
Satyanarain v. Narnarain 198
Satyanarain v. Kunj 597
Satya Ranjan v. Sarat 124
Satyeendas v. Union 765
Satyendra v. Hind Censtruccion 57
Sauapala v. Sauapala 524
Saudamint v. Gopal 548
Saugat v, Sital 698
Saukanta v. Jagannath 383
Saualappa v. Deochand 396, 643
Sauntiya v. Ramnaya 155
Savaral v. Kumaru 529
Savitra v, Nagar 848, 873
Savkar v. Amritlal 673, 720
Sawaram v. Municipal Committee 606
Sawyer v. Louis 158, 254, 260, 672, 730, 808
Saxena v. Damodar 647
Sayapye v. U. Kundinnya 2, 499, 799
Sayalzai v. Kalabhai 37, 526, 584
Sayed v. P. V. Rao 9
Sayed v. Temporary 839
Sayya v. Sitaram 202
Saypaparaju v. Nekkanti 717, 840
S. C. Prashar v. Vasant Sen 15
Schofield v. Allen 316
Scott v. Avery 731, 746, 747, 749, 750, 751, 762, 789, 809, 813, 815
Scott v. Morley 348
Scott v. Liverpool 26, 32
Scott v. Nondon 370
Scott v, Mercantile 789
Scott v. Van Sadan 165, 166, 167, 173, 174, 252, 314, 648
Scott v. Delsel 753
Scottish v. Saraswati 527, 842,
Secretary v. Balwant 180, 548. 549, 554
Secretary v. Golab 6
Secretary v. Arathoon 151
Secretary v. Augustus 635
Secretary v. G. P. Sarin 23
Secretary v. Mark 4
Secretary v. Kundan 542, 551,
Secretary v. Surendra 769
Secretary v. Parejut 194
Secretary v. Giridhari 194
Secretary v. Jehangir 837
Secretary v. Gajjan 768
Secundar v. Rajah 614

Seetaram v. Rupram 507
Seethamna v. Annapuranama 704
Sellappa v. Masu 92
Seller v. Highland 145
Selley v. Whitebread 501
Setharam v. Rani 717
Senegal v. Woods 594
Senk v. Oree 614, 635
Seonarani v. Prabhu 509
Serajuddin v Michael 44, 445, 704
Serimaglio v. Taornett 854
Seshachalan v. Alwar 419
Seth v. Purshottam 535
Seth v. Union 395
Seth v. Manikyan 709
Seth v. Ajmir 449
Seth v. Surja 127
Seth v. Seth 22
Sewdutrai v. Tata 334, 336, 397, 609, 667, 676
S. H. Motor v. National 756
Sha v. Ishar 612, 613, 616, 674, 676, 677, 682, 717, 729
Shadavji v. Hira 777
Shahazadi v. Mohammad 526, 484
Shahlal v. R, S. Jain 37. 405
Shah Mohammad v. Shah Mohamed 89, 90, 109
Shaikh v. Shaikh 483
Shaik Mossa v. Shaik 192, 193
Shama Sundaram v. Abdul 576, 581
Shambhu v. Hari 225, 857, 862
Shambhunath v. Surja 130
Shamchand v. Bhayaram 203,
Shamdas v. Khiman 137, 223, 431, 433, 665
Shamji v.,Seffon 221, 235, 839
Shamlal v. Misir 433
Shamser v. Ranji 12
Shamsundar v. Bhairon 159
Shamsuddin v. Md. Hassan 829
Samupatter v. Abdul 362
Shankar v. Ramchandra 544, 548
Shankar v. Goblnda 406, 663
Shankar v. Phnlchand 246, 254, 256, 260
Shankar v. Chnnilal 169
Shankar v. Amir 832
Shankar v. Madhoram 358
Shankar v. Jainy 51, 53, 56, 72, 131, 250, 268, 758
Shammugam v. Chidambaran 728
Shantilal v. Munshilai 91, 97, 252
Sharafat v. Bhagwati 571
Sharifa v. Munekhan 198
Sharp v. Nowell 408
Sharpe v. Brickeridge 367
Shaw Wallace v. Subbir 244, 254, 256, 263
Shaw wallace v. Gurbux 249, 254, 259, 260
Shaylor v. Woolf 85, 86
Sheak v. Taylor 118
Shettpans v. Machit 518
Sheik Mohidin v. Ramswami 307, 308
Shekrullah v. Rahmat 681, 682
Shedambar v. Deo Dutt 234, 541, 594
Sheocharan v. Sonichar 721, 836
Sheobalav v. Udit 735, 739, 781
Sheodahin v. Dasrath 570
Sheodas v. Brij 103, 574
Sheodatt v. Pandit 54, 645, 656, 728
Sheodatt v. Prokash 740, 747
Sheodat v. Sheo Sankar 541, 546, 593
Sheodat v. Mohanlal 573
Sheo Karan v. Kanhaiya 60, 307, 375, 471 650
Sheonarain v. Balrao 157, 159, 182. 544; 552, 560
Sheonath v. Ramanath 113, 569, 586
Sheopal v. Bhaya 554
Sheopatan v. Sukhedea 306, 529
Sheo pershad v. Indore 557
Sheo prakash v. Sriram 507
Sheo prosad v. Indore 757
Sheo prosad v. Collector 191
Sheoram v. Dutt 701
Sheoram v. Gopal 509. 723, 728
Shephard v. Brand 313, 314, 639
Sher Bahadur v. Ramnarain 424, 854
Sher Bambal v. Hossainbhoy 618
Sherry v. Richardson 417
Sherry v. Oke 610
Shiamlal v. Puroshottam 662, 834
Shiam v. Bhairon 169, 234, 595
Shiam v. Ramnarain 851
Shib charan v. Ratiram 227, 228, 231, 353
Shib dayal v. Ali baksh 556, 557
Shibkrishna v. Sunil Kumar 440, 819
Shibkrishna v. Satish 592, 603, 670
Shibnarain v. Ratiram 587
Shibrai v. Chaitram 531
Shibram v. Mohanlal 759
Shidgonda v. Bhimgonda 523, 831
Shipchandrai v. Panno 608
Shiromoni v. Harcharan 192
Shithal v. Chaturbhuj 521
Shina v. Hindlay 721, 729, 803, 808, 874, 876
Shivaldas v. Japan 781
Shiva prosad v. Lachmi prosad 533
Shiv Bhagwan v. Onkermal 8
Shiv Chandra v. Panno—127, 203
Shiv charan v. Dungara 318
Shivji v. Ranji 16, 603
Shiv Onkar v. Banshidhar 116, 378, 823
Shiv Ram v. Ram Kakha 128, 180. 829, 862
Shivram v. Mohanlal 734. 755, 758. 759
Shoembar v. Deo Dat 590
Sheocharan v. Sanichar 833
Shoolfred v. Roberts 404
Shosemukhi v. Nalin 410. 412, 415
Shree Bajrang v. Fulchand 722
Shree chand v. Sohanlal 615
Sree Meenakshi v. Patal 470
Shriram v. Mohanlal 739, 758
Shriram v. Prosident 379, 441, 615, 636. 855
Shrivallabh v. Narshing 719
Shuknella v. Rahmat 562, 589, 704
Shyama v. Prohlad 532
Shayamlal v. Purushottam 455, 458, 462, 463 492, 502
Shyamlal v. Hukum 181
Shyam Singh v. Pralhad 705
Shyam Sundar v. Khanna Cinema 607, 803
Shyam charan v. Prafulla 623
S. I. Rly. Co. v. Bhashyam 31
Siakishore v. Bihari 402, 707
Siakishori v. Bhairavi 378, 704, 726
Siakishori v. Bhai Saw 425
Siam v. Bhairam 590
Sidik v. Saran 192
Siaram v. Chetram 306
Sibnath v. Mohosh 519
Simhoo v. Posograph 239
Simla Banking v. Narpatrai 562
Simmonds v. Moss 330

Simmons v. Swaine 345
Simpson v. Emerson 494
Simsa v. Venkatagopalan 600,
Singaram v. Balmukund 766, 767, 789
Singhji Spinning 15
Siraj v. Mahomed 21
Sirajul v. Sunni Central 15
Sirajuddin v. Michael 453
Sirkar v. Kelayudhan 15
Sirmoni v. Harcharan 124
Sirmur v. Union 263
Sital v. Nihal 582
Sital v. Clements 534
Sitanath v. Baikuntha 350, 526, 533, 584
Sitanna v. Masivada 653
Sitaram v. Thakursi 359
Sitaram v. Sushil 303, 365, 367, 370, 386, 388 623, 824, 862
Sitaram v. Dhaniram 473, 481, 500, 5I7, 530
Sitaram v. Bhawani Din 396, 592
Sitaram v. Peare 584
Sitaram v. Rupram 508
Sitaram v. Balakram 833
Sitaram v. Sunil 779
Sitaram v. Bhagwati 607
Shiva Kumar v. Thakur prosad 93
Sivaprosad v, Lachman 517, 518
S. K. Mahomed v. Noor Mahomed 398. 450
S. K. Ram Chettyar v. E. R. Chettyar 16
S. Kosaraju v. Kosoraju 170
Smailes v. Wright 273
Smith v. Tromp 102
Smith v. Ludha 591
Smith v. Simons 201
Smith v. Jhonson 413
Smith v. Allen 765
Smith v. Wheat shef 118
Smith v Potter 477
Smith v. British Morine 776
Smith v.Nelson 265
Smith v. Peral 765
Smith v. Hartley 403, 404
Smith v. Ludha Ghela 267, 269
Smith v. Jones 85
Smith In re 264
Smith & Service. and Nelson In re 186
Smith coney v. Becker 164, 637
Smith v. Goff 333
Sm. Santasila v. Dhirendra 665
Smurthwaite v. Richardson 362
Shyamlal v. Par Shotton 681
Snook v, Hellyer 204
Snwalah v. Clive Mills 617
Sobha v. Faqeuer 439
Sobharam v. Ramdas 297, 303
Societe Franco v. Govt. of Cylon 655, 657
Sodawatorwala v. Volkart 791, 793
Sohamori v. Chatta 507
Sohanilal v. Thomas 382, 742
Sohanlal v. Munnalal 441, 531
Sohanlal v. Rampershad 648
Sokatchand v. Amlaram 606
Sonachetty v. Adaikalam 566
Sonamian v. Karuppiah 574
Sonelal v. Laltaprosad 55, 326, 860
Soneylal v. Lachminaraln 287
Soonarani v. Prabhu 425
Sooroporaja v. Narayanaran 507
Sornavalli v. Muthayya 399
Soshemukhi v. Nobin 600
Soudamini v. Gopal 77, 87, 88, 107, 560. 565, 580, 830
Sourendra v, Tarubala 101, 104,
South British v. Ganchi 249, 750, 790
South British v. Brojonath 272
South Indian v. Bapiraju 759
Sovachand v. Hurry 508
Sova Pathi v. NaryanSami 837
Sowaran Singh v. Municipal Committee 604
S. P. Bhatnagar v. Balmukund 713
Sparier v. Laclocha 128
Spence v. Eastern Countries 356, 403, 409
Spooner v. Payne 407
Spooner v. Jaddow 19
Springens v. Nash 273
Spurrier v. Lacloche 43, 789, 809
Sreelal v. Madan 58, 337, 405. 457, 461, 471, 489, 642
Sreenath v. Rajchunder 665
Sreenath v. Ganesh 614
Sreenath v. Raj Kumar 383
Sreeram v. Deno Bandhu 499
Sricharan v. Makham 392, 399, 663
Srikishan v' Radhakissen 822
Srikishen v. Retumal 91, 103, 441, 507, 522, 574, 624
Srikrishna In re 69
Srilal v, Arjun 397, 592, 603, 607
Srimoi Chemical v. Union 658
Srinivasa v. Sitamma 519
Srinivasa v. Venkata 390
Srinivas v. Narvan 19, 20
Sripada v. Dattatraya 94, 698
Sriram v. Cotton Seed 64
Sriram v. President 628
Sriram v. Sorabji 552, 554
Sriram v. Dist Co-operative 713
Sriram v. Mohanlal 72
Srisharan v. Makham 276
Sri Vallabh v. Narsing Das 1
S. S. Den v. Mitsui 244, 245, 249
Standard Expert Lumbro Co. 218
State v, Lalchand 778, 780
State v. Abdul 823
State v. Bhagat 541
State v. Sabid 731
State v. Jawahar Mall 782
State v Chhagan Lal 19
State of Bihar v. Abdul Majid 191
State of Blhar v. Gaya Electric Supply 752
State of Bihar v. Indian Copper Corporation 32, 212
State of Bombay v. Adamjee 83, 161, 162, 163, 223, 708, 710
State of Bombay v. Pandurang 14
State of Bombay v. Herman 10. 13
Stato of Kerala v. Kanan 434
State of Orissa v. Chandra 630, 668
State of Punjab v. Surrinder 610
State of Uttar Pradesh v. Balu Ram 11
State of W. Bengal v. Subodh 13
State of West Bengal v. Union of India 13
Statworth v. Inns 253, 268, 276, 312, 383, 385, 390
Stauss v. Frances 101
Stead v. Salt 105
Steamship Assurance Association v. Houston 385
Siebling v. Liverpool 726, 753, 755, 758
Steal v. Roberts 589
Steers v. Lastely 86
Stephens v. Lowe 132

Stephens v. Benning 203
Steven v. Bunch 776
Stevens v. General Mutual 753
Stevenson v. Watson 31, 140, 375
Steward v, North Metropolitan 362
Stibs v. Triste 404
Stiff v. Andrews 76, 77, 138, 565, 580
Still v. Hal Lord 270
Stimpson v. Emmerson 77, 168, 293
Stockdale v. Nicholson 122, 192
Stone v. Phillps 410, 459, 477, 683
Stone v. Knight 88
Stovesbury v. Turner 369, 373
Storke v. De Smith 434
Strangford v. Green 105
Strathern v. Pudden 45
Straus v. Raghubar 796
Strong v. Strong 416, 485
Stuart v. Haughly Parochlal Chureh 310
Stubbs v. Holywell 201
Sturgis v. Curzon 765
Subal v. Mahomed 211, 774, 780. 785
Subba v. Venkata 558, 569,-578, 849
Subbarama v. Siddama 593
Subbarani v. Kandada 569
Subbarao v. Appadurew 569, 572, 573. 577
Subbarao v. Ramlinga 503, 504, 507
Subbaraya v. Sadasiva 551
Subbarayadu v. Ranadasu 194
Subbayya v. Papayya 507
Subbayya v. Seshaya 51
Subbiah v. Subramnieh 499, 523, 525
Subbu v. Goviuda Charan 302
Subha Reddi v. Gumtum 19
Subhnandan v. Ramrick 194
Subraman v. Veliani 454
Subramania v. Bira Vaperumal 577
Subramania v. Devadas 122
Subramanian v. Vesudevan 450
Subramanier v. Venkata 198
Subrati v. Hafizan 414, 422 :
Subraya v. Manjunath 370, 371, 638
Sudhansu v. Ruplekha 740, 757, 782
Sudhindra v. Ganesh 567
Sudhir v. Bilasbati 116, 593
Sudhist v. Sheobharat 109
Sudkya v. Mahomed 7
Sugar v. Sitaram 250,:439
Sugar Supply v. Trade Society 364
Sugnomal v. Peromal 571, 572
Sujan Rai v. Jhabba 497
Sukar Gope v. State 10
Sukdeo v. Mangal 567
Sukdeo v. Radhika 426, 695
Sukdeo v. Ayaram 789
Sukhamala v. Babulal 531
Sukhan v. Emperor 23
Sukhdial v. Maniram 420
Sukhal v. Maruchand 574, 855
Sukhmal v. Babulal 49, 50, 56, 250, 260, 261 314, 649
Sukhnath v. Nehalchand 541
Sukhal v. Issurdas 837
Sulakhan v. Central Bank 13
Sultan v. Sheo prosad 157, 552, 590
Sultan v. Great Northern Rly. 360
Sumeshar v. Baldeo 124, 195
Sumitra v. Ganesh 522
Suraj v. Harduttrai 71
Sundara Mudali v. Ponnuswami 297
Sundar Singh v. Fakirch 39
Sundar Singh v. Nighaiya 498
Sundarasam v, Viswanath 125
Sundarmal v. Tribhuban 258
Sundarmal v. Paris 110
Suppu v. Gobinda 301
Surabjit v, Gouree 269
Suraj v. Phut 624
Suraj v. Beni 33, 35
Suraj v. Harduttrai 50
Suraj v. Chandmull 141, 381, 438
Surajnarain v. Benimadhab 25
Suraj prosad v. Lukher 195
Suraj prosad v. Munnalal 609
Suraj Singh v, Fulkumari 614
Surajvan v. Sadanand 17
Surapparajee v. Venkataratnam 851
Surayya v. Anandayye 516, 704, 720
Sureebjeet v. Gouree 375,
Su.endra v. Susil 536. 594
Suresh v. Ambika 581, 588
Surji v. Ratan 837
Surooprani v. Gobinda 236
Surrier v. Laohoche 746. 747, 750
Surubjut v. Gouree 154
Suryanarain v. Soralaya 497, 499, 670
Suryanarain v. Gullapadi 757
Suryanarain v. Banwari 508
Suryanaraya v. Sorabji 384
Suryanarayana v, Venkata 704, 717
Sushies v. Ellison 854
Sutakhan v. Central Bank 10
Sutramaniah Vasudevan 455
Suttherland v. Hannebring 347
Suwalal v. Clive 377, 616
S. V. Seshmull v. S. Umaji &. Co. 842
Swaminathan v. Moona 253, 581
Swamirao v. Collector of Dharwar 315
Swamirao v. Channappa 414
Swandratham v. Moona 126
Swastika v. Union of India 704, 833
Swedish East Asia Co. v. P. R. Herman 782
Sweet v. Morrison 398
Swilt v. Board of Trade 896
Swintern v. Lord Chelmsfred 100
Swinfern v. Swimfern 101
Swroop Ram v. Govind Ram 587
Syed Mohammad v. Syed Ali Hyder 22
Syeed v. Zinno 276
Symes v. Goodfellow 368
Symonds v. Swaine 479

T

T. W. Thomas v. Portsea Steam Ship 131
T. Wang v. Sona Wangdi 62, 562, 579
Tabarak v. Province of Bihar 7
Tacoorden v. Ali Hossein 109
Tohal v. Bisheshar 757, 758
Takhitram v. Kishin chand 429, 531, 879
Tahinoff v. Hammond 594
Tallanpragada v. Tallapragada 47I, 500, 557
Tandy v. Tandy 374, 459, 683
Tapessieree v. Nasiruddin 738
Tarachand v. Syed Abdul 114
Tarachand v. Parasram 69, 113, 546
Tarachurn v. Kundu 382
Tarakanta v. Rai Kishori 421

Turamoni v. Gynandra 568
Taranath v, Manik 578
Taraprosad v. Raja 254, 385, 391, 393, 396
Tara prosad v. Baijnath 554
Tashildar v. State 9
Tatavasti v. Bala Bhadra 759
Tata Steam Navigation v. Anglo-Canadian Shipping 300
Tawahar v. Union of India 606
Taylor v. Yielding 26
Taylor v. Dutton 386
Taylor v. Marling 204
Taylor v. Party 132
Taylor v. Backhouse 269, 857
Taylor v. Denney 225, 239
Taylor v. Shuttleworth 204, 624
Tebernath v. Knight 183
Tegha v. Ram 188. 189, 190, 595
Tehlu Mal v. Dhana Mal 557
Teja Singh v. Union 440
Tejbhan v. Somnath 574
Tejpal v. Nathumal 496, 497, 603. 608
Tejpal v. Kedarnath 361, 827
Tejpur v. Mahommed 512
Tej Singh v. Ghasi Ram 522, 570, 614, 681
Telakal v. Sripat 420
Telamal v. Dhana Mal 830
Teldasley v. Harper 362
Tella progada v. Tella progada 522
Tomakhal v. Subbammat 89, 90, 91, 512
Temperley Steam v. Smith 55, 61, 240
Tew v. Harris 260
Textile Labour v. Labour Appellate 615. 701, 848
Thadomal v. Meughraj 103, 323. 430. 551, 574, 589, 634, 639
Thakur v. Ram 233, 235
Thakur v. Hardy 404
Thakur v. Narain 664
Thakurani v. Rai Jagat pal 13
Thukurdos v. Narain 229, 237
Thakurdas v. Ramdas 227, 529, 839
Thakurdas v. Jaswant Rai 398, 403
Thakur prosad v. Baleswar 5, 121, 562, 582
Thakur prosad v. Kalka prosad 103
Thakur Singh v. Kamdhao 441, 844
Thamiraju v. Bapiraju 229, 237, 253, 278, 297, 312, 383, 663
Thandanoyi v. Gunamoyi 567
Thangatur v. Nichanametta 414
Tharais Sulphur Co. v. Loftus 29, 66
Tharpal v. Arjun 823
Thartal v. Arjun 542
Thasis Sulpher v. Loftus 120
Thawardas v. Union 495
The Ganges Sugar Work v Nurimiah 111
The Indian General Steam v. The Dokpasi Tea Co. 23
The Mercantile Bank v. The Official Assignee 22
Thenka Veeriah v. Tammisetti 21
The Premier Insurance v. V. K. Khanna 772
The Punjab Marwari Chamber v. Rammal 780, 798
The Punjab province v. Lakshmi 67
Theval Ammal v. Sokammal 103
Thew v. Harris 232
Thimmalai v. Nanjayyar 126, 127
Thira Vugada v. Vaidyanath 454
Thirumabai v. Nanjappa 483, 683
Thomas v. Bani 100, 574
Thomas v. Morris 320
Thomas v. Atherton 105
Thomas v. Fredricks 210. 232, 233, 246, 260, 261
Thomas & Co. Ltd. v. Portsea Stoamship 240
Thomas Iron Works v. Reg 409
Thompsett v. Bowyer 361
Thompson v. Anderson 153
Thompson v. Charnock 735
Thonapadu v. Kotiamsaru 688
Thoongan v. Chinna 168, 590
Thorp v, Colo 375, 376, 485
Thorp v. Cop 140
Thorpe v. Gole 76
Thornburn v. Bornes 140, 285, 289, 625
Thorugan v. Chinna 159
Thota chenna v. Thota Veeraswami 622, 665
Threlall v. Faushaw 309, 375. 376
Tigi Ma v. Mahomed 459
Tikaram v. Hansraj 661. 684, 685, 856, 857
Tinaji v. Rama piraji 194
Tincori v. Muller 163
Tinplate v. Hughes 73
Tirakram v. Kodumal 760
Tirath Singh v. Ishar Singh 822, 839
Tirati Das v. Motiram 36
Tirthsami v. Annappayya 561
Tirtu Das v. Motiram 642
Tirumal v. Venkata devi 200
Tiru Vengada v. Swami Iyengar 198
Tiru Vengadatham v. Mongayya 419
Tisath v. Isher 377
Ti Ti Ma v. Mahomed 355, 479, 482, 618
Toddiwalla v. Bai Dinbai 564
Talaram v. Birla Jute 71, 289, 786
Tolaram v, National 84
Tolaram v. Jowanram 755, 789
Toller v- Land Accident Insurance 752
Tolhit v. Saunders 273, 386, 858
Tolsimoney v. Sudevi 177, 298, 357, 358, 370 632, 837
Tombri v. Fordwick 53, 54
Tonlinson v. Arriskin 155
Tons Tato v. Kissenlal 616
Toolsimony v. Sachon 314
Toomey v. Ram Sashi 203
Toronto City Corporation v. Toronto City Corp. 654
Toronto Ry. Co. v. National Insuranoe Co. 750, 751
Tothasilatama v. State 78
Toussaint v. Hartop 185, 187. 196
Toyo Menka v. Sohan Singh 62
Trailakhya v. Sukumar 833, 835, 836
Trainor v. Phoontix Fire Assurance 750, 751, 789
Trayluckonath v. Collector of Birbhoom 222
Trebhubandas v. Lallubhai 434
Tredwen v. Holman 746
Tremble v. Hills 404
Trew v. Burton 348, 409, 437
Tribhuwan Sundar v. Sri Narain 123
Trimbak Rauji v. Bishnath 21
Trinmalai v. Arunachalla 125
Tripaet & Eyre 270, 386
Tripara Modern Bank In re 7
Trinedi v Munshed Das 530
Tropical Insurance v. Superintendent 839
Tucker v. Lingir 143

Tukaram v. Narayan 12
Tularam v. Bilas 613, 655
Tuljamal v. Bikhchand 461, 470
Tullis v. Jackson 510
Tulsabai v. Jayannath 852
Tulsiram v. Jhanaklal 78, 408, 513, 545, 609, 662, 834
Tulsiram v. R. C. Paul 11
Tumman Singh v, Sheodarshan 184
Tunisienne v. Govt. of Ceylon 386
Tunno v. Bird 386
Tunno In re 269, 273, 274
Tuo v. Harris 246
Turabaljlshad v. Bibi Naju 362
Turnbull v. Piperton 15
Turner v. Swainson 87, 652
Turner v. Goulden 31. 32, 34,·403
Turnock v. Sartoris 791
Tursi v. Basdeo 474, 515, 521, 526, 531
Tusar Kanti v, Attulananda 782 784
Twarng v. Sona 522
Tyebally v. James 738, 806
Tyebbhai v. Abdul 295, 306, 315, 356
Tyler v. Jones 187
Tyre v. Shaw 357

U

U. Pyyimnya v. Ottama 310
U, Sain v. The Central Plumbing 513, 521, 522, 526, 678
U. Ba Thein v. U. Po. Mya 507
U. M. Choudhury v. Jiban Krishna 468, 486, 489
U. P. Government v. Haranath 764, 770, 773, 778
U, Po v. Daw 7, 385, 596, 665
U. Po. Kyam v. U. Shwe Mya 292
Uda Begum v. Imamuddin 45
Udaychand v. Debibux 261. 314, 370,.630, 647, 649
Udayaryan v. Radhashyam 11
Udholdas v, Ukamal 434
Udit r. Ram 531
Udit Singh v. Ram Lakhan 441. 503, 507, 581
Udoychand v. Bhagirath Lal 427, 502
Uli widow of Bald v. Ali widow of Bhithu 645
Uma Dutt v- Chandrao 508, 509, 682, 695, 718 727
Umar v. Mahabir 92, 94
Umar v. Dadhi 76
Umar v. Abdul 92
Umed Singh v, Sobhag mal 51, 581
Umer v. Dadhj 563
Umar v. Radi 93
Umer v. Shivnatu 799
Umersey v. Shanji 117, 397, 592, 607, 670
Umesh v. Fatima 610
Under v. Dadhi 560
Unioh v. Narayan 784, 794, 799
Union v. Shri Nath 740, 743, 748
Union v. Alhiel Trading 676
Union v- Mansraj 770
Union v. Mangaldas 224
Union v, Ramsukh 336, 338
Union of India v. Kishorilal 70, 83, 171
Union of India v. Joginder Singh 487, 615, 656, 840
Union of India v. Narayan 800, 829
Union of India v. New India Construction 220, 221, 234
Union of India v. Lakshmi Ice Factory 537, 782
Union of India v. Sri Nath 829, 862
Union of India v. Jogendra Singh 126. 505, 525
Union of India v. Bakshi Ram 455, 473 504, 617, 631, 667, 823
Union of India v. A. L. Ralia Ram 84, 656
Union of India v. American States 488
Union of India v. K. P. Mandal 516
Union of India v. B. M. Sen 726
Union of India v. Hans Raj 778
Union of India v. B. C. Nuwar 726
Union of India v. Chamanlal 542
Union of India v. Firm Kiron 729
Union of India v. T. R. Varma 333
Union of India v. Sri Girish 764, 770, 771
Union of India v. Bahadur Singh 183
Union of India v. Birla Cotton 747
Union of India v. Bhagat Singh 728
Union of India v. South India Corporation 336
Union of India v. Natend 835
Union of India v. Radhanath 524
Union of India v. N. P. Singh 521, 721
Union of India v. Salween Timber 619
Union of India v. Mahendra 837
Union of India v. Radhanath 37
Union of India v. S. N. Das 553
Union of India v. Pratap 833
Union of India v. Din Dayal 789
Union of India v. S. S. Sasmal 537, 538
Union of India v. Sanusar chanel 221
Union of India v. Firm Vishydhaghee 781
Union of India v. Shambhu Dial 489
Union of India v. Nalini Ranjan 741
Union of India v. Thakedar Bhojrag 756, 782
Union of India v. Himat Singha 456
Union of India v. Bungo Steel 237
Union of India v. Mangaldas 657
Union of India v. United Timber Works 656
Union of India v. Premchand 115
Union of Inhia v. Bharat 596, 748
Union of India v. Himco 544
Union of India v. Allied Trading 128, 658, 856
Union of India v. Premchand 640, 656
United India v. Bhagat 513
United Kingdom v. Hustom 265, 275, 276, 277, 312, 383, 394, 664
United Printing v. Kishori Lal 225, 684, 856
Universal Cargo v. Cital 337, 468, 476
Unni v. Narakarutti 396
Unniram v. Chatham 100, 574
Uppara v. Gaddam 97, 577
Upendra Nath v. Hait Lai 697
Upendra Nath v. Gurupada 109
Upendra Nath v. Umesh Chandra 420
Upper India v. Haji Habib 72, 801
Urga v. Phulu 530
Utoomal v. Haridas 54, 71, 395
Uttam v. Kakoo 518
Uttam chand v. Mahmood 62, 481, 579, 609, 616

Uttam chand v. Jewa 62, 579
Uttam chand v. Balmukund 65, 213, 220, 244 248, 256
Uttam Singh v. Jodhan Bai 568
Uttam Singh v. Motiram 653

V

V. Gurumurahy v. V. Narasingha 802, 805
V. K. Chettiyer Firm v. Ma Thung Shwe 252
V. N. Krishna Iyar v. V. N. Subbarama 697
Vadilal v. Thakorelal 32, 114, 118, 379
Vagirathi v. Ram Ghulam 516
Vaithanatha Aiyar v. Subramania Aiyar 492
Valchand v. Gubba 441
Valean v. Mowinckels 259
Vahi v. Shamdeo 131
Vallabh v. Keshab 426
Vallabhdas v. Chowasjee 247, 255, 261
Vallabh Pitte v. Narsinghdas 546
Vallavdas v. Keshavlal 105
Vaman v. Chaugi 202
Vaman Ravji v. Nagesh Vishnu 837
Vanguard Fire v. N. R. Srsnsvasa 778, 814, 870
Varadan v. Narsi 48, 116, 329, 379
Varanarhi v. Killamsethi 254, 386, 664
Varipati & Olympia oil etc Company, In re 278. 282
Varjivaadas v. Rabindra 625
Vasudeva v. Sundara 489, 493
Vawdery v. Simpson 783, 785, 800
Vedavalli v. Raghava 624
Veeramma v. Seetamma 108
Velchand v. Lister 62, 574
Veela Hanimayya v. Mullangi chana 523
Vellu v. Appaswami 442, 503, 507
Velore Electric v. State 628, 642, 656, 687
Veluswami v. Raja Nainder 15
Vema D. P. v. Lula Gehrilal 396
Venayak v. Anant 434
Vengamma v. Vengamma 311
Venga Ayyar v. Yeggam Ayyar 467, 471, 500 835
Venicome In re 269
Venkata v. Srinidhi 712
Venkata v. Venkata 303
Venkata v. Ramiah 366
Venkata v. Padma Valli 479
Venkata v. Suryanarayana 186, 191, 315, 316, 540, 549, 621, 632, 697
Venkata challam v. Rangiah Reddi 541, 543 544, 557
Venkata chalam v. Ramnathan 523, 557, 581
Venkatagiri v. Subbarayalu 96
Venkata Narasinha v. Bhashya Karlu 94
Venkata Narasinha v. Partha Sarathy 565
Venkatanaraya v. Lakshmidevamma 229,230
Venkataramayya v. Pulayya 427, 441
Venkataramia v. Vasudeva 571
Venkatarao v. Padmavalli 641
Venkata Reddi v. Krishna Reddi 304
Venkata Row v. Rao 689
Venkatasaminiappa v. Srinidhi 696
Venkatasubba v. Jagannatha 124
Venrata Subbaraya v. Kenkataramayya 303, 309, 572
Venkatasubbarayya v. Bapuda 707
Venkatasubbiar v. Ramiah 306
Venkata Surya Rao v. Venkata Rao 542
Venkataswami v. Sirimma 294, 455
Venkatesh v. Chana pgardu 511
Venusami v, Chilakuri 34, 418, 471, 481, 499
Verma O. P. v. Lala Gehrilal 389
Vestry St. John's Hamstead v. Collon 5
Vesudeva v. Sundaraja 89
Vijaya Ramayya v. Venkatasubba 93, 675, 680
Viney v.Bignold 747, 870
Viramy v. Wanhe 322, 589
Visabhadra v. Kalyani 560
Vishambar v. Gulamally 75, 289, 708, 722
Vishindas v. Khusdas 486
Vishindas v. Tejumal 116, 410, 417, 459, 486 697, 698
Vishram v. Gangaram 92, 94, 292, 460, 620
Vishwas v. Bhal chandra 180, 183, 235, 236 545, 555
Vithaldas v. Dattarm 92
Vithi Nath v. Brithilinga 517
Vithoba v. Parashram 584
Valkant v. Fateh Muhammad 785
Valkant v. Achrajram 434
Vulson v. Kelukutty 610, 616, 865
Vyankatesh v. Sakharam 518, 718
Vyankattesh v. Ram chandra 733. 738
Vythinatha v. Bhithilinga 523
Vytha v. Murivada 126

W

W. Ramsden & Co. v. Jacobs 298
W. Wood v. Bengal Corporation 780, 871, 872, 873
Wade v. Wowling 390, 391
Wade Gray v. Morrison 767, 795
Wahed v. Ram 570
Wajid Khan v. Ewaz Ali 109
Wakefield v. Llanelly 332, 405, 410, 411, 412, 477
Walford Baker v. Macpie &. Sons 369
Wali v. Pani 505. 695
Wali Mohammad v. Bahawal Baksh 516, 551 557
Wali Mohammad v. Sohaha 283
Wali Ullah v. Bhaggan 581, 589. 665
Walji Mathura v. Elji Unersay 517, 523
Walker v. Forbes 407
Walker v. Forbisher 285, 296, 298, 309, 367
Waller v. King 261, 370
Wallish v. Hirch 787
Walmsley v. White 783
Walsh v. Glinor 398
Wang v. Sona Wangdi 561
Wankford v. Wankford 193
Warburton v. Storr 152
Warbutton v. Loveland 5
Ward v. Pean 349, 437
Wari Saha v. Mohamad 568

Waters v. Dodley 407
Watkins v, Phill potts 409
Watkins v. Fox 561
Watson v. Duke of Northhnberland 299, 380
Watson v. Watson 417
Waverly Jute Mills v. Raymon 84, 456, 722
Wazoera v. Mookim 574
Wazeer Mahton v. Chuni Singh 518
Wazir v. Chuni 695
Wazir Ali v. Mahbub Ali 399, 421, 622
Wazir Mathoon v. Lalit Singh 516
Webb v. Cowdwell 201
Webb v. Wyatt 323
Weed v. Ellis 89
Wecks v. Cox 386
Weir v. Johnson 181
Weir & Co. v. Pirie 131
Weldon v. Neal 362
Western India Theatres Ltd. v. Municipal Corporation 13
Westing house v. Under ground 487, 489, 491, 494, 639
Westminister and Brymbo Canal and Coke v. Clayton 273, 386
Westwood & Co. v. Cape of Good Hope Govt 323, 878
Wharton v. King 345
Whatley v. Morland 363
Wheatley v. Lane 201
Whetmore u. Smith 140
Whincup v. Hughes 200
White v. Sharp 140, 383, 394
White v. Buccench 38, 143
Whitmore v. Smith 284, 374, 375, 680
Whitehead v. Totterdell 403
White worth v. Hulse 407, 410, 412, 477, 601
Wholenbury v. Lageman 412, 417
Wicks v. Cox 273, 858
Wild v. Holt 288
Wilkinson v. Paige 410, 412, 477
Willesford v. Watson 55, 594, 734. 768, 785, 786, 795
William v. Wallis 364
William v. Burgers 260
William Jacks v. Harrawing 731, 759
Williams v. Wallis & Co. 177, 290, 366, 628
Williams v. Wilson 865
Williams v. Wills 627
Williams and Stepney In re 128, 211
Willoughby v. Willoughby 255
Wills v. Rich 193
Wills v. Wakely 322, 589. 878
Wilson v. Jagmandir 429, 430, 820
Wilson v. King 302, 368
Wilson v. Tucker 202
Wilson v. Conde D. E. Ry. 362
Wilson v. Thorpe 140
Wilson and Eastern Countriss Navigation In re 209, 211
Wilson and Sons In re 137
Windsor Rural v. Otterway 216, 335, 344
Winter v. White 239, 288, 399, 411
Winter v. Munton 414, 415, 416, 600
Winter v. Lethbridge 418, 484
Winteringham v. Robertson 226, 270, 273, 386, 858, 859, 862
Woran v. Hiranand 518. 522, 571
Wood v. Thompson 104
Wood v. Doe 270
Wood v. Wilson 407
Wood v, Hohan 336
Wood v. Leake 261, 648, 649
Wood v. Griffith 87, 417, 426, 486 560
Woodal v. Pearl Assurance 61, 81, 82, 751, 753, 755, 758
Woolf v. Collins 65, 80
Wooly v. Clark 193
Wordsworth v. Smith 26, 29, 32
Wordsworth Board v. United Telephone 15
Workman v. Belfast Harbour 765, 787
Wright v. Howsen 305, 366
Wright v. Sastte 102
Wright v. Graham 39
Wright v. Governor General 822
Wright v. Cromford canal 601
Wriglton v. Bywater 410, 412, 413, 415, 477 479, 600, 602
Wyatt v. Curnell 413
Wyatt v. Benson 87, 107, 560
Wykes v. Shipton 407
Wyndham v. Jackson 38

Y

Y. L, Paul v. G. C. Joseph 276
Yakub Khan v. Sirajul 54
Yar Mahomed v. Ghulam Sarwar 216, 554
Yeats v. Carutu 244
Yegna v. Gopala 454
Yemnava v. Revanshidappa 398, 399, 422
Yeshovant Rao v. Dattaraya Rao 157, 402, 614, 696
Young v. Miller 269, 857
Young v. Buckett 791
Young v, Walter 76, 565, 580
Yusuf Ali v. Dalkuar 203
Yusuf Khan v. Rayasat 434, 629, 633, 660

Z

Zahur v. Tashimmunissa 554, 557
Zaifunnissa v. Shafiqeue Zaman 24, 398
Zalinoff v. Hummond 777, 795
Zamiram v. Fateh Ali 697
Zaralbibi v. Shamsuddin 500
Zeauddin v. Abdur 586, 852
Zine Corporation v. Hirsh 80, 163
Zumal Khan v. Fulchand 566, 620, 627

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THE ARBITRATION ACT, 1940

(ACT No. X OF 1940.)

[PASSED BY THE INDIAN LEGISLATURE.]

(Received the assent of the Governor-General on the 11th March, 1940.)

An Act to consolidate and amend the law relating to Arbitration.

WHEREAS it is expedient to consolidate and amend the law relating to arbitration.*

It is enacted as follows ;—

"To consolidate and amend the law relating to arbitration."—"The law of arbitration in British India is at present substantially contained in two enactments, the Indian Arbitration Act, 1899 (IX of 1899), and the Second Schedule to the Code of Civil Procedure, 1908 (V of 1908). The operation of the 1899 Act is limited to the Presidency-towns and to such other areas as it may be extended by the appropriate Provincial Government: its scope is confined to 'arbitration by agreement without the intervention of a court.' The Second Schedule to the Code of Civil Procedure deals with arbitrations outside the operation and scope of the 1899 Act ; it relates for the most part to arbitration in suits, though arbitration without intervention of a court is also briefly provided for. This Schedule also contains an alternative method whereby the parties to a dispute or any of them may file their arbitration agreement before a court which after a certain procedure, refers the matter to an arbitrator.

"2. The question of amending and consolidating this law is not new. The Civil Justice Committee in 1925, recommended several changes in the arbitration law. The Act of 1899, was based largely on the then English law, to which several substantial amendments have been effected by an amending Act of Parliament in 1934 (24 & 25 Geo. V, c. 14). In 1938 the Central Government placed an officer on special duty to examine the question, and the present Bill is the outcome of this examination. The existing law, the amended English law, and the recommendations of the Civil Justice Committee, have been scrutinized together and the present Bill, which seeks to consolidate and standardize the law relating to arbitration throughout British India, in its detail, extracts from the sources referred to those principles of law which, it is considered, are most suitable to British India.

"3. More detailed explanations of the several clauses of the Bill are contained in the Notes on Clauses appended."—*Statement of Objects and Reasons* of L. A. Bill No. 34 of 1939. *Vide Gazette of India*, Part V, dated 22nd July, 1939 page 142. This Act as its preamble shows, a consolidating and amending Act and is intended to be exhaustive law on the subject. Sri Vallabh V. Narsingdas 65 Bom. L.R. 29 = I.L.R. (1962) Bom. 743 = A.I.R. 1963 Bom. 157.

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* In India the words "in British India" were substituted by the words "in the Provinces" and the words "in the Provinces" have been omitted by The Adaptation of Laws Order, 1950.

2. Origin of Indian Arbitration Act of 1899.—The Indian Arbitration Act, 1899, is based on the English Arbitration Act, 1899 (52 & 53 Vict., c. 49). Many sections are taken verbatim from that Act. Before the passing of the Arbitration Act a contract to refer matters to arbitration was governed by the Indian Contract Act, the Civil Procedure Code and the Specific Relief Act (I of 1877). So far as the provisions contained in the Indian Contract Act and the Specific Relief Act are concerned, no contract to refer (present or future differences) to arbitration could be specially enforced. But the party who refuses to perform is debarred from bringing a suit on the same subject. The Arbitration Act was complete in itself and was not affected by rules as to appeal as laid down in the Code of Civil Procedure with reference to the proceedings taken under the Second Schedule of the Code *Saya Pye* v. *U Kundinya,* 76 Ind.Cas. 525=2 Bur.L.J. 193=1 Rang. 661=A.I.R. 1924 Rang. 47.

3. Origin of rules of arbitration contained in Second Schedule of the Civil Procedure Code.—Before the enactment of the Civil Procedure Code (Act VIII of 1859), sections 312-327, which contained rules for arbitration between the parties in suit, several Regulations were passed in Bengal, Bombay and Madras which also made provisions for referring suits to arbitration. *Vide* Bengal Regulations of 1772, 1780 and 1781, Bengal Regulation XVI of 1793, Bengal Regulation XV of 1795, and Bengal Regulations VI of 1813 and XXXVII of 1814 (in Bengal), Bombay Regulation VII of 1827 (in Bombay), Madras Regulation (V of 1816), and Madras Regulation VII of 1816 (in Madras). These Regulations remained in force until the enactment of the Civil Procedure Code (Act VIII of 1859). The Act was extended to the Presidency-towns in 1862. The Bombay Regulations were repealed by Act X of 1861, and the Madras Regulation VII of 1816 was repealed by Act VII of 1870. *Vide Chanbasappa* v. *Baslingayya,* A.I.R. 1927 Bom. 565=51 Bom. 908 (F.B.).

4. Arbitration in ancient India.—In ancient India, decisions by *Panchayets* have been accepted as binding long before the regular courts were established by the British Government. *Amir Bibi* v. *Arokiam,* 45 Ind.Cas. 813=34 M.L.J. 184. The head of a family, the chief of a community or selected inhabitants of a town or village may act as *Punchayet.* In ancient India there were three grades of arbitrators, namely, (1) *Puga,* (2) *Sreni* and (3) *Kula.* According to Mr. Colebrooke these were diffenent degrees of *Panchayet,* which was not in the nature of a jury, or of a rustic tribunal but merely a system of arbitration, subordinate to regularly constituted tribunals or Courts of Justice (*Sarkar* p. 4; *Banerjee p.* 4). In the wards of *Martin, C.J.,* arbitration "is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case of England. To refer matters to a *panch* is one of the natural ways of deciding many a dispute in India. It may be that in some cases the *Panch* more resembles a judical court because the *panch may intervene on the complaint of one party and not necessarily on the agreement of both,* e.g., in a caste matter. But there are many cases where the decision is given by agreement between the parties." *Chanbasappa* v. *Baslingayya,* A.I.R. 1927 Bom. 565=51 Bom. 908=29 Bom. L.R. 1254 (F.B.). In ancient times the decisions of the *Panchayet* were subject to revision. The decision of *Kula* or kinsmen were subject to revision by the *Sreni,* which again could be revised by *Puga.* From the decision of the *Puga* an appeal was maintainable to *Pradvivaca* and finally to the Sovereign Prince.

5. Arbitration under early British rule.—With the advent of

British rule in British India *Panchayeti* system was not abrogated and provision was made in the Bengal Regulations of 1772 that "in all cases of disputed accounts, etc., it shall be recommended to the parties to submit the decision of their cause to arbitration, the award which shall become a decree of the court." Further facilities for arbitration was intended to be given by Regulations of 1780 and 1781. In the Regulation of 1781 a provision was made that "no award of any arbitrator or arbitrators be set aside, except upon full proof, made by oath of two credible witnesses that the arbitrators had been guilty of gross corruption or partiality, in the cause in which they had made their award". This provision, enacted to render arbitration more effectual, affected the constitution of the arbitration board. The original Hindu idea was that it was a lowest tribunal, as such an appeal lay against its decision. But the Regulation of 1781 imported the idea that it is a tribunal of the parties' own chice as such in the absence of misconduct the parties are bound by its decision. So the only course left open to a dissatisfied party was to impeach an award on the ground of gross corruption or partiality. The result was that all respectable persons declined to serve as arbitrators and the *Panchayeti* system fell into disuse. Regulation of 1787 empowered the courts to refer certain suits to arbitration but that Regulation made no provision for difference of opinion among the arbitrators. There were other defects in it. In 1793, the Bengal Regulation of 1793 (Reg. XVI of 1793) was passed. By that Regulation powers were given to Court to refer matters to arbitration with the consent of parties, where the value of the suit did not exceed sicca Rs. 200/- and the suits were for accounts, partnerships, debts, non-performance of contracts, etc. In this Regulation procedure for conducting arbitration proceedings were also laid. Regulation XV of 1795 extended the Bengal Regulation XVI of 1793 to Benares and the Reg. XXI of 1803 extended the same to the territory ceded by the Nawab Vazeer.

Madras Regulations IV of 1816 and V of 1816 gave certain powers to *Panchayets* to settle disputes bv them. Similar provisions were made by Bombay Regulations IV and VII of 1827.

In 1859, the first Code of Civil Procedure (Act VIII of 1859) was placed in the Statute Book and law relating to arbitration was incorporated in Chapter VI of that Code (*vide* Ss. 312-327). That code was not applicable either to the Supreme Courts, or to the Presidency Small Cause Courts or to non-Regulation Provinces. This Act was repealed and consolidated by Act X of 1877 which again with all its amendments was replaced bv Act X of 1877 which again with all its amendments was replaced by Act XIV of 1882. The present code which is now in force is Act V of 1908. The provisions regarding arbitration were incorporated in the Schedule II of this Code. The present Arbitration Act of 1940 has repealed section 89, clauses (a) to (f) of sub-section (1) of section 104 and the Second Schedule of Act V of 1908.

6. Effect of arbitration clause in a contract—whether ouster of jurisdiction of courts.—"By English law the courts are the recognized machinery for settling dispute between the parties to contracts. A complainant by taking out a writ can cause his opponent to be ordered to appear before a court, and the parties must accept its decision. But it has long been a practice in certain classes of contracts for the contracting parties to name a private tribunal to whom they gave authority to settle disputes under that particular contract. If a dispute has been brought before the private tribunal thus constituted, and an award made, that

award is binding on both parties and concludes them as to that dispute. In effect the parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award, so that in essence it partakes of the character of accord and satisfaction by substituted agreement. The original rights of the parties have disappeared, and their place has been taken by their rights under the award.

"Very early in the history of arbitration there arose the question whether a party to a contract containing an arbitration clause was precluded thereby from appealing to a court of law to enforce his rights under the contract. The answer which the courts gave to this question admits of no doubt. They decided that no provision in a contract which ousted the jurisdiction of the courts law could be valid, but that a clause agreeing to refer disputes to arbitration was valid because it did not oust the jurisdiction of the courts. In other words, they decided that the jurisdiction of the courts to compel a defendant to appear before them, and their jurisdiction to pronounce finally and conclusively on the rights of the parties after due hearing, were left untouched by such a clause, or by the appointment of a specific arbitrator to decide the matter, or even by proceedings having been commenced by such a submission. Neither a general agreement to submit disputes to arbitration, nor the submission of the dispute in question to a particular arbitrator, nor even the pendency of an arbitration thereon, could be pleaded in answer to a claim in an action." *Per Fletcher Molton J.* in *Doleman & Sons* v. *Ossett Corporation*, 81 L.J.K.B. 1092 (1099)=(1912) 3 K.B. 257=107 L.T. 581 (C.A.).

7. Interpretation of consolidating Act.—In construing an Act of Parliament which is a consolidating Act and does not profess to amend or alter the provisions of the Acts consolidated, *prima facie the same effect* ought to be given to its provisions as was given to those of the Acts for which it was substituted. *Mitchell* v. *Simpson*, 25 Q.B.D. 183=59 L.J.Q.B. 355=63 L.T. 405. In construing a consolidating and amending Act as distinguished from a codifying Act, the court is entitled to have regard to the previous decisions. *Budget, In re*: *Cooper* v. *Adams*, (1894) 2 Ch. 557=63 L.J.Ch. 847=71 L.T. 72=42 W.R. 551. When a clause in an Act which has received a judicial interpretation is re-enacted in the same terms, the Legislature is deemed to have adopted that interpretation. *Campbell, Ex-parte*, 5 L.R.Ch. 703=23 L.T. 289=18 W.R. 1056; *Balmukund Dube, In the Goods of*, A.I.R. 1930 All. 82=126 Ind.Cas. 357. If there is any doubt as to the proper construction of sections in a new Act, it is undoubtedly legitimate to consider the previous law which it was consolidating and amending. *Secretary of State* v. *Mark & Co.*, A.I.R. 1940 P.C. 105 (106). In *Mathuradas* v. *Maganlal*, A.I.R. 1934 Bom. 79=36 Bom. L.R. 47=150 Ind.Cas 478=58 Bom. 369, *Blackwell, J.* said: "In my opinion the expression 'amend the law' means no more than alter the law previously existing in so far as it would be affected by the amendment." But the Arbitration Act of 1940 is not only an amending Act but is a consolidating Act as well.

It may no doubt be presumed that a local Legislature when re-enacting a former statute intends to accept the interpretation placed upon that statute by local courts of competent jurisdiction with whose decision the Legislature must be taken to be familiar. But when it incorporates in a local Act the term of a foreign statute, it cannot be presumed that it intends to accept the interpretation placed upon those terms by the courts

of the foreign country with which the local Legislature may or may not be familiar. *Nadarajan* v. *Chandrasekera,* 54 C.W. 878 (P.C.).

8. Distiction between codifying and consolidating Statutes—Arbitration Act.—In *Thakur Prosad* v. *Baleswar,* A.I.R. 1954 Pat. 106 (107) *Jamuar, J.* observed: "The Arbitration Act 1940, was an Act passed mainly to consolidate the law relating to arbitration.....It is the rule that, where words or expressions in a statute are plainly taken from earlier statues *in pari materia* which have received judical interpretation, it must be assumed that the legislature was aware of such interpretation, and intended it to be followed in late enactments.....The distinction between statutes which codify and those which consolidate the law has been well summarised in paras 770 and 771 of volume 31, *Halsbury's Laws of England* (*Hailsham,* 2nd Edition):

"770. In construing a codifying statute the proper course is, in the first instance, examine its language and to ask what its natural meaning is. It is an inversion of the proper order of consideration to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with the view. After the language has been examined without presumptions, resort may be had to the previous state of the law for construction of provisions of doubtful import, or of words which have acquired a technical meaning. The same words used in different codes may have different meanings, in each code according to the intentions of the statutes having regard to the mischiefs which they are designed to prevent.

"771. If a distinction is to be drawn between statutes which codify and those which consolidate the law, it is that in construing the latter there is a presumption that the law was not intended to be altered, but this presumption must yield to plain words to the contrary. Where a consolidating statute re-enacts sections that have come into existence at different previous dates, the statute must be construed on the same principles as one which enacts the provisions in question for the first time."

9. Interpretation of Statutes : cardinal rules.—"In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnancy or inconsistency, but no further." *Per Lord Wensleydale in Grey* v. *Pearson,* 6 H.L.Cas. 106=26 L.J.C.H. 481. See also, *Vestry st. John's Hamstead* v. *Collon,* (1886) 12 App.Cas. at p. 6; *Rhodes* v. *Rhodes,* (1882) 7 App. Cas. 192 (205) P.C.). Again the same learned Judge in *Abbott* v. *Middleton,* 7 H.L.Cal. 68 (114, 115)=25 L.J.Ch. 110=5 Jur.N.S. 717, observed: "It is now, I believe, universally admitted, that in construing that writing the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity or some repugnancy or inconsistency with the declared intention of the writer, to be extracted from the whole instrument, should follow from the so reading it. Then the sense may be modified, extended or abridged so as to avoid those consequences, but no further. This rule in substance is laid down by *Mr. Justice Burton* in the case so frequently quoted of *Warbutton* v. *Loveland,* I. Hudo, (Br. 648). It had previously been described as 'a rule of common sense as strong as can be' by *Lord Ellenborough* in the

case of *Doe* v. *Jessop,* 12 East 293. It is stated 'as a cardinal rule' from which if we depart, we launch into a sea of difficulties not easy to fathom, by my noble and learned friend *Lord Cranworth* when Chancellor in *Gundry* v. *Pinninger,* 1 DeM. & G. 502, and as 'golden rule' when applied to Acts of Parliament, by *Chief Justice Jervis* in *Mattison* v. *Hart,* 14 C.B. 385, and by the late *Mr. Justice Maule,* the most general of rules', 'a general rule of great utility,' in *Gether* v. *Guffer,* 24 L.J.C.P. 71." See also. *Secretary of State* v. *Golab Rai Paliram,* I.L.R. (1937) Cal. 614 *Deputy Comm. Jhang* v. *Budhu Ram,* 18 Lah. 1=166 Ind.Cas. 997=39 P.L.R. 112=A.I.R. 1937 Lah. 38 (F.B.). But it is the duty of a court interpreting statutes to attempt to find the intention of the Legislature, and, if possible to give effect to that intention. The more literal construction ought not to prevail if it is opposed to the intention of the Legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Gobind* v. *Srinivas,* I.L.R. 1937 Bom. 655=170 Ind.Cas. 1=39 Bom.L.R. 548=A.I.R. 1937 Bom. 275 (F.B.): *Caledonian Ry. Co.* v. *North British Ry. Co.,* (1881) 6 App.Cas. 114. Where the meaning of the words of a section of a statute is plain, it is not the duty of the courts to busy themselves with supposed intention. *Narayanaswami* v. *Emperor,* 66 I.A. 66=18 Pat. 234 =(1939) 1 M.L.J. 756=20 P.L.T. 265=(1939) A.L.J. 298=69 C.L.J. 273=I.L.R. 1939 Kar. 123 (P.C.) =41P.L.R. 272=41 Bom. L.R. 428=180 Ind.Cas. 1=34 C.W.N. 473= (1939) M.W.N. 185=A.I.R. 1939 P.C. 47; *Rasul* v. *Emperor,* I.L.R. 1939 Lah. 239=41 P.L.R. 69=180 Ind.Cas. 849=40 C.L.J. 505=A.I.R. 1939 Lah. 70 (F.B.).

10. Fundamental principles of construction.—It is the fundamental principle of the interpretation of statutes that their language must be understood in its most ordinary and popular acceptation. *Per Mahmood, J.* in *Queen Empress* v. *Abdullah,* 7 All. 385 (398) (F.B.). The language of the statute taken in its most ordinary and popular sense, and its policy or supposed intention, is the safe guide in construing enactments. *Philbot* v. *St. George's Hospital,* (1857) 6 H.L.Cas. 338. The intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute [*Fordyce* v. *Bridges,* (1847) 1 H.L.C. 1=11 Jur. 157], because the court knows nothing of the intention of an Act, except from the words in which it is expressed and is applied to the facts, existing at the time. *Logan* v. *Courtown (Earl of),* 13 Beav. 22=20 L.J.Ch. 347. *Nanak Ram* v. *Mehin Lal,* 1 All. 487; *Madhusudan* v. *Bama Charan,* 1 Hyd. 100; *Madhusudan* v. *Raja Mohesh,* 3 B.L.R.A.C. 202; *Jogodishary* v. *Kailash,* 24 Cal. 725 (F.B.)=1 C.W.N. 374. In *Commissioners for Special Purposes* v. *Pemsal,* (1891) A.C. 531 (542), *Lord Halsbury, L.C.* said: "My Lords, to quote from the language of *Tindal, C.J.* when delivering the opinion of the Judges in the *Sussex Peerage case,* 11 Cl. & F. at p. 143: "Then only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expand those words in their natural and ordinary sense. The words themselves alone do in such cases first declare the intention of the law-giver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the

Preamble, which according to *Dyere, C.J.* (*Stowart* v. *Lord Zonch*) is a key to open the minds of the makers of the Act, and the mischiefs which they are intended to redress." See also, *River Wear Commissioners* v. *Adamson,* (1877) 2 App.Cas. 743 (778)=47 L.J.Q.B. 193 ; *Glass* v. *Patterson,* (1902) 2 Ir.R 660 (667). Where an act speaks with uncertain or ambiguous voice, resort may be had to the previous history of the subject for light and guidance in construing its provisions. *Sarbeswar* v. *Maharaja Sir Bijoy Chand,* 34 C.L.J. 233=26 C.W.N. 15=63 Ind.Cas. 986 ; *Kyauksema* v. *Aparna,,* 62 *Ind.Cas.* 342 ; *Satish Chandra* v. *Ram Dayal,* 24 C.W.N. 982=32 C.L.J. 94 It is no doubt the duty of the Court to make benificial construction of the Act without stretching, but it is also equally its duty to construct it strictly and literally, where it makes inroad on contractual rights and rights which go with the ownership. It is not for the Court to be lachrymose over the consequences of its decisions that it is to say whether as a result thereof the Act survives or dies. *Indian Iron Steel* v. *Ramrichpal* 67 C.W.N. 644.

11. Retrospective operation of Statutes.—It is a well-established cannon of construction that every Act is *prima facie* prospective in operation and unless the language used by the Legislature is clear and unequivocal retrospective operation is not to be enforced. Retrospective operation is not a matter of course but has to be gathered from the clear wording of the statute. *Abdul* v. *Bora,* A.I.R. 1951 Orissa 153 (S.B.) ; *Tabarak* v. *Province of Bihar,* A.I.R. 1950 Pat. 228=51 C.L.J. 936=5 D.L.R. (Pat.) 66 ; *Tripura Modern Bank Ltd., In re,* A.I.R. 1950 Cal. 240=54 C.W.N. 262 ; *Sudkya* v.*Mahomed,* A.I.R. 1950 Bom. 236 =52 Bom.L.R. 123. But the law is different with regard to procedure. A.I.R. 1950 Cal. 240=54 C.W.N. 262 ; *Beni* v. *Bhagana,* I.L.R. (1949) All. 130 ; *Daulat* v. *State,* A.I.R. 1950 M.B. 112 (F.B.). If the statute is expressed in a language which is fairly capable even of either interpretation, it should be construed as prospective only and not retrospective. *Romesh* v. *Nagendra,* 85 C.L.J. 324. Merely because a statute is remedial it does not follow that it must be retrospective irrespective of the language used. A.I.R. 1951 Orissa 153 (S.B.). Where a statute, is passed for the purpose of supplying an obvious omission in the prior statute or to explain of former statute, or where an Act is in its nature declaratory, it has relation back to the time when the prior Act was passed and the presumption against construing it retrospectively, is inapplicable. *Tabarak* v. *Province* of *Bihar,* 5 D.L.R. (Pat.) 66=51 Cr.L.J. 936=A.I.R. 1950 Pat. 228. It is well-known principle of construction of statutes that they operate only on cases and facts which come into existence after the statutes are passed unless a retrospective effect is clearly intended. *Radhi* v. *Bhagwan,* I.L.R. (1951) Cut. 177=A.I.R. 1951 orissa 378 (F.B.) ; See also A.I.R. 1960 S.C. 12 and A.I.R. 1963 A.P. 270 (F.B.),

It is one of the general rules of construction that if rights and procedure under an enactment are both altered by an amending or repealing statute but right accrued under the repealed enactment are saved, then, in the absence of an intention to the contrary expressed or necessarily implied in the new statute, it will be proper to interpret the intention of the Legislature to be that the old procedure will subsist for the enforcement of the saved rights. *Jatindra* v. *Jetu,* 225 Ind.Cas. 24=50 C.W.N. 502=81 C.L.J. 60=A.I.R. 1946 Cal. 339 (F.B.).

For modern purposes a declaratory Act may be defined as an Act to

remove doubts existing as to the meaning or effect of any statute. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have a judicial error in the interpretation of statutes, usually, if not invariably, such an Act contains a preamble and also the word "declared" as well as the word "enacted". A remedical Act, on the contrary is not necessarily retrospective; it may be either enlarging or restraining and it takes effect prospectively, unless it has retrospective effect by express terms or necessary intendment. *Central Bank of India* v. *Their workmen* A.I.R. 1960 s.c. 12=(1960) I.S.C.R. 200=(1960) S.C.J. 842=(1960) 1.S.C.A. 454.

12. Retrospective operation—Law of Procedure.—The general principle is that no party has a vested right to a particular procedure or to a particular forum; it is also settled that all procedural laws are retrospective unless the Legislature expressly states to the contrary. Therefore, procedural laws in force must be applied at the date when the suit or proceeding comes on for hearing or disposal. *Shiv Bhagwan* v. *Onkarmal,* A.I.R. 1952 Bom. 365=54 Bom.L.R. 330 Where the law is altered during the pendency of an action, or where a new Act is passed repealing the old law, in the absence of special provisions for the pending action in the new law, the parties would continue to be subject to the liabilities and to have the rights created by the repealed law. But where the rights and liabilities are governed by the substantive law properly so-called in force at the commencement of the action, the procedure under the new law would be governed by the new law, which would be retrospective unlike the new substantive law. *Abadi Jain* v. *Otermal,* A.I.R. 1952 V.P. 39. A right of appeal is not merely a matter of procedure. It is a matter of substantive right. Such a vested right cannot be taken away except by express enanctment or necessary intendment. *Hoosein* v. *State,* A.I.R. 1953 S.C. 221.

13. International Laws—English Rules—Applicable in India or not.—Courts in India have hitherto invariably followed the English Rules of Private International Law. Circumstances, however, have now altered and it is no longer incumbent upon them to follow the English Rules, or for the matter of that, any rule excepting their own. After the attainment of a sovereign independent status, the Courts in India are not bound to follow any particular principle of Private International Law, as adumbrated by any particular school. India is now free to evolve her own principles, such as are consonant with her own ideas of justice, enquiry and good conscience. *India and General Duvests Trust Ltd.* v. *Ram Chandra,* B.L.R. 1952 Cal. 240=A.I.R. 1952 Cal. 508.

14. Proviso—function and nature of. A proviso to a section in a statute is not an independent section calling for a construction entirely removed and detached from the construction to be placed on the main section. It must not be forgotten that a proviso is subsidiary to the main section and has to be construed in the light of the section itself. The object of the proviso is to carve out from the main section a class or category to which the main section does not apply; but in carving out from the main section, the Court must bear in mind what is the class referred to in the main section and must also remember that the carving out intended by the Proviso is from a particular class dealt with by the main section and from no other class. The proviso cannot possibly deal with an entirely different topic or subject-matter. *Cambatta & Co., Ltd.* v. *Commissioner,* (1952) 21 I.T.R. 121=B.L.R. 1952 Bom. 230=A.I.R.

1952 Bom. 290=54 Bom.L.R. 202. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. *Sayed* v. *P. V. Rao,* 51 Bom.L.R. 993=A.I.R. 1950 Bom. 158. The cardinal rule of construction of the provisions of a section with a proviso is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion, throwing light if need be on the rest. *Tashilder* v. *State of U.P.* 1959 S.C.J. 1042=A.I.R. 1959 S.C. 1012; *C.I.T. V. Indo Mercantile* 1959 S.C.J. 655=A.I.R. 1959 S.C. 713:

15. Statutory rules—Powers of Court.—The power, which the courts have to consider the validity of Statutory Rules is very limited one. If the rule is within the ambit of the Statute, then it cannot be successfully challenged on the ground that it is a unreasonable rule. Reasonableness, before the Constitution was enacted, was a matter of policy which was left to the Legislature and a law or a rule could only be challenged on the ground of its being *ultra vires* of the Legislature or the rule-making authority. But if it was within the competence of the Legislature or the rule-making authority, the law or rule could not further be challenged on the ground that it was not a reasonable law. Statutory rules formed part of the Statute and if they were within the scope of the Statute and permitted by the Statute to be framed, then they could not be challenged on the ground of unreasonableness. In this respect Statutory Rules stand on a different and distinct footing from bye-laws; while a bye-law may be challenged on the ground that it is unreasonable, a statutory rule cannot be so challenged. *Mulchand* v. *Mukund,* 54 Bom.L.R. 285=A.I.R. 1952 Bom. 296=B.L.R. 1952 Bom. 236.

16. Rules and Bye-laws—whether construed benevolently or strictly.—There is really no conflict between the rule of benevolent construction of a statute, or rule or bye-law and the rule of strict construction because they apply to different topics and not to the same topic. The two rules of construction only represent different modes of apporach. The question as to which of the two rules should be adopted will always depened upon the nature of the attack made against it. If there is no doubt that a local body making the rule or bye-law is acting within its jurisdiction and the irregularity which is alleged against the rule or bye-law or list is merely in respect of a matter which is not essential. Courts would and should be reluctant to declare the rule or the list *ultra vires* on the technical ground of that irregularity. Where, however, the local body purports to levy a tax, it must submit the rules framed by it in that behalf to a strict construction at the hands of the Court. Statutes which impose pecuniary burdens are subject to the rule of strict construction. This rule is usually applied in cases where it is doubtful whether the taxing Act really touches the person or the subject taxed. If the provisions of the Act in effect emphasise the compliance with the preliminary procedure amounts to a condition precedent before the levy of the tax, it would not be open to the local body to contend that the tax levied by it or the rule framed by it in that behalf should be benevolently construed and that the failure to comply with the preliminary procedure should be condoned. *Borough Municipality* v. *Pratap,* I.L.R. (1952) Bom. 918=54 Bom.L.R. 451=A.I.R. 1952 Bom. 401.

17. Construction in favour of validity and not to defeat object of Legislature—Duty of Court.—The court must always lean in favour of the validity of an Act rather than against it. There may be cases in

which a law is alleged to contravene fundamental rights. In such cases, undoubtedly the Court must zealously scrutinize the provisions of the impugned Act in order to see that the fundamental rights are not violated. But where what is challenged is only the letter of the law and the substance is in the interest of a large number of citizens then so far as possible the Court must try to uphold the substance and not permit the letter to defeat the object of the Legislature. *State of Bombay* v. *Herman,* A.I.R. 1952 Bom. 16=B.L.R. 1952 Bom. 11=53 Bom.L.R. 837. Where in the interpretation of the section of an Act two constructions are possible one which leans towards the constitutionality of legislation should be preferred to that which has the effect of destroying it. *Atma Ram* v. *State of Bihar,* A.I.R. 1952 Pat. 359=B.L.R. 1952 Pat.220=31 Pat. 493 (S.B.); see also *Bankey* v. *Jhingan,* 30 Pat. 1085=A.I.R. 1952 Pat. 166. While no doubt, it is not permissible to supply a clear and obvious lacuna in a statute and imply a right of appeal, it is incumbent on the Court to avoid a construction, if reasonably permissible on the language, which renders a part of the statute devoid of any meaning or application. *Rao Shiv* v. *State,* A.I.R. 1953 S.C. 394.

18. Meaning of words.—It is well-settled principle of law that when a particular word in a statute has been judicially interpreted it must be understood to have been used in a later statute in the sense attributed to it by the Courts unless a countrary intention is clear from the statute itself. It must be presumed that where the Legislature has deliberately used a term which has a known legal significance in law it has attached to that term that known legal significance. *Sukar Gope* v. *State of Bihar,* 31 Pat. 145; see also 56 I.A. 93. Whether or not it is permissible to refer to a statement made during a debate in Parliament any statement made in any debate is not conclusive regarding the meaning to be attached to a word or phrase used in Parliamentary enactment. *Harnam Singh* v. *State* I.L.R. (1952) Nag. 118=B.L.R. 1952 Nag. 84=1952 Cr.L.J. 871= A.I.R. 1952 Nag. 172=1952 N.L.J. 154. Courts would have only to interpret a section of an Act according to the natural meaning of the words used therein. *Kochu* v. *Corhin,* 1952 K.L.T. 461=A.I.R. 1952 T.C. 387. In interpreting statutes the golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. *Sutakhan* v. *Central Bank,* A.I.R. 1954 Punj. 66.

19. Grammatical or literal construction when to be avoided.—It is well-settled rule of interpretation that every clause of a statute should be construed with reference to the context and other clauses of the Act, and, so far as possible no clause, sentence or word should be considered superfluous, void or insignificant. A grammatical and literal construction is therefore to be avoided if such construction leads to absurdity, repugnance or inconsistency. *Champamani* v. *Yunus,* 30 Pat. 690=1951 Pat. 177

20. Intention of the Legislature is clear—Duty of court.—When the main object and intention of a statute is clear, it must not be reduced to a nullity by a draftsman's unskilfulness or ignorance of the law. In other words where the language of the Act, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the Act, or to some inconvenience or absurdity, hardship or injustice, presumbaly not intended, the Court may put it a construction which modifies the meaning of the words and even the structure of the sentence. *Bihar Subai Sunni* v. *Sitaram,* 31 Pat. 295.

21. Definitions.—Definitions given in statute are limited to that particular statute and cannot be extended to define those used in another statute, specially when those statutes are not in *pari materia*. *Tulsiram* v. *R. C. Paul,* A.I.R. 1953 Cal. 160 When an expression is defined in the Act that definition must apply whenever the expression occurs in the statute unless the Act itself indicate to the contrary. *Anant* v. *Ratnagiri,* A.I.R. 1953 Bom. 71.

22. Definition section in one Statute whether can be applied in another Statute.—The definition section of a particular statute should be confined as a general rule to explain and define the meaning of words used in the statute and cannot be extended to define those words used in other statute. This is more so when the statutes are not in *pari materia*. *Tulsiram* v. *R. C. Pal,* 89 C.L.J. 127. Construction just in other statutes, language of which and the circumtances under which they were passed, are different, is not a safe guide. *Puran Chand* v. *Md. Latif,* A.I.R. 1953 Cal. 566.

23. Directory and mandatory.—The question whether any requirement is mandatory or directory has to be decided not marely on the basis of any specific provision which, for instance, sets out the consequences of the omission to observe the requirement but on the purpose for which the requirement has been enacted, particularly in the context of the other provisions of the Act and the general scheme thereof. *Collector of Monghyr* v. *Keshav* (1962) S.C.A. 708=A.I.R. 1962 S.C. 1684; *Banwari lal* v. *State of Bihar* A.I.R. 1961 S.C. 849 (about tests); *State of Uttar Pradesh* v. *Balu Ram* (1961) I.S.C.A. 593=A.I.R. 1961 S.C. 751 (use of word "shall"); *Sainik Motors* v. *State of Rajasthan* A.I.R. 1961 S.C. 1480; A.I.R. 1960 S.C. 444=1960 S.C.J. 594; *Major Jogindra Singh* v. *Bibi Raj* A.I.R. 1960 Punj 249; *Bijai Cotton* v. *State of Rajasthan* I.L.R. (1959) 9 Raj. 1242. It is an established rule of construction of statute that if a statute imposes a public duty and requires that it should be performed in a certain manner and within a certain time or on certain conditions such cases will be regarded as intended to be directory; otherwise injustice or inconvenience will result to persons who have no control over those exercising their duty without promoting the essential aim of the Legislature. *Hriday Narayan* v. *Jang Bahadur,* 30 Pat. 865=A.I.R. 1952 Pat. 265=B.L.R. 1952 Pat. 157; see also *Monstreal Street Ry.* v. *Normandin,* A.I.R. 1917 P.C. 142. It is well-established that all rules of procedure are to be regarded as mandatory and non-compliance with such a rule, wthether by a party or by a court, renders the result of the proceeding a nullity. Another well-established rule is that where a provision of law is enacted for the benefit of a person; non-compliance with it is a mere irregularity. But where the provision is intended for the benefit of a class of persons or based on public policy, the enactment is to be regarded as mandatory and non-compliance with the same would be fatal. *Udayarayan* v. *Radhashyam,* I.L.R. (1949) Cut. 559=A.I.R. 1950 Orissa 36. Broadly speaking, it may be stated, that the provisions of an Act, which confer jurisdiction on a statutory body and enact words where the thing to be done is for public benefit must be taken to have a compulsory force. The principle is that the ordinary sense of enacting words is primarily to be adhered to, and the words or provisions which appear on the face of them to be imperative cannot without strong reason, be held to be directory. When a statute requires that something shall be done in a particular manner or from, without expressly declaring what

shall be the consequence of non-complaince, neglect of the statutory requisite would obviously be fatal. The fundamental rule is that the question is, in the main, governed by consideration of justice and convenience. and would depend on the scope and object of the enactment. The general rule is that an absolute enactment must be obeyed or fulfilled exactly, but in the case of a directory enactment, it would be sufficient if it is obeyed or fulfilled substantially. Enactments regulating the procedure of courts are usually imperative and not merely directory. *Giridhari* v. *Hrishikesh*, I.L.R. (1949) Cut. 392.

24. Mandatory provision of a Statute.—In *Jagannath* v. *Jaswanti*, A.I.R. 1954 S.C. 210, *Mahajan, C.J. observed* : "It is one of rules of construction that a provision like this is not mandatory unless non-compliance with it is made penal." The question whether a particular provision is imperative or directory is, in many instances, extremely difficult. The language employed is not always a sure index and it is scarcely possible to lay down a hard and fast rule of general application. Broadly speaking, however, there are three fundamental tests which are often applied with remarkable success in the determination of this question. They are based on consideration of the scope and object sometimes called the scheme and purpose of the enactment in question on consideration of justice and balance of convenience and on a consideration of the nature of the particular provisions, namely, whether it affects the performance of a public duty or relates to a right, privilege or power, in the former case, the enactment is generally directory, in latter mandatory. *Ajit Kumar Sen* v. *State*, A.I.R. 1954 Cal. 47 ; see also 35 Cal. 61 (74) ; *Liverpool Borough Bank* v. *Turner*, (1860) 2 D.C. G.F. & J. 502=36 L. J. Ch. 379 ; *Howard* v. *Badington*, (1877) 2 P.D. 203 (221) ; *Dhanendra Krishna* v. *Nihar*, A.I.R. 1943 Cal. 266.

25. Preamble—use of.—There can be no doubt that where there is an ambiguity the preamble of an Act may be looked at to solve, if possible, the ambiguity. Where a word or words or a sentence in an Act is capable of two meanings then a meaning consonant with the preamble should be preferred. On the otherhand, the preamble of an Act cannot be used to cut down the scope and the plain meaning of the provision of an Act. The preamble may show the motive for enacting a piece of legislation. But it does not by any means follow that in enacting the legislation the Legislature did not go further than giving merely effect to the motive. *Anwar Ali* v. *State*, A.I.R. 1952 Cal. 150=1952 Cr.L.J. 450 (F.B.)=B.I.R. 1952 Cal. 145. The preamble should be resorted to, to unlock the minds of the Legislators. *Shamser Ali* v. *Ratnaji*, B.L.R. 1952 Hyd. 23=A.I.R. 1952 Hyd. 58 (F.B.) ; see also *Tukaram* v. *Narayan* A.I.R. 1952 Bom. 144=J.L.R. (1952) Bom. 565=54 Bom. L.R. 88=B.L.R (1952) Bom. 34 In *Poppat Lal Shah* v. *State of Madras*, A.I.R. 1953 S.C. 274. *B. K. Mukherjee, J.* said: "It is a settled rule of construction to ascertain the legislative intent, all the constituent parts of the statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself. The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the legislation itself." The preamble which is said to be a good means of finding out the meaning of the statute and, as it were a key to the understanding of it may legitimately be consulted to solve any ambiguity or to find the meaning of words which may have more than one or to keep the effect of the Act

within its real scope whenever the enacting part is in any of these respects open to doubt. *Irani* v. *Chidambaran,* A.I.R. 1953 Mad. 650; Maxwell 9th Ed. p. 46.

26 Marginal notes—use of.—It is clear that marginal notes to sections in statutes may not be looked at for the purpose of construing the section. But though they form no part of the sections themselves, they are of some assistance, in as much as they show the drift of the sections. While it is perfectly true that if the sections by themselves make the meaning of the words used by the Legislature plain and explicit, marginal notes cannot be invoked for the purpose of adding to, subtracting or altering the words used. When the words are ambiguous, there should be no objection to looking at the marginal notes in order to understand the drift of the sections. *State of Bombay* v. *Herman Santilal,* B.L.R. 1952 Bom. 11=A.I.R. 1952 Bom. 16=53 Bom. L.R. 837; *Nalinakhya* v. *Shyam Sundar,* A.I.R. 1953 S.C. 148; *Western India Theatres Ltd.* v. *Municipal Corporation* 1959 S.C.J. 390=A.I.R. 1959 S.C. 586. But see *Thakurani* v. *Rai Jagat Pal,* 26 All. 393=31 I.A. 132=7 O.C. 248, where *Lord Macnaghten* said: "It is well-settled that marginal notes to the section of an Act of Parliament cannot be referred to for the purpose of construing the statute. *Income Tax Commissioner* v. *Ahmedbhai,* A.I.R. 1950 S.C. 134; A.I.R. 1953 All 524; A.I.R. 1953 All. 406. It was undoubtedly the view of the courts in England for considerable time that the marginal note formed no part of the statute itself and that view was accepted in India. The courts in England have, however, somewhat changed that view because the marginal notes now appear in the draft bill which they did not do in earlier years. *Iswari Prosad* v. *N. R. Sen,* 55 C.W.N. 179 (F.B.)=A.I.R. 1952 Cal. 273.

27. Headings of chapter.—In *Commissioner of Income Tax* v. *Ahmedbhai Umarbhai,* A.I.R. 1950 S.C. 134=1950 S.C.R. 335. *Patanjali Sastri, J.,* said: "Nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment." See also *Sulakhan Singh* v. *Central Bank,* A.I.R. 1954 Punj. 66; *Bhinka* v. *Charan Singh* A.I.R. 1959 S.C. 960.

28. Interpretation of Statutes—Reference to proceedings of the Legislature.—It is no doubt true that proceedings of the Legislature cannot ordinarily be looked into in making judicial construction of a statute, and the plain meaning of the language used must be adopted. When, however, there is any difficulty or ambiguity as to the interpretation of any section, there is no reason why assistance should not be obtained from discussions in the Legislature as to the scope and intention of the Legislature. *Deorajin* v. *Satyadhyan,* A.I.R. 1954 Cal. 119.

29. Statement of Objects and Reasons.—The statement of objects and reasons is not admissible as aid to the construction of a statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the bill to introduce the same and the extent and urgency of the evil which he sought to remedy. *State of West Bengal* v. *Subodh Gopal,* A.I.R. 1954 S.C. 92; see also *Aswini Kumar Ghosh* v. *Arabinda Bose,* A.I.R. 1952 S.C. 369=1953 S.C.R.; *State of West Bengal* v. *Union of India* A.I.R. 1963 S.C. 1241; *Prashar* v. *Vasant Sen* (1963) 49 I.T.R. (S.C.) 1=(1963)1 I.T.J. 519=(1963) 1 S.C.J. 687=A.I.R. 1963 S.C. 1356 (where it was held that the statement of objects and reosons can be referred to for the purpose of ascertaining the circumstances which led to the legislation in order to find out what

was the mischief which the legislation aimed at); *Gujrat University* v. *Shri Kishna* A.I.R. 1963 S.C. 703.

30. Illustration.—Illustration to a section are valuable guides in ascertaining the meaning of a section. *Kumaraswami* v. *Karuppuswami,* A.I.R. 1953 Mad. 380. In *Mahomed Syedol* v. *Yeonool,* (1916) 2 A.C. 575=A.I.R. 1916 P.C. 242, the Judicial Committee observed as follows: "Illustrations appended to sections of a statute should be accepted if that can be done as being of relevance and value in construing the text; they should only be rejected as repugnant to the section as the last resort of construction." See also *Ram Lal* v. *Emperor,* A.I.R. 1928 Oudh 15.

31. Interpretation of deeming provisions in a Statute.—In *State of Bombay* v. *Pandurang Vinayak,* A.I.R. 1953 S.C. 244, *Mahajan, J.* said : "When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. [*Vide Lord Justice James* in *Ex parte Waxton; In re Levy* (1881) 17 Ch.D. 746 at p. 756]. If the purpose of the statutory fiction mentioned in S. 15 is kept in view, then it follows that the purpose of that fiction would be completely defeated if the notification was *Dwelling Co., Ltd.* v. *Finsbury Borough Council,* (1952) A.C. 109, *Lord Asquith* while dealing with the provisions of the Town and Country Planning Act, 1947, made reference to the same principle and observed as follows : 'If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which if the putative state of affairs had in fact existed, must invariably have flowed from or accompanied it. . . . . The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'"

In *Chandra* v. *Union,* A.I.R. 1953 Assam 193 (F.B.) *Sarjoo Prosad, C.J.* said : "The word 'include' or 'shall be deemed to include' is very generally used interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute, or where it is intended that while the term 'defined' should retain its ordinary meaning, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or not comprise so as to make the definition enumerative and not exhaustive and when it is so used, these words or phrases must be considered as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. *Mt. Surajbansi* v. *Larho,* A.I.R. 1946 Pat. 310; *Dilworth* v. *Commissioner of Stamb,* (1899) A.C. 99; *King* v. *B. C. Fir and Cedar Humbro, Co., Ltd.,* A.I.R. 1932 P.C. 121; *Province of Bengal* v. *S. M. Hingal Kumari,* A.I.R. 1916 Cal. 217; *Madras Central Union Bank Ltd.* v. *Corporation of Madras,* A.I.R. 1932 Mad. 474; *Official Assignee of Bombay* v. *Chandulal,* A.I.R. 1924 Sind 89; *Jeramdas* v. *Emperor,* A.I.R. 1934 Sind 96; (1949) A.C. 433." In modern times the expression "deemed" is used a great deal and for many purposes. It is at times used to introduce artificial conceptions which are intended to go beyond legal principles or to give an artificial construction to a word or phrase. *New Shorrock Spg. Mfg.*

Co. v. *N. V. Raval* 61 Bom. L.R. 618=I.L.R. (1959) Bom. 1256=A.I.R. 1959 Bom. 477.

32. Intention of the Statute.—The Court must construe an Act as Court finds it and unless the intention appears in language used by the Legislature it cannot go outside the ambit of the section and speculate as to what the Legislature intended. *Sankar* v. *Mohibub,* A.I.R. 1953 Bom. 123. Sections should ordinarily be interpreted as they stand without addition of any word. *Nitish* v. *Promode,* A.I.R. 1953 Cal. 16 *Promode Ranjan* v. *R. N. Mullick* 63 C.W.N. 6=A.I.R. 1959 Cal. 318. Where the language used in the statute is plain and the meaning is clear, there is no scope for interpretation. *Sirkar* v. *Velayudhan,* A.I.R. 1953 T.C. 1. "It is a cannon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. *Vide Wordsworth Board of Works* v. *United Telephone Co.,* (1884) 13 Q.B.D. 904 at p. 920. They are to be construed as particular it the intention be particular, that is they must be understood as used with reference to the subject-matter in the mind of the Legislators and limited to it. *Vide Bradlaugh* v. *Clarke,* (1883) 8 A.C. 354 at p. 372, *Cox* v. *Hakes,* (1890) 15 A.C. 506 and *Viscountess Rhondda's claim,* (1922) 2 A.C. 339. *Sankarasubha Iyer, J.* was inclined to adopt this view in 1943 Trav.L.R. 509." Per *Govinda Pillai, J.* in *rlahannan* v. *Variathu,* A.I.R. 1953 Tr. 382.

In *Garimella* v. *Gada,* A.I.R. 1953 Mad. 458 (F.B.), *Venkatarama Aiyar, J.* said : "In an old English case known as *Heydon's case* (1584) 3 Co. Rep. 7a=76 E.R. 637, *Lord Coke* observed that to arrive at the real meaning of a statute it was necessary to consider '(1) what was the law before the Act was passed ; (2) what was the mischief or defect for which the law had not provided ; (3) what remedy Parliament has appointed ; and (4) the reason of the remedy.

In *Mayfair Property Co., In re, Baslet* v. *Mayfair Property Co.,* (1898) 2 Ch.D. 28, *Lindley M.R. stated*: "In order properly to interpret any statute it is, as necessary, now, as it was when Lord Coke reported 'Heydon's case,' to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

33. Harmonious Construction.—It is the duty of court to avoid conflict between two provisions of a given statute, whenever it is possible to do so. Court construe provisions of a statute so they harmonise. *Raj Krishna* v. *Binod,* A. I. R. 1954 S.C. 202 (203). *Purushottamdas* v. *State of West Bengal* A.I.R. 1961 S.C. 1589=(1961) 2 S.C.J. 563 ; *Collector of Custom* v. *Digvijay Singhji Spinning* (1961) 2 Cr. LJ. 720= A.I.R. 1961 S.C. 1549: *S. C. Prashar* v. *Vasantsen* (1963) 49 I.T.R. (S.C.) 1 =(1963) I.T.J. 519=(1963) I.S.C.J. 687=A.I.R. 1963 S.C. 1356 ; A.I.R. 1963 Bom. 163 (F.B.). *New India Sugar Mills* v. *Commissioner of Sales Tax* (1963) 14 S.T.C. 216=A.I.R. 1963 1207 ; *Cheladina* v. *Engles* (1962) 2 Audh. W.R. 372=A.I.R. 1963 A.P. 168 (F.B.) ; *Veluswami* v. *Raja Nainar* A.I.R. 1959 S.C. 422=1959 S.C.A. 424=1959 S.C.J. 751: *Siraj-ul Haq* v. *Sunni Central Board.* A.I.R. 1956 S.C.198=1959) S.C.J. 367. The proper method of construing a statute which has different provision is not to come to a conclusion that one part overrides another part of the statute but try and see whether the different parts of the statute can be reconciled so as to present one complete picture. *Mohanlal* v. *Commissioner,* 52 Bom.L.R. 445=A.I.R. 1950 Bom. 287=1950 I.T.R. 454. Every

Act must be interpreted in a manner congenial to the production of harmony and consisitng among its various provisions. *Deberndranath* v. *Gouri Sankar,* A.I.R. 1950 Orissa 198=5 D.L.R. (Cut.) 79. The true meaning of any part of a statute is that which best harmonizes with every other part of it, and a construction which will leave without effect any part of a statute must be rejected. *Emperor* v. *Narji,* 52Bom.L.R. 321= 51 Cr.L.J. 1303=A.I.R. 1950 Bom. 273 ; see also *Narottam Das* v. *Philips,* 52 Bom.L.R. 571=5 D.L.R. (Bom.) 183.

34. Act ousting the jurisdiction of High Court—Strict construction.—It is well-established cannon of construction that when the Legislature ousts the jurisdiction of the High Court, the language used by the Legislature must be very strictly construed and the court must leave against holding that the Legislature has attempted to oust the jurisdiction of the High Court except in those classes of cases which are clearly and specifically indicated by the Legislature. *Shivji* v. *Kamji,* 51 Bom.L.R. 515=A.I.R. 1949 Bom. 337.

35. Ejusdem generis rule.—It is a well-known cannon of construction that where you have general words following particular and speific words of the same nature, the general words will be *prima facie* construed *ejusdem generis* and not in this unrestricted and absolute meaning, unless there is anything in the context to suggest that they were intended to be used in their unrestricted meaning. *Rustomji* v. *Sorabji,* 50 Bom.L.R. 115 A.I.R. 1948 Bom. 306 ; *New Shorrock Spg. &Mfg.* v. *N. V. Raval* 61 Bom L.R. 618=A.I.R. 1959 Bom. 1256 ; *Hydrabad (Sindh) Electric Supply Co.* v. *Union of India* A.I.R. 1959 *Punj.* 199 ; *Punjab State* v. *Meher Chand* A.I.R. 1959 Punj. 222 ; see *Maxwell* p. 571. So the word "land" does not include building when it is coupled with the word "building" *Derohist* v. *Fieldren,* 66 R.R. 693.

36. Means and includes.—When a definition is intended to be exhaustive, the Legislature, as rule, uses the word "means" and not the word "includes." *Queen Empress* v. *Narpat,* (1901) A.W.N. 10 ; *Rex* v. *Kershaw,* 6 E. & B. 1007=26 L.J.M.C. 19 ; *Rex* v. *Horman,* 48 L.J.M.C. 106. In *Province of Bengal* v. *Hingal Kumari,* A.I.R. 1946 Cal. 217= 225 I.C. 130=1946 Cal. (Rul.) 308=50 C.W.N. 148, *Das, J.* Said: "It will be noticed that in the definition of "immovable property' the Legislature have used the word 'includes' and in that of 'land' the word 'means.' It is well-known that the Legislature uses the word 'means' where it wants to exhaust the significance of the term defined and the word 'includes' where it intends that while the term defined retain its ordinary meaning its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise, so as to make the definition enumerative but not exhaustive."

37. Duty of subordinate Courts.—It is highly improper for a subordinate court to criticise rulings by which he is bound. *Kanshi Ram* v. *Emperor,* 157 Ind.Cas. 735=36 Cr.L.J. 1195=37 P.L.R. 83=A.I.R. 1935 Lah. 433. Where there is a ruling of the higher court of the province published, a subordinate court is bound to follow it. *S. K. Ram Chettyar* v. *V. E. R. Chettyar,* A.I.R. 1935 Rang. 525. Where there is a direct decision of a High Court on any particular point courts subordinate to that court ought to follow that decision in preference to a contrary decision of other High Courts on the same point. *Mahadeo Prosad* v. *Jagarnath,* 13 Pat. 303=150 Ind.Cas. 34=15 P.L.T. 255=A.I.R. 1934 Pat. 173. A subordinate court is bound to follow the rulings of the Chief Appellate

Court of its Province and it should not rely on the authority of decisions of Courts outside the Province. *Haider* v. *Alladitta,* A.I.R. 1932 Part. 346; *Kishan* v. *Gangabai,* A.I.R. 1936 Nag. 278; *Surajvan* v. *Sadanand,* 11 Pat. 616=140 Ind.Cas. 572=A.I.R. 1932 Pat. 346. Latest Division Bench cases should be followed in preference to earlier Division Bench cases or to cases decided by a single judge. *Ram Din* v. *Balabhaara Singh,* 14 Luck. 515=181 Ind.Cas. 70=(1939) O.L.R. 235=(1939) O.W.N. 372=A.I.R. 1939 Oudh 210.

38. Privy Council Federal Court or Supreme Court Ruling—duty to follow.—In *Draupadi* v. *Vikram Krishna,* A.I.R. 1938 Nag. 423 =(1938) N.L.J. 237, the Court observed: "It must be borne in mind that as their Lordship of the Privy Council pointed out in *Mata Prosad* v. *Nageswar Sahai,* A.I.R. 1925 P.C. 272=91 Ind.Cas 370=28 O.C. 352 =47 All. 833 (900)=52 I.A. 398 (P.C.), it is not open to the Courts of India to question any principle enunciated by the Board, which must therefore be followed irrespective of the inconvenience and embarrassing results which may attend the application of that principle. Section 212 of the Government of India Act, 1935, enacts: "The law declared by the Federal Court and by the judgment of the Privy Council, shall so far as applicable be recognised as binding one and shall be followed by all the Courts in British India." Article 141 of the constitution of India states: "The law declared by the Supreme Court shall be binding on all courts within the territory of India. The terms "all Courts" include "Revenue Court". *Ali Akbar* v. *Safir Khan,* 16 Lah.L.T. 29. An *obiter dictum* of the Privy Council is entitled to the greatest weight. *Dhanknara* v. *Probodh,* 41 C.W.N. 54; *Jogendra* v. *Askarulla,* A.I.R. 1937 Cal. 27= 169 Ind.Cas. 700.

39. Conflict between Privy Council case and House of Lords case.—In case of conflict between Privy Council case and the House of Lords case, the former should be followed in India. *Firm Karam Narain* v. *Volkart Brothers,* A.I.R. 1946 Lah. 116 F.B. In the above case *Harries, C.J.* observed: "The second point taken by the appllants was that the House of Lords case is in conbict with 1926 A.C. 497 (*Hirji Mulji* v. *Cheong Yne Steamship,* 95 L.J.P.C. 121=134 L.T. 737=1926 A.C. 356) and as the latter is a decision of their Lordships of the Privy Council, this Court must follow the latter case. It is true that the House of Lords doubted the correctness of many observation contained in the judgment of 1926 A.C. 497 and in fact their Lordships were of opinion that 1926 A.C. 497 case wrongly decided. If, however, 1926 A.C. 497 case governs the present case, it must be followed in spite of the criticism levelled at the decision in the speeches of their Lordships in (1942) 1 All.E.R. 337=(1942) A.C. 356=111 L.J.K.B. 241=166 L.T. 306 (*Heyman* v. *Darwin Ltd*)."

40. Conflict of views between Federal Court and Privy Council.—Section 212 of the Government of India Act states: 'The law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on, and shall be followed by, all Courts in British India." In *Om Prokash* v. *United Prouinces,* A.I.R. 1951 All. 205, *Desai, J.* observed: 'There was conflict between the view of the Federal Court and the view of the Privy Council. As the Privy Council was the higher Court and as its judgment was of a later date, the learned Civil Judge was right in following the view of the Privy Council. The view of the Federal Court could not prevail against that of the Privy Council. Under the present constitution 'the law declared by the Supreme

Court shall be binding on all Courts.' (Art. 141). The Article refers to 'law declared by the Supreme Court' and not to 'law declared by the Federal Court.' The constitution has no retrospective effect and in deciding this appeal we must consider the law that existed on the date on which the learned Civil judge passed his decree. *An Appellate Court can take notice of a change in the circumstances after the passing of the decree by the lower court, but cannot take notice of a law passed subsequently which is not retrospective in effect.* This Court may not be bound at present by either the Privy Council's view or the Federal Court's view but the learned Civil Judge was certainly bound by the Privy council's view. His judgement was correct on the date on which it was pronounced and did not become incorrect owing to the passing of the prospective law." In the same case *Dayal, J.* said : It may be that due to constitutional changes, the decisions of the Privy Council are not binding on Courts now ; but the judgments of their Lordships of the Judicial Committee are to be treated with the greatest respect possible and are in my opinion, not to be departed from unless very good reasons exist. Otherwise much of the settled law will become unsettled.

"Just as the judgments of the Judicial Committee be not binding on the Courts now on account of the constitutional changes, the decisions of the Federal Court also are not binding. Learned Counsel for the appellant referred us to Arts. 141 and 374 (2) of the Constitution. Art 141 is : 'The law declared by Supreme Court shall be binding on all Courts within the territory of India.' Article 372, Sub-section (2) is :

"All suits, appeals and proceedings, Civil or Criminal pending in the Federal Court at the commencement of the constitution shall stand removed to the Supreme Court and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court."

"It is argued for the applicant that according to the latter portion of this provision of the statute the Federal Court judgment has the same force and effect as if it had been delivered or made by the Supreme Court. I do not think that this provision means that all the judgements pronounced by the Federal Court before the commencement of this Constitution will have the same forces and effect as if they had been delivered and made by the Supreme Court. I understand this proviso to mean that in cases which were pending before the Federal Court at the commencement of the Constitution and which cases would stand removed to the Supreme Court at the commencement of the Constitution, the judgment and orders which had been passed in those cases before the commencement of the Constitution would be deemed to be the judgements of the Supreme Court, and would have effect as such. I therefore do not agree that the judgements of the Federal Court continue to be in any way more effective and binding on the Courts in this country than the judgment of the Privy Council."

41. Privy Council decisions—Binding effect after independence. —On this point there is some conflict between different High Courts as well as different benches of the same High Court as such a through discussion on this point is absolutely necessary to have a complete grasp of the matter. Section 8 of the Abolition of Privy Council Jurisdiction Act, 1949, (Act 5 of 1949) attached the binding value only to the decree and order of the Privy Council and to nothing more. The reasoning and

the rules laid down in the decision appear to have been deliberately excluded from having such effect. The reasoning and conclusions in the Privy Council decisions, therefore do not have now the compelling force which they had before the 26th January, 1950. They are however entitled to great respect and while they are no longer binding on the courts of this country, still retain like the decisions of any other country whatever persuasive value they may intrinsically have. *Corporation of Calcutta* v. *Director,* A.I.R. 1955 Cal. 282=1955 Cr.L.J. 792. The Supreme Court observed in *Chief Controlling Revenue Authority* v. *Maharashtra Suggar Mills Ltd.,* A.I.R. 1950 S.C. 218=1950 S.C.R. 536=1950 S.C.J. 444=52 Bom. L.R. 769=(1950) 2 M.L.I. 564=64 Mad. L.W. 4, with reference to *Spooner* v. *Jaddow,* 4 M.I.A. 353=6 Moore P.C. 257 : "This reasoning and conclusion although they have not now the compelling force they had before the 26th January, 1950, are entitled to great respect,"

In the first-named case (A.I.R. 1955 Cal. 282) the court observed : "If this was the law before the independence and not what privy council declared it to be, the question raised on behalf of the State that the rule laid down by the Privy Council still continue to be law under S. 372 hardly arises..... Besides the definition in S. 2 (1) of 'existing Indian Law' in the Indian (Adaptation of Existing Indian Laws) which is an order of the Governor-General under S. 9 (1), Indian Independence Act, includes only Acts, Ordinances, Regulations, Rules, Orders, or bye-laws *but not the declaration of law by a Court.* While S. 18 (3) Indian Independence Act, continues in force 'existing Indian Law' and that is done by the order referred to. It is thus clear that what the Privy Council declared to be the law is not continued by any provision of law." See *Subha Reddi* v. *Guntum,* A.I.R. 1955 Andhra Pra. 49, see also *State* v. *Chhagan Lal,* A.I.R. 1955 Bom. 1=I.L.R. (1955) Bom. 203=56 Bom.L.R. 1084 ; *Onkar Mal* v. *Commr.,* I.L.R. (1953) 5 Assam 389=A.I.R. 1984 Assam 139 ; *Ramchand* v. *Appellate Authority,* I.L.R. (1952) Patiala 242=A.I.R. 1954 Pepsu. 75 ; *Jubilee Mills* v. *Commissioner,* (1958) 34 I.T.R. 30=60 Bom.L.R. 920=I.L.R. (1958) Bom. 1153=A.I.R. 1959 Bom. 51. In the last-named case it has been held that the position after 1950, as far as the Privy Council is concerned, is different from the position which it occupied before 1950. Before 1950 the law laid down by the Privy Council was the law of the country. After 1950, the Privy Council's decision are only of a persuasive authority. The only final tribunal which can lay for this country is the Supreme Court ; and if the Supreme Court has not laid down the law, then final authority in Bombay State is the High Court of Bombay ; and it was not open to the Tribunal to consider the decision of the Privy Council but to follow its decision till the Supreme Court laid the correct principle. *Jubilee Mills* v. *Commissioner, Ibid.* See also *Municipal Board* v. *Eastern U. P. Electric Co.,* A.I.R. 1988 All. 506.

In a very recent case, namely *Das Bank* v. *Kali Kumari,* A.I.R. 1958 Cal. 530 (D.B.) *P. N. Mookerjee, J.* said : "A word now on the Privy Council decision.....*as an 'obiter dictum' of the Privy Council, containing as it does an enumeration of principle or exposition of a rule of law, the statement would be binding on the Courts there unless and until the law is held to be different by the Supreme Court* (Vide *Badharman Dasi* v. *Sisir Kumar Benerjee,* 52 C.W.N. 127 at p. 130 A.I.R. 1953 Cal. 524 at p. 526): *Srinivas Krishna Rao* v. *Narayan Dasi* 1954 S.C.J. 408=A.I.R. 1954 S.C. 379 at p. 387 and Articles 225 and 141 of the Constitution.

In *Punjabi* v. *Shamrao*, A.I.R. 1955 Nag. 293=1955 Nag.L.J. 32= I.L.R. (1954) Nag. 805 (D.B.) the Court observed: "It is however urged that under Art. 141 of the Counstitution, it is only the law declared by the Supreme Court that is binding on the Courts in India, and therefore the Privy Council decisions which are contrary to the original text of the *Mayukha*, are open to review..... "Section 212, Government of India Act, 1935 invested the Privy Council decisions with binding authority. Art. 225 of the Constitution laws down that *law administered in any existing High Court means the same as immediately before the commencement of the Constitution. Therefore the law as laid down by the Privy Council, which does not conflict with any decision of the Supreme Court would be binding on us.*"

42. Article 141 of the Constitution.—*Subreme Court.*—"The law declared by the Supreme Court shall be binding on all Courts within the teritory of India" (Articles 141). The obiter dicta of the Supreme Court are entitled to considerable weight. *C.I.T.* v. *Vazir Sultan* (1959) 2 S.C.A. 184=A.I.R. 1959 S.C. 814. The Supreme Court should not make any pronouncement or any question which is not necessary for the disposal of the case. *Basheshar Nath* v. *C.I.T.* A.I.R. 1959 S.C. 149. When the Supreme Court expresses its view on any particular point of law such expression of view shall be considered as over-riding contrary view expressed on the point in earlier decisions of the same court and it is the latest pronouncement of the Supreme Court which would be binding on all the courts. *New Kishna Bhavan v. C.T.O.* A.I.RR. Mys, 3. If a declaration of law has been made by the Supreme Court, it is not open to subordinate courts to hold that declaration of law is not binding, because on facts, the case decided by the Supreme Court is distinguishable from the case before the subordinate court. *Lalu Jela* v. *State of Gujrat* A.I.R. 1962 Juj. 250.

43. Article 225 of the constitution—Jurisdiction of existing High Courts.—Subject to the provisions of this Constitution and the provisions of appropriate legislature made by virtue of powers conferred on that Legislature by this Constitution, jurisdiction of, *and the law administered* in any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including, any power to make rules of Court and to regulate the sittings of the Court and of the members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of the Constitution :

"Provided that any restriction to what the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."

The law administered in any High Court includes *any case law*. *Radharani* v. *Sisir Kumar*, 57 C.W.N. 127 (130)=A.I.R. 1953 Cal. 524 (526)); *Srinivas Krishna Rao* v. *Narayan Devji*, A.I.R. 1954 S.C. 379 (387)=(1954) S.C.A. 878=896. So the decisions of Privy Council delivered before 26-1-1950 will be binding on all High Courts if the Supreme Court did not hold otherwise—*vide* Art. 141 of the Constitution.

In *Radharani* v. *Sisir Kumar*, 57 C.W.N. 127 (130) the Court observed : "It is also to be remembered that a decision of the Judicial committee is binding upon the Court until the Supreme Court rules

177897
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otherwise (*vide* Art. 225 of the Constitution and Art. 141), and it is not disputed before us that there has been uptil now no contrary pronouncement of the Supreme Court affecting the above decision of the Judicial Committee or the relevant dictum contained therein."

44. Full Bench case.—So long as a latest Full Bench case is not overruled, it is to be followed if it cannot be distinguished. *Siraj* v. *Mahomed Ali*, 138 Ind.Cas 463=(932) A.L.J. 437=A.I.R. 1932 All. 293 (F.B.). Full Bench decision of the Madras High Court after the inauguration of the Andhra High Court is not a binding authority on the Andhra (now Andhra Pradesh) High Court, though of great persuasive effect. *Thenka Veeriah* v. *Tammisetti*, (1959) 2 Andh. W.R. 166=A.I.R. 1959 Andh. Pra. 547 (1=B): *Bankelal* v. *Sant Sharan*, 1958 M.P.C. 808=1959 M.P.L.J. 589. (Full bench division of the now defunct Madhva Bharat to have persuasive effect on the new Madhya Pradesh High Court).

Though a Full Bench decision may not state in so many words that certain cases were wrongly decided, when a full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided. *Jaikaur* v. *Sher Singh* A.I.R. 1960 S.C. 1118.

45. Conflict of views between Full Bench.—Where a Full Bench of three judges is inclined to take a view contrary to that of another Full Bench of equal strength, the better course would be to constitute a larger Bench. *Atma Ram* v. *State of Punjab* 1959 S.C.J. 407=A.I.R. 1959 S.C. 579.

46. Implied decision on point not taken.—It is unsafe to presume that a point not argued or considered has been decided by the Court by implication. *Trimbak Ravji* v. *Bishnu*, I.L.R. 1937 Bom. 158=167 Ind. Cas . 548=38 Bom.L.R. 1314=A.I.R. 1937 Bom. 114. A case is an authority for what it decides not for what may seem logically to follow from it. *Babu Sakharam* v. *Lahoo Sombhaji*, I.L.R. 1937 Bom. 508=170 Ind.Cas 393=39 Bom.L.R. 382=A.I.R. 1937 Bom. 279 (F.B.).

47. Conflict of ruling of two Division Benches.—Where a Division Bench of the High Court does not agree with the decision of another Division Bench of the same High Court, it is its duty as a matter of constitution to refer the matter to a larger Bench. If instead of doing so, it disagrees with the view of the other Bench, other Division Benches of the High Court would be constitutionally bound to follow the prior decision of the first Bench. *Mahabir* v. *Udit*, 17 Pat. 594=19 Pat. L.T. 570=A.I.R. 1938 Pat. 613: *Emperor* v. *Naga Lun*, 13 Rang. 570=158 Ind. Cas. 784=36 Cr. L.J. 1487=A.I.R. 1935 Rang. 370 (F.B.). The decision of a Division Bench of a High Court is binding not only on the subordinate Courts but also on the other Division Benches of the Court so long as that decision is not overruled by a Full Bench of that High Court or, on appeal, by the Privy Counsil. *Mahadeo* v. *Jagannath*, 13 Pat. 303=A.I.R. 1934 Pat. 173=15 P.L.T. 255=150 Ind.Cas. 34. *Ramanagina* v. *Bishwanath*, 147 Ind.Cas. 726=15 P.L.T. 102=A.I.R. 1934 Pat. 85. A Division Bench should not take upon itself to say that an earlier Division Bench ruling of the same High Court cited before it, is wrong, but should follow the usual procedure in case of difference of opinion with an earlier decision of referring the question to a larger Bench. *Mahadev* v. *Administrator General of West Bengal* A.I.R. 1960 S.C. 936:

Jaisri Sahu v. *Rajdewan Dubey* (1962) 1 S.C.J. 578=1962) 2 S.C.R. 558= A.I.R. 1962 S.C. 83.

48. Reference to English cases.—English cases on construction of English statutes are of great assistance, sometimes, in construing Acts of Indian Legislature, but of course, it is always necessary to see that the Indian statute and the English statute resemble one another in their purposes, and not only in a portion of a section which, for convenience of drafting, has been adopted by the draftsmen of the Indian Act. *Pershad Singh* v. *Ram Pertab Roy,* 22 Cal. 77(81, 85). Where an Indian Act was passed for the purpose of extending to India the provisions of the English Act, English decisions may be referred to as a guide to the Act, *Ganesh* v. *Harihar,* 26 All. 299 (P.C.)=31 I.A. 116=8 C.W.N. 521=14 M.L.J. 190=6 Bom.L.R. 505; *Seth Utoom Vasmal* v. *Seth Haridas,* 4 S.L.R. 26=7 Ind.Cas 595; *Mulchand* v. *Sungachand,* 1 Bom. 23; but see *Mahomed* v. *Ali Haider,* 12 O.L.J. 1. "In construing a section of an Indian Act which is professedly based on English enactment, which in fact reproduces word by word the language of the English enactument, we are in practice, if not in theory, bound by the decision of the English courts." *Per Mookerjee, J.* in *Ramendra* v. *Brojendra,* 21 C.W.N. 794= 41 Ind.Cas. 944. "When we are construing an Act which in many instances is taken, word for word, from an English Act, and when we are dealing with a branch of law which is essentilly English law, though we may not be actually bound by it, yet we ought certainly to pay the greatest respect to the decisions of the English Court of Appeal," *Per White, C.J.* in *The Mercantile Bank of India Ltd.* v. *The Official Assignee of Madras,* 39 Mad. 250=35 Ind.Cas. 924. See also, *Lovelock & Lewis* v. *Malabar Timber Yards & Saw Mills,* 13 M.L.T. 282. Unless the English statute and the Act of the Indian Legislature are *pari materia* references to English decisions, instead of affording any help, will tend to confuse the consideration of the matter in issue. *Ezra* v. *The Secretary of State,* 30 Cal. 36=7 C.W.N. 249. In construing a section of an Indian Act, cases bearing upon the construction of the similar provisions of an English Act, different in its language, can be little or no assistance. *Collector of Dinapore* v. *Girija Nath,* 25 Cal. 356. A Judge should not interpret statutory law, when it provides for specific procedure, by reference to a decision pronounced under a different system of procedure. *Radha* v. *Lakhmi,* 31 C.L.J. 283=24 C.W.N. 554=55 Ind.Cas 541. But where the point to be decided arises under the law of India reference to English law is unnecessary. *Per Lord Shaw* in *The Indian General Steam Navigation* v. *The Dekposi Tea Co.,* 28 C.W.N. 302=M.L.T 531=(1924) M.W.N. 158=22 A.L.J. 173=51 Cal. 304=6 Bom.L.R. 571 80 Ind.Cas 1438=A.I.R. 1924 P.C. 40. So also, rules relating to procedure under an Indian Act should not be interpreted by a reference to decisions relating to another statute in England even where the language of the two statutes is the same. *Brojolal* v. *Sharjubala,* 51 Cal. 745=A.I.R. 1924 Cal. 864. See also, *Radha Kissen* v. *Lakshmi,* 24 C.W.N. 454. The statute law in India is no doubt based on the principle of English law but in its application the courts should follow the opinion of Indian courts acquainted with Indian ways of life and thought and not of English courts which deal with people widely different from Indians in their social habits and intellectual development. *Syed Mohammad* v. *Syed Ali Hyder,* 1 O.W.N. 803. "It is a sound rule of interpretation,' says *Lord Sinha,* "to take the words of the statute as they stand and to interpret them ordinarily without any reference to the previous state of law on the

subject or the English law upon which it may be founded." *Abdur Ranim v. Syed Abu,* 55 I.A. 96=55 Cal. 519=32 C.W.N. 482=26 A.L.J. 464; *Secretary of State* v. *G.T. Sarin,* 11 Lah. 375=31 P.L.R. 765=A.I.R. 1936 Lah. 364; *Sukhan* v. *Emperor,* A.I.R. 1929 Lah. 344 (F.B.)=30 P.L.R. 197=10 Lah. 283.

Even though a matter has been expressly provided for an Indian Act, recourse may be had to the English decisions in order to interpret particular provisions of the Act when they are of doubtful import owing to he obscurity of the language in which they have been enacted. *Parbhoo* v. *Emperor,* 1941 A.L.J. 619=A.I.R. 1941 All. 402 (F.B.)=I.L.R. (1941) All. 843=197 Ind.Cas 525=43 Cr.L.J. 177. "When the statutory law is closely simlar in England and in India and one is presumably modelled on the other, the English construction may be adopted." *Nizam Khan* v *Hukum Chand,* A.I.R. 1941 Lah. 316=I.L.R. 1942 Lah. 330=197 Ind.Cas. 564. In *Lachminarain* v. *Md. Medhi,* A.I.R. 1941 Pat. 70 (82)=192 Ind.Cas. 387=20 Pat. 223, *Monohar Lal, J.* said: "Reliance was placed upon the results of an examination by *Mookerjee, J.* in that decision of a large number of English cases that an action was allowed to be maintained in England on a judgment. But in my opinion, as their Lordships of the Judical Committee have observed repeatedly, it is not permissible for the Courts of India to embark upon an examination of English law based upon English statutes and English practice where the matter is expressly governed by the English statutes."

In regard to the interpretation of statutes passed by the Parliament to define and regulate the powers of the Courts in India their language ought not to be enlarged by any implication of English doctrines. *Dattatraya* v. *Registrar,* A.I.R. 1941 Nag. 282=I.L.R. 1941 Nag. 397=197 Ind.Cas. 36; see also, *Chunna Mall* v. *Mool Chand,* A.I.R. 1928 P.C. 99=108 Ind.Cas. 678=9 Lah. 510=55 I.A. 154 (P.C.); *Ramanandi* v. *Kalawati,* A.I.R. 1928 P.C. 2=207 Ind.Cas. 14=7 Pat. 221=55 I.A. 18 (P.C.). It is always dangerous to apply English decision to the construction of Indian Act. *Lasa Din* v. *Gulab Kunwar,* 9 O.W.N. 638=A.I.R. 1932 P.C. 207; see also *Gonda Municipality* v. *Bachchu,* A.I.R. 1951 All. 736 (F.B.); *Municipal Board v. S. C. Das* 9 O.W.N. 46.

If the term of the provisions in an Indian Act are plain and ambiguous the court cannot nave resort to the position in law as obtained in England or in other countries when the statute was enacted by the Legislature. Such recourse would be permisible only if there was any latent or patent ambiguity and the courts were required to find out what was the true intendenment of the Legislature. *Sales Tax Officer* v. *Kanhaiya Lal* 1959 S.C.J. 53=A.I.R. 1959 S.C. 135.

49. Construction of one contract with reference to another contract.—Construction of a contract by the court has very little effect in construing another contract of the same nature, unless a general principle is explained and technical terms are compounded. *Robinson* v. *Evans,* 43 L.J.Ch. 82. In *Ogdens* v. *Nelson,* (1905) A.C. 109 at p. 111; *Earl Halsbury,* L.C. said: "I very much dodbt wheher in dealing with this contract we can get light from other cases decided upon other forms of contract." In the same case *Lord Macnaghten* said: "Now I entirely agree with the Lord Chancellor, that cases on the construction of other contracts do not help us at all in this matter."

50. Arbitration.—"Arbitration means the determination of disputes by the decision of one or more persons, called arbitrators. Practically every question which might be determined by a civil action may be referred to arbitration."—*Byrne's Law Dictionary.* See also, *Macnaghten* v. *Rameswar Singh,* 30 Cal. 831, in which case the court after citing *collins* v. *Collins,* (1858) 26 Beav. 306, observed; "The Master of the Rolls in the course of his judgment made the following observations: 'It becomes necessary, therefore, to consider what an arbitration is. Now I fully concur in the observation, that fixing the price of a property may be arbitration. But I do not think that in this particular case fixing of the price of the property is an arbitration in the proper sense of the term. An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in sense it must be implied that although there is no existing difference still that a difference may arise between the parties; yet I think the distinction between an existing difference and one which may arise is a material one and one which has been properly relied upon in the case." See also, *Zaifunnissa* v. *Shafique-Zaman,* 75 Ind.Cas. 626=A.I.R. 1923 Oudh 185=26 O.C. 33.

The essence of arbitration is that some dispute is referred by the parties for settlement to a tribunal of their own choosing. *Russell,* p. 1 (15th Ed). In *Akbari Begum* v. *Rahamat,* A.I.R. 1933 All. 861 (S.B.)= 56 All. 39, *Sulaiman, C.J.* observed: "In concurrence with the opinions of the learned Judges who have made this reference, I hold that an agreement to abide by the statement of a particular witness is in substance not a reference to arbitration. The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgment which is later on incorporated into the decree of the Court. The arbitrator can either proceed on the basis of his own knowledge or make enquiries and take evidence and then give his decision on such evidence."

"Arbitration is the settlement of a dispute by the decision not of a regular and ordinary Court of law but of one or more persons who are called arbitrators." *Encylopaedia of the Laws of England, S.* 1. In its broad sense arbitration is the substitution, by the consent of parties, of another tribunal for the tribunal provided by ordinary process of law, a domestic tribunal—as distinguished from a regularly organised Court proceeding according to the course of the common law—depending upon the voluntary act of the parties disputants on the selection of Judges of their own chice. The object of arbitration is the final disposition in a speedy and inexpensive way, of the matters involved so that they must not become the subject of future litigation between the parties. *Encyclopaedia of American Law and Procedure.* So an arbitration is "an arrangement for investigation and determination of a matter or matters in difference between contending parties by one or more unofficial persons chosen by the parties." *Banerjee's Laws of Arbitration,* 4th Edn., p.1.

51. Arbitrator.—It is not a universal proposition that whenever a suit can be instituted in a civil court the subject-matter of the suit can be referred to arbitration. An arbitrator is a tribunal chosen by the consent of the parties and unless the law allows them to choose such a tribunal in respect of certain class of cases, they have no power to do so. *Mohammad v. Ahmed,* 6 Ind.Cas 219=7 A.L.J. 761.—Where a member of the firm of architects is holding an inquiry as to the costs of certain work re-done on the refusal of the contractor to do so, he acts in his

capacity an an arbitrator. *Harnam Singh* v. *Parsram,* 173 Ind.Cas. 401 = A.I.R. 1938 Sind 45.

52. Arbitrator and referee, distinguished.—"An agreement that parties will abide by the statement of a witness, who has been designated as a referee, is enforceable in law ; and as pointed out by the Court in *Suraj Narain v. Benimadho,* A.I.R. 1937 All. 701 = 171 Ind.Cas. 697, there is nothing in law to prevent the parties to a suit from agreeing apart from the Oaths Act, to abide by the statement of a third party. The question whether such an agreement amounts to (1) a reference under the Oaths Act, (2) a reference to arbitration, (3) a mutual admission of the parties creating an estoppel, or (4) if carried out, an adjustment of the claim. *Lakshmi Narain* v. *Ram Babu,* A.I.R. 1953 All. 9(15). These points were dealt with elaborately in the Special Bench decision of the Allahabad High Court. *Akbari Begam* v. *Rahmat Hussain,* A.I.R. 1933 All. 861 = 56 All. 39 (S.B.) = 1933 A.L.J. 1127 = 146 Ind.Cas. 48. In the above case *Sulaiman,* C.J. observed at page 879 ; "I hold that an agreement to abide by the statement of a particular witness is in substance not a referene to arbitration. The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgment which is later on incorporated in a decree of the Court. The arbitrator can either proceed on the basis of his own knowledge or make enquiries and take evidence and then give his decision on such evidence. But where parties agree to abide the statement of a third person or a referee, the referee makes a statement according to his knowledge or belief and the Court then decides the case and pronounces its judgment on the basis of such a statement and passes a decree thereon. The referee is not authorised to make enquiries and take evidence, and then announce his decision on the basis of such evidence. He is called upon to make statement according to his knowledge or belief. In the case of an arbitration, as the arbitrator's award is an expression of an opinion and his procedure resembles that of a Court, a party is entitled to file objection and challenge the validity of the award. The making of a statement by a referee or a third person has no resemblance to a proceeding conducted by him as if he were a court of law, and accordingly there can be no procedure for filing objections as to its vilidity." See also, *Lakshmi Narain* v. *Ram Babu,* A.I.R. 1953 All. 9(13) ; *Rameshwar* v. *Ghulam,* A.I.R. 1939 All. 92 = 1938 A.L.J. 1132 = I.L.R. 1939 All. 50 = 180 Ind.Cas. 316 = 1938 A.W.R. 807 ; *Himachal Singh* v. *Jatwar Singh,* A.I.R. 1924 All. 570 = 80 Ind.Cas 16 = 46 All. 710 ; *Gordhan Das* v. *Hussain,* A.I.R. 1927 All. 659 = 103 Ind.Cas. 34. In *Suraj Narain* v. *Beni Madhab,* A.I.R. 1937 All. 701 = 1937 A.L.J. 1066 = 1937 All. L.R. 875, the parties to a suit appointed a person as a referee with respect to their dispute and agreed to abide by the statement of such person made in court after making necessary inquiry and the referee was authorised to take oral evidence and inspect documents filed in Court. On such inquiry the referee made a statement in court, but unlike the arbitrator on oath. In holding that the referee is not an arbitrator the court observed: "It is agreed by learned Counsel for the applicant that B. Brij Behari Lal was authorised to perform acts of a judicial character, he was not a referee but an arbitrator, and this contention derived some support from the certain dicta of the Chief Justice which we have quoted from p. 1155 of the last mentioned case [*Akbari Begam v. Rahmat,* A.I.R. 1933 All. 861 (S.B.)] On the other hand, the parties to the present suit allowed the referee to be examined on oath and no oath is administered to an arbitrator, who is merely to file his award. It is perhaps difficult to say exactly what his proceeding was ;

it apparently partook of various elements. We think it is obvious however that it was never the intention of the parties that there should be a reference to arbitration under Schedule 2, Civil P.C.; their intention was that their nominee should make an enquiry and that they would be bound by whatever statement he might make in court."

53. Valuer whether arbitrator.—In *re Carus Wilson and Greene,* (1886) L.R. 18 O.B.D.7. *Lindley, L.J.* said: "A valuer may be in one sense called an arbitrator, but not in the legal sense of term. In the ordinary cases of arbitration there is a dispute which is referred. The object of the valuation on the other hand is to avoid dispute." See also, *Chooney Money Dassee* v. *Ram Kinkur Dutt,* 28 Cal. 155, where *Maclean, C.J.* in delivering the judgment of the court observed as follows: "It may well be that it was intended, in making that order (*i.e.,* the order of reference to the referees), to make one under section 506, but obviously it cannot properly be regarded as one under that section, for what the so-called arbitrators and umpire were to decide was not any matter in difference between the parties in the suit, but merely to settle the price of the pltintiff's share and interest in the disputed property. They were in effect valuers than arbitrators. [*See in re Garus Wilson and Greene* (*supra*)]."

In re Carus Wilson and Greene cited above *Lord Esher, M.R.* said: "If it appears from the terms of agreement, by which a matter is submitted to any person, that that which he is to do it to be in the nature of a judicial inquiry, and that the object is that he should hear the parties and decide the matter upon evidence to be led before him, there the person is an arbitrator. But if it appears that the object of appointing the person was not to settle differences after they had arisen, but to preclude differences from arising, there the person appointed is not an arbitrator. There is an intermediate class of cases in which a person is appointed to determine disputes after they have arisen, but is not bound to hear evidence or argument. In those cases it may be more difficult to say whether the person is a valuer or an arbitrator. *They must be determined according to the circumstances in each particular instance by the intention of the parties.*"

In *Hormusji* v. *District Local Board,* A.I.R. 1934 Sind. 200=28 S.L.R. 223=153 Ind.Cas. 361, the court observed: "One of the essential ingredients of a submission to arbitration is that the parties should intend that the dispute intend to be referred should be determined in a *quasi-judicial* manner: See *Halsbury's Laws of England* Vol. 1, part 1071. If it is not to be so determined the agreement does not amount to a submission and the person who decides the dispute is not an arbitrator. Therein lies the distinction between an agreement to accept the decision of a valuer *(1) or appraiser or of a racing steward or of the counsel of the parties. In all such cases there is no *animus arbitrandi.*"

In *Wordsworth* v. *Smith;* (1871) 6 Q.B. 332=40 L.J.Q.B. 118, *Blackburn J.* said, "Where by an agreement the right by one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination is an award." So also where the contract provides for the determination of the claims and liabilities of the contractors by the judgment of some particular persons, this would be incorrectly called a provision for submission o arbitration. *Scott* v. *Liverpool Cor.* 28 L.J.Ch. 230.

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*Vide *Taylor* v. *Yielding,* (1912) 56 S.J. 253; *Re. Hooper,* (1867) L.R. 2 Q.B. 367; *Collins* v. *Collins* (1856) 26 Beav, 306; *Leeds* v. *Burrows,* (1810) 12 East. 1.

In *Kennedy Ltd.* v. *Barrow-in-Furness Corporation* (Vide *Hudson on Building Contracts,* 4th Edn. Vol. II at p. 411), the agreement provided that the engineer was to be exclusive Judge on all matters arising out of the contract and his certificate was to have the force of an award. It was held that the engineer was not an arbitrator, *Buckley J.* observing : "He (the Engineer) is the person whose determination is required by the parties. It is not a judicial act, but it is an administrative act in the interest of the Corporation who is going to pay and he is to be the Judge, or a kind of arbitrator or a person whose decision is to be final in the matter of the execution of the work. I do not think that means he is an arbitrator or acting in a judicial capacity at all."

This case was referred to with approval by *Pickford L.J.* in *Monro* v. *Bognor Urban Council* (1915) 3 K.B. 167=84 L.J.K.B. 1091 (1095=79 J.P. 286=112 L.T. 969. In *Charles* v. *Cardiff Collieries Ltd.*, (1928) 44 T. L.R 448, *Scrutton J.* has pointed out that the decision of a Chairman of Concillation Board was not an award within the meaning of the English Arbitration Act and the mere fact that the parties had called the Chairman's decision an award or himself an arbitrator, seemed to his Lordship, a matter of very small importance, and by no means introduced the whole machinery of the Arbitration Act, 1889, with its special powers to review the decisions of a tribunal within the Act. *Hormusii* v. *District Local Board* A.I.R. 1934 Sind. 200=20 S.L.R. 223=153 Ind. Cas. 911. See also *Re Hammond and Waterton*, (1890) 62 L.T. 808.

54. Quasi-Arbitrators.—The plaintiff claimed damages from the defendants, a firm of surveyors and valuers, for negligence while acting as his agents in valuing growing timber sold by him to one F. The negligence alleged was that the defendants had failed properly to measure the trees, and that the plaintiff had consequently received from the purchaser considerably less than their true value. The plaintiff and the purchaser had jointly appointed the defendants, as arbitrators or *quasi*-arbitrators to value the timber and agreed to accept their decision as final and binding between them. *Held* that it was the duty of the valuers to hold the scales impartially between the two parties, and no action for negligence would lie against them. The rule extended not only to arbitrators but also to *quasi*-arbitrators, who were under a duty to exercise an impartial judgment between the parties. *Boynton* v. *Richardson's Firm*, (1924) W.N. 262=69 Sol. Jo. 107=59 L.Jo. 569=158 L.T. Jo. 131 : see also *Pabba* v. *Rose* (1872) L.R. 7 C.P. 32, 525 : *Chambers* v. *Gold Throbe*, (1901) 1 K.B. 624. "But a mere agreement to accept a valuation need not consitute an arbitration agreement, but it may do so. 'Although an appraisement or valuation is not necessarily an award, there is no reason why it should not be'" *per Lord Esher M.R.* in *Dawly and Hartcup* (1885) 15 Q.B.D. 426 (431). See also *Finnegah* v. *Allen*, (1943) K.B. 425 ; *O'Brien* v. *Perry and Daw* (1941) 85. S.J. 142.

In *Des Ram* v. *Secretary of State*, A.I.R. 1936 Sind 201=165 Ind.Cas. 598, the Court observed : "It is well-settled that a mere agreement between two persons to be concluded by the decision of a third does not itself constitute such person an orbitrator. To give him that character it should be intended that such third person should determine the dispute in a *quasi*-judicial manner : 28 S.L.R. 223 (1) at page 227. What is the intention of the parties in any particlar case must necessarily depend upon the true construction of the agreement between them. In a series of cases it has been held that where an architect or other technical expert

in the service of one of the parties to a contract is clothed with authority to settle disputes between the parties which he is required to decide merely by exercise of his own skill and judgment, such architect or expert is not an arbitrator. The Superintending Engineer was the officer representing the Secretary of State in the contracts, which were signed by him on behalf of the Secretary of State. He was competent to decide the disputes by the use of his eyes, his knowledge and his skill to use the words of *Lord Esher M.R.* in *In Re Dawdy,* (1885) 15 Q.B.D. 426, and there is nothing either in clause 25 or in the rest of the contract form, to suggest that the Superintending Engineer was required to give his decision in a *quasi-judicial* manner. See also *Hormusji* v. *District Local Board,* A.I.R. 1934 Sind 200=153 Ind.Cas. 911=28 S.L.R. 223.

A clause in the agreement between the parties provided as follows : "Except where otherwise specified in the contract the decision of the Superintending Engineer of the circle for the time being shall be final, conclusive, and binding on all parties to the contract on all questions relating to the meaning of the specifications, etc. The subordinate Judge held that the agreement in the clause did not indicate any *animus arbitrandi* and was in the nature of a reference to a valuer or an assessor: In holding that the finding was not correct, *Abdur Rahaman J.* observed : 'I do not find myself in agreement with this finding. It is true that the words 'arbitration' or 'arbitrator' or arbitration agreement' do not appear in the clause but that is, in my view, immaterial so long as the parties can be found to have agreed to allow the matter to be decided by a person of their own selection whose decision is to be final, conclusive or binding on them". *Governor-General* v. *Simla Banking,* A.I.R. 1947 Lah. 215= 226 I.C. 444.

55. Building contract—Architects' certificate.—A building owner employed an architect for reward to supervise the erection of certain houses by a contractor. The building contract provided for payment on account of the works during their progress, and for the payment of the balance after their completion, upon certificates of the architect, showing the final balance due or payable to the contractor, should be conclusive evidence of the works having been duly completed, and that the contractor was entitled to receive payment of the final balance. *Held* that the architect, in ascertaining the amount due to the contractor and certifying for the same under the contract, occupied the position of an arbitrator, and therefore was not liable to an action by the building owner for negligence in the exercise of those functions. *Chambers* v. *Gold thrope,* (1901) 1 K.B. 624=70 L.J.K.B. 482=84 L.T. 444=17 T.L.R. 304. In delivering his judgment *A.L. Smith M. R.* said : "The question raised is whether, in ascertaining and certifying the amount payable by the defendant to the contractor, the plaintiff was in the position of an arbitrator between the building owner and the contractor, or merely in the position of an agent for the building owner. If he were merely in the latter position, he would be liable for negligence ; but if he were in the position of an arbitrator, then beyond all doubt, the building owner could not sue him for negligence, for in that case he would only be liable to an action on the ground of fraud or legligence....."

It was argued that there was no dispute between the parties prior to the plaintiff giving his certificate and that, unless there was a dispute, the plaintiff could not be in the position of an

arbitrator. I do not see why there should not be an arbitration to settle matters, as to which, even if there was no actual dispute, there would probably be a dispute unless they were so settled. In the case of *Tharsis Sulphur Co.* v. *Loftus*, 4 C.P.D. 148, there was no more a dispute than in the present case. There a ship having incurred a general average loss, an average adjustment had to be made..... It was held that the average adjuster could not be sent for negligence on the general principle that a person so employed is in the position of an arbitrator, and cannot be sent in respect of the manner in which he has exercised his functions, unless he be guilty of fraud or collusion. *Bovill C.J.* said : "No authority has been cited to shew that a person called upon to act as an arbitrator, or to settle dosputes, or adjust accounts between parties, is liable to an action for negligence." *Kealing J.* said : "Now, without deciding what is the proper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, in as much as he was a person by whose decision two parties having a difference agreed to be bound. It appears to me that the safe rule, when parties agree to be bound by the decision of a third party on any matter, is that they take him in such a case for better or worse ; and if he discharges his duty faithfully and honestly, they must be satisfied." *Brett J.* said : "Then it is said that the defendant is liable because he was not an arbitrator, but only a person who undertakes to adjust accounts between the two parties. Now the case of *Pappa* v. *Rose* (L.R. 7 C.P. 32, 525) decides that a person who undertakes to give decision between two parties as to any matter, *though he may not be an arbitrator in the strict sense of the word*, as not being bound to exercise all the judicial functions for the purpose of deciding the matter in dispute that an arbitrator in the strict sense of the term would have to exercise, nevertheless, is not liable to an action for want of case, and that, if an arbitrator in strict sense of the word is not liable for want of case, it follows that a person who has undertaken to decide a dispute between the parties is also not liable." See also *Neale* v. *Richardson*, (1938) 1 All. E.R. 753=158 L.T. 308=54 T.L.R. 539. In the case *Chambers* v. *Gold thrope*, *ubi supra Romer L.J.* in his dissenting judgment made the following observations: "I regret to say that I differ from the Master of the Rolls and my brother *Collins* in this case. I will first state my view as to the principle which in my opinion, applies to a case of this kind. Suppose a person undertakes for reward to value or estimate for another work about to be done for his principal by a third person ; in my opinion, he does not, so far as his principal is concerned, become in the position of an arbitrator in regard to his valuation or estimate, merely because he knows that his principal and the third person have by contract between them agreed that, in default of dispute previously with regard to the matter, his valuation or estimate is to be taken as conclusive, and as determining the price to be paid by his principal for the work to be done by the third person.....The state of the authorities on the subject is not altogether satisfactory.....The general question of principle had to be considered in *Wadsworth* v. *Smith* (L.R. 6 Q.B. 322) by *Cockburn C.L.*, *Blackburn J.*, *Mellor J. and Hannen* J. They had in that case to consider whether, under a clause in a building contract, an architect was constituted an arbitrator as to certain matters *Cockburn C.J.* said in judgment : "I am by no means disposed to say that this amounts to a submission to arbitration, although it is certainly wider and difierent from many clauses as to certificate of architects which have occurred in cases under building contracts, and which have been

determined to be binding on the builder, and to the clauses of arbitration. The present clause is certainly more like a submission to arbitration ; it is on the confines of the two classes ; but on the whole it seems to me to savour more of a mere architect's certificate than of a judicial proceeding." *Blackburn J.* said : *"Where by agreement the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award, but where there is an agreement that any dispute about a particular thing shall be enquired of and determined by a person named, that may amount to a submission to arbitration, and the determination though in the form of a certificate, be an award."* *Mellor J.* concurred. *Hanen J.* said: "I think this is not an agreement or submission to arbitration ; the clause in question seems to me no more than an extension of the ordinary clause in building contracts, that the certificate of the architect shall be conclusive as to work done, and the mode of doing it." Where a building contract contains a clause by which a certificate of the architect is made a condition precedent to any right of the contractor to payment and the contract also contains a clause by which all disputes except those left to the sole discretion of the architect are to be referred to arbitration, no doubt, the parties will not be allowed to question the finality of the decision of the architect in respect of matter in which the decision of the architect has become final and binding. But the dispute as to whether certificate has been improperly referred is a question that can be gone into by the arbitrator as being within the arbitration clause of the agreement. So also the claim for payment for works done which has been referred is a dispute which is covered by the arbitration clause. *Gannon Dunkely & Co.* v. *Union Carbide* (India) Ltd A.I.R. 1962 Cal. 360.

56. Architects Certificate—Arbitration agreement distinguished. —Where a member of the firm of architects is holding an enquiry as to the cost of certain work done in case of a dispute between the owner and the contractor, he acts in his capacity as an arbitrator and is subject to the provision of the Arbitration Act. *Harnam Singh* v. *Parsram*, A.I.R. 1938 Sind. 45=173 Ind.Cal 401. In that case clause 6 reads : "In all disputes of whatever nature arising out of this contract, the decision of the architects should be final and binding against both the parties." The law on the subject is thus stated in para 595 of *Halsbury's Laws of England*, Vol. 3, *Hailsham Edition* : "In cases where the architect or engineer who has to give a certificate of approval of the work done is also the person designed to act as arbitrator in case of disputes : it is very important to distinguish between his duties and powers in his capacity as arbitrator. It must also be observed that he may be acting in regard to the same matter at one time in the one capacity and at another time in the other. When the architect or engineer is acting in his capacity as certifier, the provisions of the Arbitration Act, 1889, do not apply, while he is acting in his capacity as arbitrator they do" cited in A.I.R. 1938 Sind. 45 *Supra*. In *Hudson on Building Contracts*, Edn., 6, at page 506, the case is stated thus : "Arbitrators may, it is submitted, decide without formally examining witnesses or hearing evidence in cases where : (1) they are employed to decide owing to and by the exercise of their skill and knowledge of the subject, (2) there is an agreement to refer an apparent intention that they should not hear witnesses ; or (3) there are no facts which should be inquired into beyond those which are within the skill and knowledge of

the arbitrators in the particular subject; or (4) the parties do not ask for a hearing or tender any evidence."

57. Position of architects and engineers when decision is made final.—The position of Architects and Engineers whose decision is made final, in respect of contracts whose execution is put under their supervision is that they are not 'arbitrators' in the sense in which the term is used in the Arbitration Act, but whether called arbitrators or *quasi*-arbitrators or by any other label, they are, when exercising that kind of power, discharging judicial functions. Decision of the Privy Council and of the House of Lords particularly emphasise that engineers placed in that situation, specially when they happen to be the employees of one of contracting parties are in a very delicate and embarrasing situation, and on the one hand if it is true that the other party is bound by a contract into which he has entered with his eyes open knowing that finality is attached to the decision of an employee of the other side, that party is entitled to insist that that person should have acted judicially with a full realisation of the responsibilities of his position in dealing with matter of that kind. *Per Varadachariar J.* in *S. I. Ry. Co.* v. *Bhashyam,* A.I.R. 1935 Mad. 356 = 41 M.L.W. 130 = 1935 M.W.N. 134. In that case the learned judge continued: "We are not called upon to define the extent of formal procedure which should be adopted by a person exercising such a power; but the procedure followed by him is at least important as indicating whether in the particular instance he intended to act only as a servant of one of the contracting parties or in the conscious exercise of the powers conferred on him by the special terms of the agreement. This aspect of the question is adverted to by their Lordship of the privy Council in *Bombay Burmah Trading Cor. Ltd.* v. *Aga Mahomed* (1911) 34 Mad. 453 = 12 Ind.Cal. 44 = 38 I.A. 169 (P.C.) by the House of Lords in *Hickman & Co.* v. *Roberts,* (1913) A.C. 229 = 82 L.J.K.B. 678 and *pristol Corporation* v. *John Bird & Co.* (1913) A.C. 241 = 82 L.J.K.B. 684 = 29 T.L.R. 360 = 108 L.T. 434. Two other cases referred to by the learned counsel for the appellant namely, *Stevenson* v. *Watson* (1879) 4 C.P.D. 148 = 48 L.J.C.P. 318 = 40 L.T. 485 and *Chambers* v. *Gold-thrope,* (1901) 1 K.B.D. 624 = 70 L.J.K.B. 482 = 40 L.T. 485, are not much in point. They deal with the question how far an engineer or architect acting under such circumstances can be held liable for negligence."

58. Arbitration and appraisement distinguished.—The first element of a submission to arbitration is, that it should show an intention of the parties to be concluded by the decision of the arbitrator. But a mere agreement between two persons to be concluded by the decision of a third would not in itself constitute that third person an arbitrator. To give him that character there must be a "difference" between the parties; or his duties involve the performance of judicial functions. Thus, where it is left to a person to whom the matter is referred to put a value upon something which the parties have already agreed shall be paid for, this is not an arbitration in the proper sense of the term, but an appraisement, *which in reality prevents differences and does not settle any* which have arisen [*Collins* v. *Collins* 28 L.J.Ch. 184 = 26 Beav. 306; *Bros* v. *Helsham,* 36 L.J.Ex 20 = L.R. 2 Ex. 72; *Turner* v. *Goulden,* 43 L.J.C.P. 60 = L.R. 9 C.P. 57; Fry Specific Performance, 192], so that ordinarily a person valuing between an incoming and outgoing tenant (*Leeds* v. *Burrow,* 12 East. 1), or an incoming and outgoing incumbent (*Jenkis* v. *Bettorain,* 24 L.J. C.P. 94 = 15 C.B. 168), or between a vendor and a purchaser (*Lee* v. *Haningway,* 3 L.J.K.B. 124; *Turner* v. *Goulden, Supra*), *even under the ordinary*

condition of sale providing for compensation for errors in particulars (*Bors* v. *Helsham, supra*) is not an arbitrator. Neither is a person to whom is left the uncontrolled decision of the rights of the parties, as when a building contract provides that no sum shall be due to the contractor until the amount thereof is certified by the engineer or architect of the employee. [*Wadsworth* v. *Smith,* 40 L.J.Q.B. 118=L.R. 6 Q.B. 332 *Scott* v. *Corporation of Liverpool,* 28 L.J.C. 330=3 Deg. & J. 334]—*Redman,* page 1 ; see also *Vadilal* v. *Thakorelal,* A.I.R. 1954 Bom. 121.

59. Valuation and Arbitration—Remedy.—The distinction between a mere valuation and arbitration is important to be borne in mind. In the case of a valuation the Courts have no jurisdiction to interfere between the parties, or enforce their agreement under the statute applicable to arbitration [*Lee Hening,* 3 L.J.K.B. 124 ; *Colins* v. *Collins,* 28 L.J.Ch. 184 ; *Bors* v. *Helsham,* 36 L.J. Ex. 20=L.R. 2 Ex. 701. The distinction between valuation and arbitration is this: valuers are appointed to prevent dispute, while arbitrators are appointed to settle a dispute after the dispute has arisen. *State of Bihar* v. *Indian Copper Corporation* 1960 B.L.J.R. 105=I.L.R. 38 Pat. 1160. Moreover, an action for negligence would lie against a valuer, but not against an arbitrator [*Turner* v. *Goulden, supra*]. A valuation would only require to be stamped as an appraisement not as an award [*Leeds* v. *Burrows,* 12 East. 1], even though on the form of an award [*Perkins* v. *Poles,* 2 *Chils.* 399]—*Redman* page 3. *Vide* notes under Section 2(b) under the heading *Award—Characteristic of.*

60. Stewards of races, whether Arbitrator.—The stewards of a horse race are not in the position of arbitrator between the persons whose horses are in race, and the rules of law applicable to arbitrators do not apply to them. *Park* v. *Winteringham,* 28 L.J.Q.B. 123=117 R.R. 261 ; *Ellis* v. *Hooper* (1858) 157 R.R. *Kalu* v. *Ram,* 3 Ind.Cas. 55. Where the Stewards have got jurisdiction to entertain any dispute their decision is final and supreme and is not liable to be questioned in any Courts of law, if they give party aggreieved or affected reasonable notice of what he had to answer and an opportunity of being heard. Even if the Civil Court thinks that the Stewards are wrong in their decision, the High Court has no jurisdiction to interfere. The principles of natural justice as applied to racing only require that the person affected should have reasonable notice of what he has to answer and an opportunity of being heard ; it is not necessary, that a charge should be framed against the person affected, that evidence in support thereof should be led in his presence and that he should have an opportunity to cross-examine the witnesses and to call witnesses in rebuttal. The proceedings before the stewards need not be according to the strict rules of law, the stewards has only to observe the rules of natural justice. *Daryanormal* v. *Karachi Race Club,* I.L.R. (1944) Kar. 364=218 Ind.Cas. 385=A.I.R. 1945 Sind. 21. It is however for the Civil Court to determine whether a certain matter in dispute is within the jurisdiction of the stewards and if so, whether they have acted according to the elementary principles of natural justice and fairplay. The jurisdiction of the Civil Court can only be exercised within these narrow limits. *Royal Calcutta Turf Club* v. *Kishen Chand,* 201 Ind.Cas. 619=A.I.R. 1942 Lah. 179=44 P.L.R. 236 ; *Cockson* v. *Harewood,* (1932) 146 L.T. 550, *Parr* v. *Winteringham* 28 I.J.Q.B. 123 ; *Cipriani* v. *Burdlett* (1933) A.C. 83, *Ellis* v. *Hooper,* 28 L.J.Ex. 1.

61. One party agreeing to abide by the decision of the other.—If a party to a contract agrees that in case of any dispute arising out of the contract or in any matter concerning the contract he will abide by

the decision of the other party, he cannot afterwards be allowed to say that such a decision is not binding upon him being a decision by a person in his own case. The only possible ground on which perhaps he may attack it, is by showing that it is arbitrary or otherwise unjust. *Burma Oil* v. *Narain,* 104 Ind.Cas. 185=A.I.R. 1927 Sind. 253 see also 5 Mad. 173 ; *Dataram* v. *Forbes,* A.I.R. 1930 Sind 17=117 Ind.Cas. 778.

62. Parties agreeing to abide by the statement of certain advocate. —Where the parties to a dispute make a statement that certain abvocate be appointed as referee and that he may hear the evidence orally and make a statement which will be binding on the parties, the agreement does amount to an arbitration agreement when the evidence shows, that it was not the intention of the parties to appoint an orbitrator. *Pratap* v. *Narain,* A.I.R. 1951 Punj. 416=53 P.L.R. 37=6 D.L.R. (Simla) 219. If the parties are in law entitled to agree to abide by the statement of any person as a referee, there apears to be no reason why the rights of the party should in any manner be restricted as regards matter to be decided on the basis of the referee's statement. It would not be either convenient or in the interests of the parties to adjust their difference in part, that is, so far as they relate to question of fact on the basis of the referee's statement, and to leave questions of law to be decided by Court. *Lakshmi* v. *Ram,* A.I.R. 1953 All. 9. In that case the Court observed : "The parties may choose a referee well-versed in law, in whom they have full trust and confidence and agree to abide by his statement on question of law as well as of facts. A referee is to make a statement according to his own knowledge and belief ; and if he is competent to make such a statement on question of law and facts both, the parties can certainly agree to abide by his statement on all the questions and adjust their differences accordingly. In my opinion, there is no reason why in such cases a distinction should be drawn betwen question of law and those relating to facts." See also *Suraj* v. *Beni,* A.I.R. 1937 All. 701=1937 A.L.J. 1066=171 I.C. 697. But a part of the dispute may be subject-matter of reference. *Ives* v. *William,* (1894) 2 Ch. 478, *Bristol* v. *Bird,* (1913) A.C. 261.

63. An agreement to decide suit by lottery.—"Where it appears from the terms of an agreement for the settlement of dispute, that the parties was that there should be an inquiry in the nature of judicial inquiry and that their respective cases should be heard and a decision arrived at upon the evidence there is a reference to arbitration, *Hoffer, In re,* (1867) 36 L.J.Q.B. 97 ; *Canes Wilson In re.* (1887) 56 L.J.Q.B. 530 ; *Chambers* v. *Golden thrope* (1901) 70 L.J.K.B. 482=(1901) 1 K.B. 624=84 L.T. 444 ; *Hamond and Waterton, In re,* 62 L.T. 808. It has been expressly held that stewards of a horse race, appointed to settle any dispute respecting it, are not arbitrators in the strict sense : *Ellis* v. *Hooper,* (1859) 28 L.J. : Ex. 1.....A submission is an agreement to take the decision and not the advice only, of the person or persons to whom the matter is to be referred. It is also manifest that the acceptance of office by an arbitrator is indispensable to perfect his appointment. *Ringland* v. *Lawndes,* (1864) 33 L.J.C.P. 25=15 C.B. (N.S.) 173=9 L.T., 479, though of course such acceptance may be express or implied from his conduct in proceeding to an award.

"Now in the present case, the parties had a dispute, and they made a perfectly valid submission of that dispute to the arbitration of *Gokul Prosad.* They sought his decision on that dispute. But it is manifest that he did not accept the proposal made to employ his judgment in considering the merits of the dispute. He made a counter

proposal, that the parties should refer the dispute, not to his judgment, but to chance—that two pieces of paper, one blank and the other having entered upon it some description of the property in dispute, should be placed together, and then drawn after the manner of lottery and the party drawing the paper exhibiting the property in dispute should win the suit. The parties agreed to the lottery. Thereupon the submission to arbitration fell through, the appointment of an arbitrator was never completed and no arbitration award remained possible. An actor or manager in a lottery is certainly not an arbitrator in any sense, nor can the result of any enquiry be called an arbitration award.....it is not an offspring of his judgment; there is no 'decision' by him in any intelligible and accepted significance of that term.....Therefore, in this case, *Gokul Prosad* never became an arbitrator and did not accept it. Neither was there any award. The proposal to arbitrate was superseded on his suggestion, by an agreement to compromise..... I am of opinion that the agreement was void *ab initio* as being one by way of wager and forbidden by Section 30 of the Contract Act." *Kaluram* v. *Ram Dayal* 3 Ind.Cas. 55=5 N.L.R. 107; but see *Ram Bahadur* v. *Sreekant*, A.I.R. 1943 Pat. 285=22 Pat. 108=211 Ind.Cas. 137, where it has been held that allotment of property by lot by the arbitrators did not amount to misconduct, when it was done in the presence of the parties and with their full concurrence.

64. Arbitrator and comissioner, difference between.—The essential difference between a commissioner appointed to effect a partition and an arbitrator is that the former is an officer selected and appointed by the court whereas the latter is a person selected by the parties. In the former case the parties express no consent to be bound by the decision of the commissioner and whose decision the parties may challenge before the court passing a final decree. In the latter case they express such consent and cannot challenge the arbitrators' decision on questions of law or fact except on the limited grounds contained in the Act. *Bholanath Roy* v. *Batakrishna Roy*, 95 Ind.Cas. 321=A.I.R. 1927 Pat. 135=7 P.L.J. 735; *Radhey* v. *Kanhai Lal*, A.I.R. 1939 Pat. 526=18 Pat. 193=1939 P.W.N. 591=185 Ind.Cas. 52.

65. Arbitrator and mediator, difference between.—Where a person is asked to act as mediator in the settlement of a dispute, and records a settlement agreed on by the parties, his act is not that of an arbitrator, and the record made by him is not an award, and if that record is at all operative it is so only as a contract between those who have signed it. *Subramania Aiyar* v. *Kalyansundaram*, 53 Ind.Cas. 283. The decision of a mediator is binding on the parties and is not irrelevant, in a suit involving the subject-matter of the arbitration. *Ramachandra* v. *Narayanasami*, A.I.R. 1927 Mad. 426=99 Ind.Cas. 620.

66. Three essential elements of arbitration.—In *Kaluram* v. *Ram Dayal*, 3 Ind.Cas. 55=5 N.L.R. 107, *Stanyon A.C.J.* observed: "In the first place it is not in every case where two parties intend to be concluded by the decision of a third, that third person is an arbitrator. An opinion, or even a decision, may be sought by two persons from a third merely to preclude differences from arising, and to settle them after they have arisen; and such an opinion or decision would appear generally not to be an award. [Cf. *Leeds* v. *Burrows*, 12 East 1; *Collins* v. *Collins*, (1859) 28 L.J.Ch. 184; *Turner* v. *Goalden*, (1874) 43 L.J.C.P. 60; *Lee* v. *Hemingway*, (1934) 3 L.J. (N.S.) K.B. 124, *Carns Wilson, In re*, (1887)

56 L.J.Q.B. 530; *Jenkins* v. *Betram,* (1855) 24 L.J.C.P. 94, and *Bos* v. *Helsham,* L.R. 2 Ex. 72.] Where it appears from the terms of an agreement for the settlement of disputes, that the intention of the parties was that there should be an inquiry in the nature of a judicial inquiry, and that their respective cases should be heard and a decision arrived at upon the evidence, there is reference to arbitration [*Hoffer, In re* (1867) 36 I.J.Q.B. 97. *Carns Wilson, In re (supra); Chambers* v. *Goldthrope,* (1901) 1 K.B. 624=70 L.J.K.B. 482=84 L.T. 444; *Hammond and Waterton, In re,* 62 L.T. 808.] It has been expressly held that stewards of a horse race, appointed to settle any disputes respecting it, are not arbitrators in the strict sense. [*Ellis* v. *Hopper,* (1859) 28 L.J.Ex. 1.] Both submission to arbitration and the award thereon may be oral absolutely informal; but *three elements are inseparable from every arbitration, namely,* (1) *a dispute between two persons requiring settlement,* (2) *its submission for settlement to a third person, and* (3) *a decision by third person according to his own judgment.* A submission is an agreement to take the decision, and not the advice only, of the person or persons to whom the matter is referred. *It is also manifest that the acceptance of the office by an arbitrator is indispensable to perfect his apointment,* [*Ringland* v. *Lowndes,* (1864) 33 L.J.C.P. 25], though of course such acceptance may be express or implied from his conduct in proceeding to an award." A referee is not an arbitrator. *Partap* v. *Narain,* 6 D.L.R. (Simla) 219=A.I.R. 1951 Punj. 416=53 P.L.R. 37. Arbitrators appointed under the Rules of the Bengal Chamber of Commerce must be held to enter upon the reference when they decide to accept their appointment and take steps in concert to obtain from the parties the necessary statement and papers to enable them to decide the matter and make an award. *Bajrangal* v. *Laduram,* 55 C.W.N. 147=A.I.R. 1951 Cal. 28 per *Harries* C.J. An arbitrator cannot be said to enter upon the reference the moment he is appointed an arbitrator. Arbitrators enter upon reference when they actually begin to discharge the functions of arbitrators and that does not connote that both the parties must be before the arbitrators or that there must be some previous pre-emptory order compelling the arbitrators, to conclude the hearing *exparte.* Issuing mandatory direction for pleadings or for particulars or for interrogators or fixing pre-emptory dates for hearing can only done by the arbitrators when they have begun their work as such and taken upon themselves the functions of arbitrators. *Ibid per Chatterjee J.*

As regards difference between an arbitrator and a referee, *vide Akbari Begum* v. *Rahamat* A.I.R. 1933 All. 861=1933 A.L.J. 1127=146 Ind.Cas. 84 (F.B.); *Surajnarain* v. *Beni,* A.I.R. 1937 All. 701=1937 A.L.J. 1066: *Himanchal Singh* v. *Jatwar Singh,* A.I.R. 1924 All. 570=80 8Ind.Cas. 16=46 All. 710: *Bishambar* v. *Radha,* A.I.R. 1931 All. 557=133 Ind.Cas. 29=53 All. 673=1931 A.L.J. 393; *Kesho* v. *Peare,* A.I.R. 1923 All. 443=71 Ind.Cas. 761=21 A.L.J. 209; *Rameshwor* v. *Ghulam,* A.I.R. 1939 All. 92=1938 A.L.J. 1132=I.L.R. 1939 All. 50=180 Ind.Cas 316. As soon as the agreement has been fully carried out by the Court and the referee has made his statement in favour of one of the parties or the other, it is too late for the either party to go back the agreement, and at this stage the agreement must be deemed to have eventuated into an adjustment of the claim in accordance with the statement already made. *Akbari Begam* v. *Rahamat, supra.*

67. Arbitrator—meaning of.—Arbitration means a reference to the

decision of one or more person, either with or without an umpire of some matter or matters between the parties. *Collins* v. *Collins,* (1858) 26 Beav. 306=53 E.R. 916. So arbitration is the settlement of a dispute by the decision, not of a regular and ordinary Court of law but of one or more persons who are called arbitrators. *Encyclopedia of the Laws of England, heading Arbitration* S. I. So the person appointed to adjudicate upon the difference is called an Arbitrator. *Halsbury's Laws of England* Vol. I, para 941. The arbitrators are persons indifferently chosen to determine the matters in controversy according to their own minds, whether they be matters of law or fact. *Bac. Abr tit. Arbitrament D.* "An arbitrator is an extraordinary judge which is chosen and hath power to judge given to him by the only mutual consent, will compromise, and election of private persons striving to the end they may decide their controversies, who because the controversie is committed to his pleasure and arbitrement is termed an arbitrator, and for that it is done by the mutual promise or compromise of the parties he is called *compromises judge.*" Dyer 356 cited in *Russell*, 15th Edn., p. 97. "If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an enquiry and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there should be a judicial enquiry worked out in a judicial manner." Per *Lord Esher M. R.* v. *Re Carns Wilson and Greene*. (1886) 18 Q.B.D. 7 at p. 9, cited by *Russell* 15th Edn. p. 29. Where parties agree to refer their dispute to a third person for decision and where that person has to do some judicial or *quasi*-judicial work, his decision is an award. *Mahammad* v. *Osman Ali*, A.I.R. 1935 Cal. 239=60 C.L.J. 173=39 C.W.N. 480=62 Cal. 229=155 Ind.Cas. 915: see also *Khobhari* v. *Jhamman*, 1917 Cal. 327=34 Ind.Cas. 209. *Re Carns Wilson and Greene, supra.*

An arbitrator cannot be said to enter on the reference the moment he is appointed an arbitrator. It is necessary that he must actually begin the work in the presence of the parties or with notice to them before he can be said to have entered on the reference. *Nanda Kishore* v. *Bally Co-operative Society*, A.I.R. 1943 Cal. 255=I.L.R. (1943) 2 Cal. 431=47 C.W.N. 478=208 Ind.Cas. 196. "Acceptance of office" says *Russell* "by the arbitrator appears to the necessary to perfect his appointment". *Russell* 15th Edn. p. 134. The rule is the same in the case of an umpire. *Ringland* v. *Lowndes*, (1863) 15 C.B.N.S. 173=33 L.J.C.P. 25.

68. Arbitrators—functions of.—An arbitrator is a judge of law and facts and the Court should not set as a Court of appeal on awards of arbitrators in respect of matters of law and fact. *Tirati Das* v. *Motiram*, I.L.R. (1946) Kas. 302=A.I.R. 1947 Sind 110.

69. Who may be appointed an arbitrator.—Any person in whom the parties may have confidence and to whose decision they may choose to refer their disputes or differences may be selected to act as arbitrator, provided he is not prohibited from so acting by any express provision of a statute, or by reason of public policy. Every person is free to choose his own judge for the settlement of any matter in controversy between himself and another, and the judge so chosen if accepted by the opposite party is clother with the authority to arbitrate before the controversy referred to him. If the parties choose an incompetent or unfit person that is their own affair. *Re Shaw and Sims,* (1851) 17 L.T.Inn. 160; *Banerjee* p. 152.

"Neither natural or legal disabilities do hinder any one from being an arbitrator. If they are incompetent judges, the fault is in them that choose them. They are called arbitrators, because they have an arbitrary power, if their judgement be according to submission. If they observe their commission and keep within their jurisdiction, their sentences are definitive, from which there lies no appeal." *Vin. Abr. tit. 'Arbitrament' A.* 2 cited in *Russell* 15th Edn. p. 97. But a more qualified statement of the law is thus stated in West. Symb. Part II, tit. compromise, s. 23: Touching their *i.e.*, the arbitrators' sufficiency such persons are to be elected as have sufficient skill in matters compromised, and have neither legal nor natural impediments to give an upright sentence." *Russell* p. 97. So even if the arbitrator had any interest, known to the parties, he would be perfectly competent to act as arbitrator, if the parties to the controversy had confidence in his decision, provided he accepts the *office*. *Banerjee* p. 152. A party to the controversy may be appointed an arbitrator. *Matthew* v. *Ollerton*, (1694) 4 Md. 226. The following defects are considered as disabilities: (1) deafness, dumbness and blindness: (2) Madness and idiocy". *Vide Russell* p. 98. According to *Bac. Abr. tit. Arbitrament* it is stated that an infant may be an arbitrator, but contrary view is expressed in West. *Russell*, p. 98.

70 Fluctuating body.—A reference may be made to a body or class of persons who may vary from time to time, and the reference will be treated as being to the members of that body or class at the time when the dispute comes up for decision. *Russell* p. 98. *Vide* Section 4 under the heading *reference to a fluctuating body*.

71. Reference to arbitrator by office.—The question whether the words "shall be referred to the arbitrator of the Superintending Engineer of Circle 'for the time being' in the arbitration clause of the agreement should be construed to mean that the Arbitrator must be the Superintending Engineer of the circle concerned until the date of his passing the award depends on a construction of the expression 'for the time being' in that clause. If on the date of refrence the Arbitrator was the Superintending Engineer of the circle within whose jurisdiction the work in question was completed, he may dispose of the reference even though, he may be transferred elsewhere prior to his giving his decision. *Union of India* v. *Radhanath* I.L.R. (1961) cut. 278=A.I.R. 1961 Orissa 143 (A.I.R. 1954 Cal. 606 relied on); see also *Bachna Ram* v. *State of Punjab* A.I.R. 1962 Punj. 85.

72. Rules of Arbitration of the Bengal Chamber of Commerce and other association.—Parties referring the matter for arbitration of the Bengal Chamber of Commerce are bound by the rules of that association. Vide *Kalihar Jute Mills v. Lachmi Narain*, A.I.R. 1958 Cal. 501; *Baranagar Jute* v. *Hulaschand*, 62 C.W.N. 734=A.I.R. 1958 Cal. 490. As regards the rules of Madras Kirana Merchants' Association and other association, vide *Shah Lal Chand* v. *R. S. Jain*, (1958) 2 M.L.J. 561.

73. Presiding Judge.—Matters may be referred to a presiding judge as an arbitrator. *In re, Durham County Permanent Building Society*, (1871) L.R. 7 Ch. 45; see also *Nidamurthi* v. *Thammana* 26 Mad.. 76; *Kumar Saradindu Roy* v. *Bhagabati*, 10 C.W.N. 835; *Baikunta* v. *Sita* 38 Cal. 421; *Sayid* v. *Kalabhai*, 23 Bom. 752; *Parbati* v. *Baikunta*,

3 A.L.J. 89=27 A.W.N. 35 ; *In re, Nimogaddu Peda Nagamma.* 26 Ind. Cas. 355 ; *Maung Kala v. Maung Neik,* 44 Ind.Cas. 622. In *Parbati Kuer* v. *Vaikanta Nath,* it has been held that the award of the presiding judge appointed in his personal capacity is not bad because there is Government rule against it. But see *Ganga* v. *Lakhraj,* 9 All. 253. But in *Madan Mohan v. Munnalal,* A.I.R. 1928 All. 497, the Courts followed the decision of the case *Parbati Kuer* v. *Vaikanta* 4 A.L.I. 89=27 A.W.N. 35: see also *Nanshod Ali* v. *Mohd.* A.I.R. 1937 *Oudh.* 224 ; *Baijnath* v. *Dhani Ram,* A.I.R. 1929 All. 577=117 Ind.Cas. 107=51 All. 886=1929 A.L.J. 1024. After such reference, the position is thus described in *Burgess* v. *Marton,* (1896) A.C. 136=65 L.J.Q.B. 321, where the Court observed: "Where with the acquiescence of both parties a judge departs from the ordinary course of procedure, and decides upon a question of fact, it is incompetent for the parties afterwards to assume that there have been an alternative mode of proceeding and to treat the matter as if it had been heard in due course."

In England also the subject-matter of an action may be referred to a judge as arbitrator. In such a case, the judge will, if such is the intention of the parties, be merely an arbitrator and have no special powers by virtue of the fact that he is a judge, and his award will not be subject to appeal. *Russell* 15th Edn. p. 99 ; see *Burgess* v. *Marton,* (1896) A.C. 136=65 L.J.Q.B. 321, *Busturs* v. *White,* (1876) 1 Q.B. 423 ; *White* v. *Buccench,* (1866) L.R. 1 S.C. & Div. 70 (H.L.) ; *Re Durham Co.* (1871) L.R.Ch. App. 45: *Harrison* v. *Wright,* 13 M. & W. 816. But see *Wyndham* v. *Jackson,* (1938) 2 All. E.R. 109, where Master's certificate was not considered as his award. Vide *notes under Section* 21 *under the Leading Judge as arbitrator.*

74. Foreign Court as arbitrator.—Dispute may lawfully be referred to foreign court as arbitrator. *Law* v. *Garret* (1878) 8 Ch.I. 26 ; see also *Austrian-Lloyd* v. *Gresham Life,* (1903) 1 K.B. 249=72 L.J.K.B. 211 ; *Kischar* v. *Grucban,* (1909) 1 Ch. 413=78 L.J.Ch. 117 ; *The Cap Blanco,* (1913) P. 130 ; *The Dawlist* (1910) P. 339. "A clause in a contract providing for arbitration out of jurisdiction and before a foreign arbitrator is an arbitration agreement within the Act, and an award so obtained can be made the subject of an action in the English Court. But the submission of a dispute to a foreign Court is not an arbitration agreement within the Act, (*Race Course Betting* v. *Secretary of State,* [(1944) Ch. 114=113 L.J.Ch. 129=170 L.T. 29=(1944) 1 All. F.R. 60] although the Court may stay an English action to give effect to such a submission." *Russell* p. 31.

In *Fazalally* v. *Khimji,* A.I.R. 1934 Bom. 476=36 Bom.L.R. 1005 the Court observed: "A contract which provides that a dispute arising in relation thereto should be tried by a foreign Court is considered a submission of any dispute arising between the parties to the arbitration of such foreign Court". See also *Haji Abdulla* v. *Staul,* A.I.R. 1924 Bom. 381=80 Ind.Cas. 523.

A covenant containing a clause by which arbitration of a foreign Court is contemplated is as much enforceable as a convenant containing the clause for arbitration by a foreign tribunal or a foreign body of arbitration. *Laxmi Narin* v. *Manesman Export* A.I.R. 1960 Cal. 733.

CHAPTER I.

INTRODUCTORY.

Short title, extent and commencement.

1. (1) This Act may be called the Arbitration Act 1940.

(2) It extends to the whole of [India except the State of Jammu and Kashmir].*

(3) It shall come into force on the 1st day of July, 1940.

75. Extent.—Originally the Arbitration Act extended to the whole of British India. But after the independence this Act was extended to all the Provinces of India by Act LIX of 1949. In the original enactment clause (2) ran as follows: "It extends to whole of British India." After independence of India for the words "the whole of British India" were substituted by the words "all the provinces of India" by the India, Adaptation of Existing Indian Laws Order, 1947 and in Pakistan these words substituted by the words "all the provinces of Pakistan", by the Pakistan, Adaptation of Existing Pakistan Law Order, 1947. By the Adaptation of Laws Order, 1950 issued under the Constitution of India the words "all the Provinces of India" have been substituted by the words "the whole of India except Part B States". The words "except B States" have been substituted by the words "except the State of Jammu and Kashmir" by' Act III of 1951.

76, Come into force.—The word "extends" in an enactment is not quite analogous to "shall come into force." Where it is laid down in an Act that it extends to a certain area it does not necessarily mean that it is also in force in that area, particularly when there is an express provision that before it comes into force, something further such as a notification, is necessary. *Sundar Singh* v. *Fakir Chand,* 2 D.L.R. 666 = A.I.R. 1938 East Punj. 47 = 50 P.L.R. 82.

77. Application of Aritration Act to all Revenue Courts.—The Arbitration Act of 1940, applies to all the Revenue Courts of the United Provinces. *Raghubar Singh* v. *Haji Mahomed,* 1952 A.L.J. (Rev.) 94 = 1952 R.D. 89 ; see also 1944 R.D. 325 ; 1945 R.D. 315 and 1949 R.D. 89.

78. Arbitration Act, whether has got retrospective effect.—The Arbitration Act of 1940, has no retrospective effect and does not apply to awards made long before the coming into force of that Act. *Lachuman* v. *Makar,* A.I.R. 1954 Pat. 27.

79. Application of the Act and its provisions.—This Act lays down the rules to be followed by the parties, arbitrators and Courts. But many of its provisions may be excluded by express agreement between the parties. *Vide Re Williams and Stepney,* (1891) 2 Q.B. 257 ; *Re Wilson and Son and Eastern Countries Navigation and Co.,* (1892) 1 Q.B. 84 ; *Russell.* 15th Edn. p. 1, Section 3 *infra.* In last named case *Mathew L.J.* observed : "It is argued that the judgment of the Court of Appeal in *In re Williams and Stepney, supra,* amounts to a statement of law to the effect that a submission may be overridden by the Act, but that case only decided that the Act might add things which were not in the submission,

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* In sub-section (2) for the words "except Part B States" substitute "except the State of Jammu and Kashmir"—*Vide* Act III of 1951.

unless the intention that they should not be added was expressed. In the present case a contrary intention is expressed in the submission." In the same case *A. L. Smith J.* observed : "It is contended that the case of *In re Williams and Stepney, supra,* decides that the Act of Parliament overrides the submission, but I am of opinion that it only decides that the Act applies so as to introduce certain provisions into a submission unless the contrary is provided ?

80. Clause (3).—"It shall come into force on the 1st day of July, 1940." Reference under this Act is legal everywhere in India and Pakistan. All arbitrations in India and Pakistan is now governed by this Act. *Vide Gulab Chand* v. *Kissen,* A.I.R. 1931 All. 703. After the pass- of this Act any clause in the arbitration agreement excluding the operation of this Act would be invalid in law. *R. & W. Paul Ltd.* v. *The Wheat Commission,* (1937) A.C. 139. By section 48, pending references at the commencement of this Act have been saved from the operation of this Act.

81. Stay of Act in foreign courts.—Where an agreement for the submission to arbitrator of differences on commercial or other matters, capable of settlement by arbitration, has been entered into by subjects or citizens of two or more of the contracting States which have ratified the International Protocol on Arbitration clauses of 1923, then on the application of any party to such a submission, the Court shall, unless satisfied that agreement or arbitration has become inoperative or cannot proceed, stay any legal proceedings which may have commenced against that party by any other party to the agreement. *Dicey's Conflict of laws, Fifth* Edn. Rule 7, Sub-Rule 2. The above statement of law by *Dicey* is as regards the Arbitration Clauses (Protocol Act, 1924). This Act was passed to give effect to a protocol on arbitration clauses signed on behalf of His Majesty at a meeting of the Assembly of the League of Nation, held on the 24th day of September, nineteen hundred and twenty-three. The Arbitration clauses (Protocol Act, 1924) (Stat. 14E 15 Geo. Vic. 19) is the outcome of that agreement. Vide Appendix. Now in England the provisions of that statute have been incorporated in the English Arbitration Act, 1950 (Stat. 14 Geo. 6, c. 27). Section 35 of the new Act makes provision as to foreign awards to which Part II of the Act applies. More elaborate provisions have been made in the Indian Arbitration. (Protocol and conviction) Act, 1937. (Vide Appendix G. *infra* where the Act has been fully annocated). Section 2 of that Act is an interpretation clause. Section 3 makes provision for stay of proceedings in respect of matter to be referred to arbitration. Section 4 states the effect of foreign awards. Section 5 makes provision for filing award in Court. Section 6 lays down the rules as to how foreign award is to be enforced in this country. Conditions for enforcement of foreign awards are laid down in Section 7 of the Act. Section 8 lays down what evidence would be required for enforcing foreign awards. Section 10 of the Act empowers the High Court to make rules consistent with the Act.

82. English Arbitration Act, 1950—Foreign Awards—Provision is made for the enforcement of foreign arbitral awards by the Arbitration Act, 1950, which consolidates the Arbitration Act, 1889 to 1934. The background of this provision is afforded by a Protocol of 1923 and a convention of 1927 both of which were signed by Great Britain at Geneva. The former deals with the international validity of arbitration agreement, and the latter with the enforcement in one country of arbitral awards

made in another. *Cheshire,* p. 597 (4th Edn.). The Protocol applies between persons subject to the jurisdiction of such powers as may be declared by Order in Council to the parties to Convention the Executive of Foreign Arbitral Awards signed at Geneva on the 26th September, 1927 and set out in the Second Schedule to the Arbitration Act, 1950, and in one such territories as may be declared to the territories to which the said convention applies. Orders in council have been made in respect of India and Pakistan (vide Arbitration Foreign Awards) No. 1, Order 1938, S. R. & O. 1938 No. 137. Although it is considered that India and Pakistan are now effective participants in the convention, it may be that a further Order is required in view of the fact that the Arbitration (Foreign Awards) No. 1 Order, 1938, S. R. & O. 1938 No. 137, merely declared that India was a territory to which the convention applied and did not declare India to be a pary to the convention (*Halsbury's Law of England* (3rd Ed.) Vol. 2 and 114).

83. Geneva Protocol of 1923.—The Protocol, which forms the First Schedule of the Act of 1950 14 Geo. 6 Ch. 27*, provides that an agreement to submit contractual disputes to arbitration, made by parties who are subject to the jurisdiction of different signatory states, shall be recognised as valid in every signatory state, even though the arbitration is to take place in a country to whose jurisdiction none of the parties is subject. The arbitral procedure, including the constitution of the Tribunal, is governed by the will of the parties and the law of the country in which the arbitration takes place. If one of the parties commence legal proceedings, instead of proceeding to arbitration, the Court on the application of the other party, must stay the proceedings, unless satisfied that the agreement for arbitration has become inoperative and cannot proceed or there is not in fact any dispute falling within the scope of arbitration agreement.

In order to implement the convention of 127, the Act next provides that a foreign award, as therein defined shall be enforceable in England by action or with the leave of the High Court, in the same manner as a judgment is enforced. Further the award is to be treated as binding for all purposes on the persons between whom it were made, who are to be entitled to rely upon it by way of defence, set-off or otherwise in any legal proceeding in England. *Chesire's Private International Law* 4th Edn. 597.

84. Foreign award.—In England foreign award means one which (i) made in pursuance of an agreement under the Protocol of 1923, and (ii) made between persons subject to the jurisdiction of signatory states of 1927 convention and (iii) made in a territory to which the convention has been extended by order in Council—*Cheshire* p. 597.

85. Conditions of enforceability.—A foreign award is however, before July, 1924 enforceable by an action at the discretion of the Court. *Norske Atlas Ins.* v. *London,* (1913), 43 T.L.R. 541 ; see also *Merrifield Zirglas & Co.,* v. *Liverpool Cotton,* (1911) 105 L.T. 97. *Cf. Bankers' Shippers v. Liverpool Marine,* (1924) 19 L.I.L. Rep. 335. After 28th July, 1924, a foreign award is not to be enforceable unless it satisfied, certain conditions. It must have (a) been made in pursuance of an agreement for arbitration valid by the law by which it was governed ; (b) been made by tribunal provided for in the agreement ; (c) been made in conformity with the law governing the arbitration procedure ; (d)

* Vide Appendix L.

become final in the country in which it was made ; (e) been in respect of a matter which may lawfully be referred to arbitration under the English law and its enforement must not be contrary to the public policy or the law of England.—*Cheshire on Private International Law,* 4th Edn. page 598 ; see also *Dicey's Conflict of Laws,* 5th Edn. pp. 492-493. The person seeking to enforce an award must produce the original or a certified copy, and evidence that the award has become final and complies with the conditions in Section 3(a), (b), and (c) of the Rule. The nature of the evidence required may be specified by Rules of Court under Section 99 of the Supreme Court of Judicature (Consolidation) Act, 1925. Authenticated translations of any foreign documents must be supplied. *Dicey's Conflict of Laws,* 5th Edn. page 494 ; see also *Halsbury's Laws of England* 3rd Ed. Vol. 2 and § 116.

86. Indian Law--Provisions in the Arbitration (Protocol and Convention) Act, 1937.—This Act deals with elaborately the procedure, how foreign awards are enforceable in India and Pakistan.

87. Foreign award when final.—The second schedule of the Arbitration (Protocol and Convention) Act, 1937 lays down the convention on the Execution of Foreign Arbitral Awards. So far as English law is concerned, *Cheshire* lays down the following rules as regards the finality of foreign awards: "An award is not deemed final if proceedings for testing its validity are pending in the country in which it was made. Moreover an award is not to be enforceable if it does not deal with all the questions referred to the arbitration or exceeds the scope of the arbitration agreement, or if the party against whom enforcement is sought was not given sufficient notice of the arbitration proceedings or was under some legal incapacity and was not properly represented." *Cheshire, Private International Law* p. 598.

88. Conflict of law as regards formation of contract.—When a contract is made between parties resident in different countries, or is made in one country to be performed in another, the validity and effect of an arbitration clause in the contract are to be determined (unless the contract specifically provides otherwise, as is not infrequently the case) by the 'proper law' of the contract as a whole ; that is to say, whether system of law it was intended by the parties should govern the contract. This intention, where not expressly set out in the contract itself, must be gathered from the language of the whole contract considered in the light of surrounding circumstances. *Russell* 15th Edn. pp. 32-33. "That the intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed is too clear for controversy". Per *Lindley L.J. in Fitzerald, In re* (1904) 1 Ch. 573 ; see *Hamlyn* v. *Talisker,* (1894) A.C. 202 ; *Mv.* v. *Mowinckels,* (1938) 2 All. E.R. 152.

"The law of different countries differ as to the incidents which they attach to a given contract. The true meaning and the effect *i.e.,* the rights and obligations of the parties, cannot be determined until we have ascertained the law by which the contract is to be governed. *Dicey's Conflict of Law* 5th Edn. pp. 664. "You must" said *Lord Halsbury* "have regard to the law of contract, by which I mean the law which the contract itself imports is to be the law governing the contract". *Mussorrie Steamship Co., In re,* 42 Ch.D. 321, (336). The aim of a Court, when called upon to interpret a contract, must be to give to it the sense which was affirmed to the contract by the parties when entering into it. *Dicey's*

p. 665, see also *Spurrier* v. *La Clothe*, (1902) A.C. 446. These rules are laid down by *Dicey's* in determining the proper law of a contract in accordance with the intention of the parties:—

"Sub-Rule (1)(f)—When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, the express intention determines the proper law of contract and, in general, overrides every presumption.

Sub-Rule (2)—When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.

Sub-Rule (3)—In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:—

First presumption—Prima facie the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed any where, but it may apply to contract partly or even wholly to be performed in another country.

Second presumption—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take ploce (*lex loci Solutions*)" *Dicey's Conflict of laws* pp. 663-673.

In *Jacobs* v. *Credit Lyonnais*, (1884) 12 Q.B.D. 589 (600) *Bowen L.J. said*: "The broad rule is, that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties." In *Chatenay* v. *Brazalian Submarine Telegraph Co.* (1891) 1 Q.B. 79, *Lord Esher M.R.* observed: "The business sense of the businessmen has come to the conclusion, that, if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of the other country". See *Bremer* v. *Drewry*, (1933) 1 K.B. 753; *Norske Atlas Ins.* v. *London General Ins.*, (1927) 43 T.L.R. 541, but see *Austrian Lloyd* v. *Gresham*, (1903) 1 K.B. 249=72 L.J.K.B. 211=88 L.T. 6=51 W.R. 402, where a foreigner entered into a contract with an English Insurance Company and parties agreed to submit to the jurisdiction of the Courts of Budapest.

89. Admission as regards foreign properties.—It is not incompetent either to the arbitrator or to the Court to record an admission of title to foreign immoveable properties by the parties to incorporate it in the award or decree. Such an award or decree did not declare any rights to the foreign immoveable properties. *Chidambaran* v. *Subramanian*, 65 L.W. 980=(1952) 2 M.L.J. 524.

90. Scope of Arbitration Act.—In *P. & W. Paul, Ltd.* v. *The Wheat Commission*, (1937) A.C. 139, *Lord Macmillan said* at pp. 154-155: "The Arbitration Act is a statute of general application and it confers a valuable and important right of resort to the courts of law. To exclude its operation from an arbitration is to deprive the parties to the arbitration of the rights which the Act confers. When a public general statute

provides for the reference of disputes to arbitration it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitration, with all the attendant rights which the general law confers I do not think that when Parliament enacts by one statute disputes under it are to referred to arbitration, it can be presumed to have empowered by implication the arbrogation of another statute which it has enacted for the conduct of arbitration. Rather the contrary. If this is intended, express words to the effect are, in my opinion, essential ; and there are here no such express words." That observation was made by His Lordship in connection with Stat. 52 & 53 Vict., c. 49. But by the Arbitration Act of 1940, all other statute laws regarding arbitration have been repcaled [*vide* section 49 (1)]. So now all arbitration agreements fulfilling conditions of this Act are to be governed by this Act [*vide* section 46 (*post*)]. See also *J. Belli* v. *Joghi,* A.I.R. 1951 Mad. 683 ; A.I.R. 1951 All. 860.

91. Arbitration Act, applicability to foreign awards.—The decision in which the term "foreign arbitration" and 'foreign award' have been used, appear to have been used the same in connection with arbitration in foreign lands by foreign arbitrators, to which foreign law is applicable and in which a foreign national is involved.

Agreement between the parties contained in arbitration clause which ran as follows:—

"any dispute arising out of the contract is to be relaxed by arbitration in New York according to the rules of the American Arbitration Association."

Held that American law applied to this arbitration on a proper construction of the agreement between the parties and it had all the characteristics of a foreign arbitration. The arbitration contemplated was arbitration according to the rules of the American Arbitration Association. The parties must have adopted the American law for the settlement of their disputes by an arbitration. The Indian Arbitration Act was thus excluded and it was irrelevant. So far as the present arbitration was concerned. *Serajuddin & Co.* v. *Michael Coldet.* 63 C.W.N. 717=A.I.R. 1960 Cal. 47.

92. Award under English Arbitration Act, whether can be set aside under this Act.—An award under the English Arbitration Act of 1889 duly made in accordance with English Law, can be enforced by a suit in an Indian High Court but cannot be set aside by an Indian Court on any ground of miscoduct or irregularity on the part of the arbitrator. *John Bati* v. *Kanoolal,* A.I.R. 1926 Cal. 938=53 Cal. 65=95 Ind.Cas. 21 ; see also *Oppenheim & Co.* v. *V. Hajee,* A.I.R. 1922 P.C. 120.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "*arbitration agreement*" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not ;

(*b*) "*award*" *means an arbitration award ;*

(*c*) "*Court*" *means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference*

if the same had been the subject:matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Causes Court ;

(d) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting ;

(e) "reference" means a reference to arbitration.

93. Interpretation clause.—"A definition is the most difficult of all things. There is far greater probability of a correct use of terms than of a correct definition of them. The best definition, therefore, is that by use. A correct use renders definition unnecessary, because the law will speak plainly without it. And where it is unnecessary to define, it is also dangerous, because an incorrect definition will confound the correct use."—*Vide Solicitors' Journal,* Vol. XX, p. 869.

94. "Unless there is anything repugnant in the subject or context."—"A definition clause does not necessarily, in any statute, apply in all possible context in which the word may be found therein..... If defined expressions are used in a context which the definition will not fit, then the words may be interpreted according to their ordinary meaning." *Per Lord Justice General in Strathern* v. *Padden,* (1926) S.C. (J.) 9—Ct. of Justy. See also, *Uda Begam* v. *Imamuddin,* 2 All. 75 (86) ; *Jokha* v. *Ramdin,* 8 All. 419 (425).

95. Clause (a).—The definition in clause (*a*) is based on clause (*b*) of section 4 of the Indian Arbitration Act of 1899, which again reproduced it from the English Arbitration Act of 1889 (Stat. 52 & 53 Vict., c. 49). In this definition the words "arbitration agreement" have been substituted for the word "submission." In *Re Smith & Nelson,* (1890) 25 Q.B.D. 545 at p. 547, *Bowen L.J.* in criticising on the word "submission" as used in Section 1, which runs "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made under an order of the Court," points out that the language "a submission shall be irrevocable" is ambiguous ; the word "irrevocable' being applicable not to the agreement to refer, but to the authority of the arbitrator. See also, *Doleman* v. *Ossett Corporation,* 81 L.J.K.B. 1092 (1101). To cure this defect the words "arbitration agreement" have been substituted for the word "submission" in the English Act of 1934. This definition of "arbitration agreement" is taken from the English Arbitration Act of 1934 and is retained in the English Arbitration Act of 1950. In order to come within the terms of the English Arbitration Act, 1950 (14 Geo. 6 C. 27) agreement to refer disputes to arbitration must be in writing, and all valid written agreements to submit differences to arbitration, whether such differences are present or future, and whether or not an arbitrator is named in the agreement, are arbitration agreements within the meaning of this Act. (*Halsbury's Laws of England,* 3rd Ed., vol. 2 s. 5).

The definition of "arbitration agreement" as given in the Act makes it clear that future differences can form the basis of an agreement to refer those disputes, as and when they arises to an arbitrator. Parties to such an arbitration clause cannot predict as to what actual point of difference would arise, between them at some later stage. All that they can do is to present the limits by mentioning the nature of disputes which will be referable to a domestic tribunal. What is necessary is that the subject-matter of reference should be clearly defined so that the arbitrator may be in a position to know what he has to divide. Only those disputes which appertain to the subject-matter of reference can be referred to him. *Sm. Balika Devi* v. *Kedar Nath*, A.I.R. 1956 All. 377. A dispute touching or pertaining to the agreement means a dispute as to the terms of that agreement that is to say; as to what the agreement means. *Co-operative* v. *Ganesh Sugar*, 1956 A.L.J. 711=A.I.R. 1956 All. 601. The existence of disputes or differences contemplated by an arbitration clause is an essential condition of and pre-requisite to the exercise of the jurisdiction by the Arbitrator. A dispute implies an assertion of a right by one party and a repudiation thereof by another. *Nandram* v. *Raghunath*, 93 C.L.J. 92=58 C.W.N. 510=A.I.R. 1954 Cal. 245. An arbitrator acts without jurisdiction if the parties have not agreed that the matters in dispute should be decided by arbitrator. *Commander* v. *Armugam*, I.L.R. (1953) Mys. 480=A.I.R. 1954 Mys. 46. A dispute arising from and founded on an illegal transaction cannot be referred to arbitration. *Haji Habib* v. *Bhikam Chand*, I.L.R. (1954) Nag. 514=A.I.R. 1954 Nag. 306.

96. Four different types of procedure under the old law—agreement whether should be in writing.—In *Rampratap Chamria* v. *Durgaprasad Chamria*, 83 Ind.Cas. 300 (306)=28 C.W.N. 424=A.I.R. 1924 Cal. 567, *Rankin J.* observed : "The law of this country recognises four types of procedure in respect of arbitrations. The Indian Arbitration Act applies only to matters that are not before a court of law. Section 20 and 21 of the Second Schedule provide a procedure for enforcing in a court of law an award which has been made in an arbitration held without the intervention of a court. Sections 17 to 19 provide machinery for enforcing an agreement to refer. Sections 1 to 16 deal with arbitration in suits." See also, *Purshotamdas* v. *Ramgopal*, 35 Bom. 130=12 Bom.L.R. 852=8 Ind.Cas. 171. In *Rampratap* v. *Durgaprasad* (*supra*), *Rankin J.* of the Calcutta High Court said : "The basis of an arbitration under the Act is a written submission by the parties." But in *Mathura Das.* v. *Maganlal*, A.I.R. 1934 Bom. 79=36 Bom.L.R. 47=150 Ind.Cas. 478=58 Bom. 369, *Beaumont C.J.* observed : "The argument then is that the operative part of the Act involves that every submission must be in writing, and impliedly makes illegal any verbal agreement to refer to arbitration in a case coming within the class dealt with by the Act. It is, however, to be noticed that the Act contains no express prohibition against a verbal agreement to refer to arbitration ; nor does it contain any express provision that a submission other than in writing is invalid. The only obligation, if there be an obligation, to have a written submission must be deduced from the definition of 'submission' as being a submission in writing, and from the fact that all the operative sections of the Act are based on a submission.....I think that we should not be justified in holding that, in cases which do fall within the ambit of the Act, an oral agreement to refer is invalid, unless we find some definite provision in the Act to that

effect : there is, as I have said, no such definite provision, and that being so, it seems to me that an oral agreement to refer is valid....."

In the same case *Blackwell J.* said : "There is certainly no express provision in the Act, against an oral agreement for arbitration outside the Act, and I do not think that such a prohibition is implied in the later part of the proviso to Section 21 (of the Specific Relief Act). The decision which the learned trial Judge relied on in suuport of his view that an oral agreement for arbitration was no longer legal in India, was that *of Beaman J.* in *Rukhanbai* v. *Adamji,* 33 Bom. 69 = 10 Bom.L.R. 366. With great respect to that learned Judge, I think that his view was wrong, and that is not the law. The opinion that it is still open to parties to submit their dispute to arbitration by oral agreement, even in an area to which the Indian Arbitration Act applies, was expressed by the Madras High Court in *Ponnamma* v. *Kotamma,* A.I.R. 1932 Mad. 745 = 139 Ind.Cas. 355 = 56 Mad. 85. In my opinion the learned Judges came to a right decision in that case and I respectfully agree with them. A similar view has been taken in *Ramautar* v. *Langat Singh,* A.I.R. 1931 Pat. 92, where *Kulwant Sahay J.* said (at p. 94): 'The reference to arbitration does not appear to have been by any written agreement between the parties. It must have been a verbal submission of the disputes to arbitration. There is nothing in law which requires a submission to arbitration to be in writing, and a parol submission is a legal submission to arbitration'.

"I respectfully agree with those observations, and inasmuch as I think that both the Code of Civil Procedure and the Indian Arbitration Act are not comprehensive, but deal with methods of procedure for going to arbitration and enforcing awards, it is still, in my opinion, open to those who choose to exercise the old common law right to refer disputes to arbitration by parol and to enforce awards made thereunder by suits."

97. Oral submission how to be enforced.—It has already been stated that there is nothing in law which requires a submission of the dispute between the parties to arbitration to be in writing. A parol submission is a legal submission. *Ramautar* v. *Langat Singh,* A.I.R. 1931 Pat. 92 ; *Ponnamma* v. *Kotamma,* A.I.R. 1932 Mad. 745 *Mathuradas* v. *Madan Lal,* A.I.R. 1934 Bom. 79. Awards in such cases can be enforced by suits. *Mathuradas* v. *Madan Lal, (supra).* Under the English law the rule is the same *vide Fleming* v. *Dorg,* (1921) 38 R.P.C. 57 ; *Harnsin* v *Wright* (1845) 13 M. & W. 816. But a parol submission, not based upon a written agreement to refer, there is no arbitration agreement within the Act. *Fleming* v. *Dorig,* 38 R.P.C. 57—*Russell* p. 33. *In Rungta Sons* v. *Jugamlal,* A.I.R. 1959 Cal. 423, *Bachawat J.* observed: "I am of opinion that an arbitration agreement is not by law required to be in writing. It is true that the Indian Arbitration Act does not for the purpose of that Act recognise an arbitration agreement unless it is in writing. But for purposes other than the purposes of the Arbitration Act, our law still recognises an arbitration agreement which is not in writing." In this view a subsequent oral agreement to rescind or abrogate a prior arbitration agreement in writing for purposes other than those of Arbitration Act, is not barred. *Ibid.* A reference to the arbitration would satisfy the requirement of s. 2 if it is in writing the law in section 32 does not operate to a suit in the case of following an oral submission. *Baratilal* v. *Bindabai* A.I.R. 1963 Madh. Pr. 122 = 1963 Jab. L.J. 166.

98. Arbitration.—No definition of the word "arbitration" is given in this Act or in the English Acts of 1889, 1934 and 1950. In *Collins* v. *Collins,* 26 Beav. 306=28 L.J.Ch. 184=5 Jur.N.S. 30=122 R.R. 127 M.R. said: "An arbitration is a reference to the decision of one or more persons, either with or without umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference, still that a difference may arise between the parties; yet I think the distinction between an existing difference and one which may arise is a material one, and one which has been properly relied upon is the one, and one which has been properly relied upon in the case".

99. Arbitration agreement.—One of the essential ingredients of an arbitration agreement that the parties should intend that the dispute intended to be referred should be determined in a *quasi*-judicial manner. If it is not to be so determined, the agreement does not amount to an arbitration agreement and the person who decides the disputes is not an arbitrator. *Hormusji* v. *District Local Boad,* A.I.R. 1934 Sind 200 (201)=153 I.C. 911; *Jubilee Chamber* v. *Lala Amrit,* A.I.R. 1940 Lah. 180 where at a general combined meeting of the members of 6, *Sampradayas* and 3 *Sampradayas* the matter in dispute was decided to be referred to arbitration and two separate agreements of reference to arbitration were drawn up and signed by same representative members of the two *Sampradayas* including the Secretaries it was held the reference to arbitration was perfectly valid. *Bhikamchand* v. *Chandan Mal,* 1947 M.L.R. 28 (Civil). All that the statute requires is that there should be a written agreement to submit a dispute to arbitration. It is not necessary that the word 'reference' or 'arbitration' should actually be used in the agreement, if the agreement, in substance, amounts to an arbitration agreement within the meaning of S.2 Cl. (a) *Dewan Chand* v. *State of J. & K.* A.I.R. 1961 J. & K. 58.

100. Evidence to vary or alter terms of arbitration agreement.—The arbitration agreement is a contract within the meaning of s. 91 of the Indian Evidence Act, and when the parties to an agreement of reference refer a dispute which arises between them, they cannot lead evidence to vary or add to the terms of the agreement by saying that they made the reference in any other capacity save that appearing from the agreement itself. *Radha* v. *Sapttar,* A.I.R. 1957 All. 405.

101. Arbitrator—Want of jurisdiction.—If *ab initio* arbitrators had no jurisdiction, appearance before the arbitrators and undertaking, in the event of a finding that they had jurisdiction to file a defence on merits cannot confer jurisdiction on arbitrators who had no jurisdiction at all. *Varadan* v. *Narshi,* A.I.R. 1956 Bom. 720.

102 Arbitration agreement—Power of executor to enter into agreements.—There may be occasions in which an executor may instead of involving the estate in costly litigation, refer the dispute to arbitration. These occasions, however must be special. But one of the executors alone cannot make any reference, *Chouthmal* v. *Ram Chandra,* A.I.R. 1955 Nag. 126=I.L.R. (1955) Nag. 100. All the parties must be present before the arbitrator in a partition dispute. *Chouthmal* v. *Ramchandra,* A.I.R. 1955 Nag. 126.

103. Written agreement.—It is an essential ingredient in a valid submission to arbitration alike under the English Arbitration Act

and under the Indian Arbitration Act of 1899 that the agreement to arbitrate should be contained in a written document agreed by the parties to the submission or by their agent or agents duly authorised in that behalf. *John Batt* v. *Kanorlal,* A.I.R. 1926 Cal. 938=53 Cal. 65=95 Ind.Cas. 21 ; see also *Ram Narain* v. *Lourjee,* 33 Cal. 1237=10 C.W.N. 814 ; *Sukhamal* v. *Babulal,* 42 All. 525=59 Ind.Cas. 75=19 A.L.J. 652 ; *Chamri* v. *Durgaprosad,* 83 Ind.Cas. 300 (306)=28 C.W.N. 425=A.I.R. 1924 Cal. 567 ; *Purshotamdas* v. *Ramgopal,* 35 Bom. 130=32 Bom. L.R. 852=8 Ind. Cas. 171 ; but see *Mathura Das* v. *Maganlal,* A.I.R. 1934 Bom. 79=36 Bom.L.R. 47=150 Ind. Cas. 47=58 Bom. 369, where *Beaumont C.J.* observed: "It is however to be noticed that the Act contains no express prohibition against a verbal agreement to refer to arbitration in a case coming within the class dealt with by the Act". See also *Ramautar* v. *Langat Singh,* A.I.R. 1931 Pat. 92 and *Ponamma* v. *Kotamma,* A.I.R. 1932 Mad. 745=139 Ind.Cas. 335=56 Mad. 85. But in *J. Beili* v. *Joghi,* A.I.R. 1951 Mad. 683, the Court observed: "It is common ground that there was no written submission to the *panchaytadar.* Prior to the enactment of the Arbitration Act 1940, it had been held by this and other High Courts that there is nothing in the Arbiration Act of 1899 or in Section 89 or Schedule 2 of the Civil Procedure Code of 1908 rendering an oral agreement to refer to arbitration invalid. A parol submission to arbitration was held to be a legal submission to arbitration and an award passed on an oral reference was held to be valid and enforceable by suit though not by a special procedure prescribed by Sch 2, C.P.C. or the Arbitration Act 1899 (see *Ponnamma* v. *Kotamma supra ; Mathuradas* v. *Maganlal,* 53 Bom. 369=A.I.R. 1934 Bom. 79 and *Ramanlal Sha* v. *Langat Singh, supra*). The question is whether the Arbitration Act of 1940 has superseded the law as laid down in these cases. The answer is not free from difficulty in view of the uncertain nnature of the statutory provisions. The preamble shows that the object of the Act was to consolidate and amend the law relating to Arbitration and it is legitimate assumption to make out that the Act is exhaustive of the law of arbitration in India. Oral submission to arbitration and awards passed thereon are not so much as referred to, much less saved by the Act, even though the decision referred to above must presumably have been within the knowledge of the draftsman and legislature. At the same time there is no provision in the Act an award on an oral submission would be invalid and unenforceable. Section 2(2) of the Act defines 'Arbitration agreement' as a written agreement to submit present or future difference, but Section 2(b) defines an 'award' not as an award on an arbitration agreement, but as an arbitration award, an expression which *prima facie* would include an award on oral submission. Section 47 of the Act enacts that the provisions of the Act apply ' to all arbitrations and all proceedings thereunder'. Section 32 of the Act lays down that no suit shall lie on any ground whatever for a decision upon the existence, effect or validity of an arbitration agreement or award. Section 14(2) of the Act prescribes the Court's power under the Section that an 'Arbitration Agreement' as defined in Section 2(a) must exist. The question whether it was intended merely to make awards on oral submissions unenforceable altogether, would depend to a large extent on whether the Act is exhaustive of the law of Arbitration. I am inclined to think that it is. I therefore hold that an award passed on oral submission can neither be filed and make a rule of Court under the Act, nor enforced apart from the Act. The same opinion has been expressed in *Gauri Singh* v. *Ramlochan,* A.I.R. 1948

Pat. 430=29 P.L.T. 106." Section 2(a) of the Arbitration Act lays down that the "arbitration agreement" means a written agreement to submit present or future difference to arbitration whether an arbitrator is named or not. *Suraj Mal* v. *Harduttrai,* A.I.R. 1951 Ajmir 53. So where there is no written agreement no award can be passed. *Firm Narain Das* v. *Bhagwan Das,* A.I.R. 1951 All. 860. To constitute an arbitration agreement which will bring a reference within the Act, must be an agreement—that is to say, the parties must be *ad idem,* [*Carleon Tinplate Co.* v. *Hughes,* (1891) 60 L.J. Q.B. 64 ; *Ex. parte Munzo,* (1876) 1 Q.B.D. 726 ; *Anglo Newfoundland* v. *R.,* (1920) 2 K.B. 214] and that agreement must be in writing [*Fleming* v. *Doig,* (1921) 38 R.P.C. 57 ; *Beattie* v. *Beattie,* (1938) Ch. 708]—*Russell* 15th Edn., p. 25. A written contract means a contract, the terms of which are expressed in writing. *Jubilee Chamber* v. *Amrit,* A.I.R. 1940 Pat. 780=42 P.L.R. 48.

Where the whole contract is void ; a submission being a part of a void contract cannot be enforced. *Joe Lee Ltd* v. *Lord Dalmery,* (1927) 1 Ch. 300. See also Section 21 *infra* where it is laid down that the parties are to apply in writinng to the Court for an order of reference. *Vide notes under that Section.*

Arbitration agreement—form.—No particular form can be laid down as universal for forming an arbitration agreement but this much is certain, words used for the purpose must be words of choice and determination to go to arbitration and not problematic words of mere possibility. *Jyothi* v. *Sree Durga Minig,* 60 C.W.N. 420=A.I.R. 1956 Cal. 280.

105. Written agreement whether should be signed.—Written agrement means one in which the terms on both sides are reduced into writing. *Caerleon Tinplate Co.* v. *Hughes,* (1891) 60 L.J.O.B. 640=65 L.T. 118. If an agreement to submit it in writing and is binding on both the parties as their ogreement or as the equivalent in law to an agreement between them, it is valid submission within the meaning of the Arbitration Act. It is not further necessary that such written agrement should be signed by the parties. *Radha Kanta* v. *Baerlien Brothers,* 32 C.W.N. 1101=56 Cal. 118=A.I.R. 1929 Cal. 97=115 Ind.Cas. 258 ; *Narsidas* v. *Dosa Kalian,* 8 Ind.Cas 925. In the first named case *Rankin. C.J.* observed: "Upon that point the case-law at one time was in some confusion. The first case was the case of *In re E. D. Lewis: Ex parte Miniro,* 45 L.J.Q.B. 816, which was followed apparently in *Caerleon Tinplate Co.* v. *Hughes,* 60 L.J.Q.B. 640. So far authority was in favour of the view that it was necessary that the agreement should be signed by both parties. Apparently in the case of *Ram Narain* v. *Liladhar,* 33 Cal. 1237, *Mr. Justice Woodroffe* assumed that to be the law, though I do not gather that the exact point was relevant to the case before him. In the case of *Sukhmal Bansidhar* v. *Babu Lal Kedia & Co.,* 42 All. 525, that was also assumed to be the law in the judgment of *Mr. Justice Walsh* where he said: 'We agree with the view taken by *Mr. Justice Woodroffe* in *Ram Narain* v. *Liladhor,* 33 Cal. 1237, and with the majority of the English cases on this point particularly *Caerleon Tinplate Co.,* v. *Hughes* (*supra*), that that provision involves a submission signed by both parties or their agents."

"Later in India the view has been laid down by my learned brother *Mr. Justice Page* in *John Batt & Co.,* v. *Kanoolal,* 53 Cal. 65. *Mr. Justice Page* notices certain other English cases. He has noticed the case of *Baker* v. *Yorkshire Fire and Life Assurance Co.,* (1892) 1 Q.B. 144, the case of *Hickman* v. *Kent or Rommary Marsh, etc., Association,* (1915)

Ch. 881, and the case of *Anglo-Newfoundland Development Co.* v. *The King,* (1920) 2 K.B. 214. He says, however, that the cases are to be distinguished on the ground that the plaintiff was estopped from asserting that he had not assented to the arbitration clause.

"In my judgment the law is the other way. The Arbitration Act of 1889, and the Indian Arbitration Act (of 1899) for the best of good reasons have not required that the agreement to submit should be signed by both parties. What has been required is a written agreement to submit and *Baker's case,* (1892) 1 Q.B. 144, *Hickman's case,* (1915) 1 Ch. 881, and the case of *Anglo-Newfoundland Development Co.* v. *The King,* (1920) 2 K.B. 214, show that it is illegitimate to import into the statute the requirements of a signature by both parties". See also, *Mulchand* v. *Radha Kissen,* 90 Ind.Cas. 932=A.I.R. 1926 Sind. 27; *Lyon Lord & Co.,* v. *Champai Umersi,* 49 Ind.Cas. 135=12 S.L.R. 55; *Narsidas* v. *Dosa Kalian,* 8 Ind.Cas. 925=4 S.L.R. 149; *Kishin Das* v. *Munghraj,* 81 Ind.Cas. 834=A.I.R. 1925 Sind 114; *Ram Baksh* v. *Bombay Cotton,* A.I.R. 1931 Bom. 81=128 Ind.Cas. 881; *Shankar Lal Lachman Narain* v. *Jainey Brothers,* 53 All. 384=A.I.R. 1931 All. 136=132 Ind.Cas. 324=(1931) A.L.J. 20; *Keshoram* v. *Kanhayalal,* 44 C.W.N. 607; *Kotumal* v. *Adam Haji,* A.I.R. 1939 Sind 357=(1939) Kar. 769=186 Ind.Cas. 272; *Ponnamma* v. *Marampudi,* 139 Ind.Cas. 355=A.I.R. 1932 Mad. 745=63 M.L.J. 610. *Russell on Arbitration and Award,* 15th Edn., p. 27; *Halsbury's Laws of England,* Vol. I, p. 624 (2nd Edn.). Under clouse (2) of paragraph I of the Second Schedule of the Civil Procedure Code, it has also been held by their Lordships of the Judicial Committee of the Privy Council that where the parties have agreed and applied to the court for a reference, the mere fact of the parties has not signed the application does not vitiate the reference. *Umed Singh* v. *Sobhagmal,* A.I.R. 1915 P.C. 79=43 Cal. 290=43 I.A. 1=14 A.L.J. 97 =18 Bom. L.R. 308=23 C.L.J. 130=20 C.W.N. 137—30 M.L.J. 67—19 M.I.T. 108=(1916) 1 M.W.N. 67=32 Ind.Cas. 161 (P.C.). See also, *Mohammad Solaiman* v. *Mazhar,* A.I.R. 1931 All. 320=(1931) A.L.J. 904 =133 Ind.Cas. 606; *Parbhu Lal* v. *Firm Sheo Dayal,* 84 Ind.Cas. 640; *Gopal Das* v. *Baijnath.* A.I.R. 1926 All. 238=24 A.L.J. 235=91 Ind.Cas. 930=48 All. 239; *Subbayya,* v. *Seshaya,* A.I.R. 1928 Mad. 48. Contra: *J. Leuz* v. *Lal Chand,* 19 Ind.Cas. 925=6 S.L.R. 628; *Firm Sukho Mal* v. *Babulal,* 59 Ind.Cas. 75=18 A.L.J. 652=42 All. 525.

The discussion on the subject is thus concluded by *Russell*: "The weight of authority, therefore, appears to support the view that the arbitration agreement need not be signed by the party charged, unless the contract itself is one which the law requires to be so signed. But the point cannot be looked upon as settled beyond all possible disputes." *Russell,* 18th Edn., p. 28. So it is not necessary that there should be the signatures of both parties to a written submission. A document signed by one party and accepted by the other party is enough for the purpose of the Act. *Ramlal* v. *Husi Bar,* A.I.R. 1934 Cal. 796=61 Cal. 702=38, C.W.N. 737=153 Ind.Cas. 61: *Gulamali* v. *Vishwambar.* 51 Bom. L.R. 79=A.I.R. 1949 Bom. 158. In *Mangal Chand* v. *Pyara Lal,* A.I.R. 1949 East Punj. 199 where *Mahajan, J.* observed: "So far as the English law on the subject is concerned it has been laid down in the following terms in *Halsham Edition of Halsbury's Laws of England* at Page 624 in apra 1072: "The agreement need not, it seems, be

signed by both parties it being sufficient that a party has accepted and acted upon the agreement although he may not have signed it."

"The rules laid down by *Bankers' L.J.* in *Anglo-Newfoundland Development Co.* v. *The King,* (1920) 2 K.B. 214=89 L.J.K.B. 570 seems to hove been accepted by the eminent writers of this book as enunciating a correct proposition.

"The result of the above discussion is that it can be safely said that at the present moment both in England and in India, the law is well settled When Section 2(a) speaks of an agreement in writing all that it means is that the terms of the agreement should be expressed in writing and that the agreement should be such that it binds both the parties and that the actual signatures of both parties on the agreement is not essential. The agreement may be in the form of a signed document by both the parties containing all the terms or a signed document by one party, or it may be an unsigned document containing the terms of a submission to arbitration It is sufficient if one party signs the submission and the other accepts it. The acceptance may be by word of mouth or may be by conduct." "If there is submission clause in a contract, it is not necessary that the contract must be signed by the other party before the other party can be bound by the submission claim ; that party may accept the contract orally or he may accept it by writing.....It would depend upon the circumstances of each case whether the mere delivery of a contract note and the retention of that contract note by the other party does amount to acceptance or not." *Per Chagla, C.J.* in *Gulamali* v. *Vishwambarlal,* A.I.R. 1949 Bom. 158=51 Bom.L.R. 79. Though an agreement must be in writing it need not be signed by the parties. What is necessary is that the term must be reduced to writing and the fact that the parties had agreed to reference must be established. *Government of India* A. I. R. 1960 pat. 19. See *Hans Raj. L. Bishan* v. *Surjit Singh* A.I.R. 1963 Punj. 252 (what constitute arbitration agreement in writing).

106. Signature of both the parties whether necessary.—It is not necessary that there should be the signature of both the parties to a written submission. A document signed by the party and accepted by the other party is enough for the purposes of the Act. *Ramlal* v. *Haribux,* A.I.R. 1934 Cal. 796 ; see also, *Radha Kanta* v. *Baerlein Brothers,* A.I.R. 1929 Cal 97=117 Ind.Cas. 540=56 Cal. 118 ; *Sankar* v. *Jaini,* A.I.A. 1931 All. 136=132 Ind.Cas. 324=53 All. 384. A written contract means a contract, the terms of which are expressed in writing The terms of the contract must be accepted by both the parties either in writing or orally. *Jubilee Chamber* v. *Lala,* A.I.R. 1940 Lah. 180=42 P.L.R. 48 ; sse also *Lewis* v. *Jibatlal,* A.I.R. 1947 Bom. 65=I.L.R. (1946) Bom. 777 ; *Johan Bate & Co.* v. *Kanoolol,* 53 Cal. 65=A.I.R. 1926 Cal. 938 ; *Bakar* v. *Yorkshire* (1892) 1 Q.B. 144=61 L.J.Q.B. 838. In *Kadha Kanta Das* v. *Baerlin Bros. Ltd.,* 56 Cal. 117=A.I.R. 1929 Cal. 97 *Rankin, C.J.* held that the Arbitration Act does not require that an agreement to submit should be signed by both the parties. "The weight of authority appears to support the view that submission need not be signed by the party charged, unless. the contract, itself is one which the law requires to be so signed." *Sarkar* on *Law of Arbitration* (T.L.L.) p. 26. See also the judgment of *Mahajan, J.* in A.I.R. 1949 East Punj. 199 where all the cases have been discussed. A document for submission may be signed by one and accepted by other. *Ramlal* v. *Hari Bun,* 38 C.W.N. 737=A.I.R. 1934 Cal. 796=61 Cal. 702=

154 Ind.Cas. 61. In order to constitute an agreement in writing within the meaning of S. 2(a) it is not necessary that the agreement should be signed by both the parties. All that is necessary is that parties should accept the terms of the agreement. The acceptance may be in writing or by ,conduct or by oral agreement. *Ram Chandra* v. *Howrah Oil* A.I.R. 1958 Cal. 620=62 C.W.N. 773; *Jugal Kishore* v. *Goolbax*, A.I.R. 1955 S.C. 812=(1957) 2 S.C.R. 857. In the last named case the Supreme Court has held that it is settled law that to constitute an arbitration agreement in writing it is not necessary that it be signed by the parties, and that it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established. "An arbitrative agreement need not, it seems, be signed by the parties, it being sufficient that a party adopted and acted on the agreement, although he may not have signed it." *Halsbury*, Vol. II. p. 4, 3rd Edn., citing *Banker* v. *Yorkshire Fire* (1892) 1 Q.B. 144; *Hickman* v. *Kent*, (1915) 1 Ch. 881 (901, 903); *Anglo-Newfoundland* v. *R.*, (1920) 2 K.B. 214. A reference to arbitration between an individual and a Corporation under the hand of the former and the common seal of the latter is valid. *Tombri* v. *Fordwich*, (1836) 5 A.E.E. 147=5 L.J.K.B. 209.

107. Agreement must be in writing—object of.—"In giving judgment. [in *Ex parte Munro: In re Lewis*, (1876) 45 L.J.Q.B. 816=1 Q.B.O. 724=35 L.T. 857], *Lord Coleridge, Chief Justice*, stated it as his opinion that the 4th section intended that the agreement must be an agreement in writing by both parties, that is, both parties must give in writing what is the agreement they have come to. The object of the Act was to prevent parties contradicting each otder as to what was agreed and understood, by requiring that the terms agreed to should be ascertained in a writing, to which the signatures of both parties should be attached." *J. Leuz* v. *Lal Chand*, 19 Ind.Cas. 925=6 S.L.R. 628; see also *John* v. *Kanoolal*, A.I.R. 1926 Cal. 938=53 Cal. 65. But in the previous topic we have stated that according to the majority of the cases no signature is required to be put.

108. Written agreement—fulfilment of the condition when it can be collected from several documents.—In *Shankar Lal Lachman Narain* v. *Jatney Brothers*, A.I.R. 1931 All. 136=53 All. 384=132 Ind.Cas. 324. *Young, J.* observed. "Section 4(b), Arbitration Act, enacts that a 'submission' means a written agreement to submit present or future differences to arbitration. There must, therefore, be an agreement in writing between the parties. It was urged by the appellants that a 'written agreement' means that each party must sign the document which contains the submission to arbitration, and that as the letter of the 10th December 1923, did not refer in specific terms to the clause relating to arbitration, in law this could not amount to an agreement in writing. It is clear on the authorities both in England and in India that the terms of a written agreement may be collected from a series of documents, and a 'written agreement' does not mean that each party has to sign a document containing the terms. The plain acceptance of a document containing all the terms is sufficient.....All that is required is that both parties accept a written document as containing the agreed terms: it might be in the form of a signed document by both parties containing all the terms, or a signed document by one party containing the terms and a plain acceptance either signed or orally accepted by the other party or, in the third case, an unsigned document containing the terms of the submission to

arbitration agreed to orally by both parties. A written contract does not mean a contract which is proved by documentary evidence, but one in which the terms are expressed in writing in the act of making it." No special form of written agreement is required. *Utoomal* v. *Haridas,* 7 Ind.Cas. 596=4 S.L.R. 26. See also, *Kotumal* v. *Adam,* I.L.R. 1939 Kar. 769=A.I.R. 1939 Sind 357. See also *Bansidhar* v. *Babu Lal* 42 All. 525=A.I.R. 1920 All. 258; *Caerleon* v. *Hughes,* (1891) 60 L.J.Q.B. 640; *Firm Narain Das* v. *Bhagwan Das,* A.I.R. 1951, All. 860. Such agreement may be found in correspondence consisting a number of letters. *Tomlin* v. *Fordwich,* (1836) 5 A.E.E. 147=5 L.J.KB. 209; *Frank* v. *Karsan,* (1949) 82 L.I.L. Rep. 673; *Aitken* v. *Batchere,* (1893) 62 L.J.Q.B. 193. The language of Section 2(a) does not even mention an application. It only requires an agreement in writing. So where a statement in Court by counsel recorded upon a Court *rub-kar* signed by the parties in the presence of the Court a reference is made, it is a valid reference to arbitration. *Yakub Khan* v. *Sirajul,* 1949 A.L.G. 288=A.I.R. 1949 All. 771=1949 A.W.R. 342. "Two trading firms were in the habit of contracting by cable for the sale of goods. The custom was for the buyers to send to the sellers, after the deal been concluded by cable, a numbered contract form, with printed terms including an arbitration clause and having a printed form of acceptance (to be signed by the sellers) attached to it. After such a deal had been concluded by cable, the buyers sent the usual form to sellers, who did not complete the form of acceptance but did refer to the contract by number in subsequent cables which impliedly acknowledge its existence. The Court of Appeal held the contention that there was no "submission" within the Act to be "unarguable". *Frank Fehr & Co.* v. *Kasam Jivraj,* (1949) 82 L.I.L.R.Rep. 673 cited in *Russell,* 15th Edn., p. 25.

109. Illustration.—A clause providing for the reference of any dispute to arbitration, contained in a contract effected by means of bought and sold notes, indentical in their terms and signed by the respective parties or their agents, constitutes a submission within the meaning of S. 4 of the Indian Adbitration of IX of 1899. *Ram Narain v. Liladhar,* 33 Cal. 1237.

110. Decision by third parties.—An arbitration agreement sets up a private tribunal of the parties. The tribunal must consist of persons appointed as arbitrators. Outsiders who had never been appointed as arbitrators cannot give a decision which will be binding on the parties. *Lachhuman* v. *Markar,* A.I.R. 1954 Pat. 27.

111. Agreement of reference bad for uncertainty and indefiniteness.—Where parties are not *ad idem* about dispute to be decided by the arbitrations, there is no valid arbitration agreement. And if the agreement of reference is bad for indefiniteness and uncertainy as to the exact dispute refereed to arbitration, the award is bad. The award on the basis of an invalid reference is a nullity and can be challenged in an appropriate proceeding. *Sheodatt* v. *Pandit Vishnudatt,* A.I.R. 1955 Nag. 116=I.L.R. (1955) Nag. 224=1955 Nag.L.J. 258. But where parties to arbitration are major or minor arbitration is not void. *Firm Kapur* v. *Raj Kumar,* A.I.R. 1955 Punj. 235. Where the matters in dispute were referred to arbitration of three named persons, two of whom were described as arbitrators and the third as an umpire, but the position of the umpire was so vague as to leave it open to him to act either as an umpire or

as an arbitrator or a *sar-hand* at his sweet will, held that such a reference could not be regarded in law as proper and was invalid. *Chouthmal* v. *Ramchandra,* I.L.R. (1955) Nag. 100=A.I.R. 1955 Nag. 126. An arbitration agreement stands on the same footing as any other agreement. It is binding upon the parties unless it is tainted with fraud, coercion, undue influence, etc. in which case it can be avoided like any other agreement. Once there is valid reference to arbitration, the parities cannot recede from it merely because the arbitrators have allowed their time to expire without making an award or that they have neglected or refused to act. *Sonelal* v. *Lalta Prasad,* A.I.R. 1955 M.B. 91=I.L.R. (1954) Madh. B. 31.

Recission of a contract, whether written or parol, need not be express. It may be implied, and it will be implied legitimately, where the parties have entered into a new contract entirely or to an extent going to the very root of the first inconsistent with it. *Jugghal* v. *N. U. International,* 58 C.W.N. 730=A.I.R. 1955 Cal. 65

112. Incorporation of arbitration agreement.—If the agreement is written it may be in a particular contract by reference or implication. The agreement between the parties may incorporate the provisions for arbitration which are set out in some other document. *Temperley Steam Shipping Co.* v. *Smyth & Co.,* (1925) 2 K.B. 791 (C.A.). But in order to be binding the provisions for arbitration must have been brought to the notice of both parties (*M'Connell and Reid* v. *Smith,* (1911) S.C. 635). Where a written agreement contained an arbitration clause, but incorporated in the printed agreement sponsored by a trade association itself containing another and inconsistent arbitration clause, the written clause was held to prevail (*Central Meat Products Co. Ltd.*) v. *McDaniel* (F.V.) *Ltd.,* (1952) 1 Lloyd's Pep. 562. But the contdactual force given to articles of association is limited to such provisions of the articles as apply to the relationship of the members in their capacity as members. (*Halsbury's Laws of England,* 3rd Edn., Vol. 2 § 7).

113. Articles of Association containing arbitration clause.—The plaintiff in 1905 sent in a written application for membership in the defendant company, which was registered as an association not for profit, engaging when elected to conform to the rules and regulations. He was duly elected and notice of his election was sent to him by the Secretary. In December 1914, the plaintiff brought an action against the company to enforce his rights under the articles, one of which provided for differences between the members and the company as to claims on account of any breach of the articles or relating to any of the affairs of the company to arbitration. The company having issued a summons to stay proceedings under S. 4 of the English Arbitration Act of 1889—it was held that the article, being an article regulating the rights and obligations of the members generally as such, created rights and obligations between the members and the company respectively, and should be treated as a statutory agreement between themselves *inter se* and constituted a submission to arbitration within the meaning of the Arbitration Act, 1889. See also *Baker* v. *Yorkshire Fire and Life Assurance Co.* (1891) 61 L.J.Q.B. 838=(1892) 1 Q.B. 144. In the above case it was also held that the application form of membership, signed by the plaintiff and accepted by the company, constituted a contract between the plaintiff and the company, and was a submission in writing within the meaning of the Arbitration Act, 1889. *Willes Ford* v. *Watson,* (1873) I.R. 14 Eq. 572 ; See also

Hickman v. *Kent,* (1915) 1 Ch. 881=84 L.J.Ch. 688. In the concluding para of the above case where all the earlier relevant cases were discussed *Astbury, J.* said: "In my judgment the contract so made between the plaintiff and the association is also a submission in writing within the true meaning and intent of the Arbitration Act."

114. Arbitration clause in a contract.—An arbitration clause in a contract amounts to a 'submission' within the meaning of S. 4 of the Indian Arbitration Act, 1899, and is valid, being covered by exception (1) to Section 28 of the Contract Act. *Ganges Manufacturing Co.* v. *Indra Chand,* 33 Cal. 1169.

115. Indent form, etc.—The indent form contained an Arbitration clause and clauses determining the rights and liabilities of M. and ended as follows:—"That the provisions made in this padt shall in no way affect the relation between us as between principal and principals and shall in no way affect any of the terms herein stated." M. telegraphed the effect of the plaintiff's order to B. in Manchester and B. sent certain sale notes to the plaintiff. The sale notes were as follows:—"We are in receipt of your esteemed order sent by M. and have booked the same with thanks as specified hereunder." The plaintiff supplied to B. confirming his (plaintiff's) order sent through M. It was held that the whole indent form signed by the plaintiff in favour of M. was a part of the offer which B. accepted. Consequently the arbitration clause in the indent form was a part of the contract between the plaintiff and *B. Radhakanta* v. *Baerlein Brothers Ltd.,* 32 C.W.N. 1101, see also, *Sukhamal* v. *Babu Lal,* 42 All. 525=18 A.L.J. 652; *Shanker Lal* v. *Jaincy Brothers,* A.I.R. 1931 All. 136= 53 All. 384=132 Ind.Cas. 324=1931 A.L.J. 20. In the above-mentioned case the Court observed. "It is clear on the authorities both in England and in India that the terms of a written agreement may be collected from a series of documents". In *Lobitos Oil Fields Ltd.* v. *Admiralty Commissioners,* (1917) W.N. 227=86 L.J.K.B. 1444=117 L.T. 28 the Court held the correspondence to amount to a submission. In the above-named case *Bray J.* said: "There was no formal agreement, but there was correspondence between the claimants and the Admiralty.....it seems to me that the passing between the claimants and the Director of Transport, do contain, a written agreement to submit the matters in dispute to arbitration."

116. Agreement reference of dispute regarding contract of arbitration.—Where an arbitration clause in a contract provided that if the interpretation or application of the contract any difference of opinion in regard to the application of the contract must in the context mean the working out of the contract or giving effect to its terms. The words 'interpretation or application of the contract' are frequently used in the arbitration agreement and they generally cover disputes between the parties in regard to the construction of the relevant terms of the contract as well as their effect, and unless the contract compels a contrary construction, a dispute in regard to the working of the contract would generally fall within the clause in question. The word 'application of the contract' does not mean only a dispute as to the applicability of the contract. *Printers (Mysore) Private Ltd.* v. *Pothan Joseph* A.I.R. 1960 S.C. 118.

117. Nature of arbitration contract.—A contract appointing arbitrator is a contract *uberrima fide,* and unless there is a complete confidence between the tribunal and the parties, it would be wrong to bind

a party to this contract when there is a probability that injustice would result from doing so. *Gangaram* v. *Sumangal*, A.I.R. 1933 Sind 347 = 147 Ind.Cas. 486. In *Kali Prosanna* v. *Kajani Kanta*, 25 Cal. 141, *Maclean C.J.* said : "In cases of arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appointment, and every disclosure, which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made."

In *Satyendra Kumar* v. *Hind Construction*, A.I.R. 1952 Bom. 227 = 54 Bom.L.R. 37 = B.L.R. 1952 Bom. 121, *Chagla C.J.* observed : "There can be no doubt that an arbitrator must show *uberrima fides* to the parties whose disputes he is going to arbitrate and who have constituted him their domestic forum. In a sense the position of an arbitrator is different from that of a Judge. If a party goes to a Court, he has got to submit to the decision of the Judge. But when a party goes to a domestic forum and want their matters to be determind by arbitration ; they have every choice as to the person whom they should select as their arbitrator, and therefore, it is clear that the highest faith should be shown by the arbitrator. It also follows that the arbitrator must disclose to the parties all facts which are likely or calculated to bias him in any way in favour of one or the other party. A circumstance or a fact may, in fact, not bias or influence the decision of the arbitrator. The arbitrator may have too strong a character, too deep a sense of justice to be influenced by any consideration extraneous to or foreign to the evidence which he has got to consider. But the question is not what is likely, in fact, to happen, but what is likely to tend or is calculated to tend to a particular result. Therefore, if the Court comes to the conclusion that there are any facts or any circumstances which are likely to bias him, it would be incumbent upon the arbitrator to disclose those facts to the parties. If he fails to disclose those facts, then his award would be liable to be successfully challenged". See also *Dinus* v. *Protors* (1852) 2 H.L.Cas. 759, where the decision of the *Lord Chancellor* was successfully attacked on the ground that he was adjudicating in respect of a company in which he is a share-holder and he had failed to disclose the fact that he held the shares in the company. It is the most fundamental principle of justice that a judge or a tribunal should not decide a dispute if there is a probability that he would be biased in the case. *Bhuwalka Bros.* v. *Fatehchand*, 87C.L.J. 71 = A.I.R. 1952 Cal. 294.

An arbitration clause is distinct from other clause. A contract with an arbitration clause rolls as it were, two contract into one. No doubt if the main contract does not exist the arbitration agreement also can not exist. *Damodar Shah* v. *Union of India* A.I.R. 1959 Cal. 529 (1942) 1. All E.R. 337 followed. Where the contract itself is forbidden by law and, as such illegal, the arbitration clause which forms part of the contract is also illegal and void. *Suwala* v. *Clive Mills* A.I.R. 1960 Cal. 90.

118. Arbitration agreement—Parties.—In an agreement to refer dispute with regard to dissolved partnership where minor, who is admitted to the benefit of partnership is a necessary party. Such an agreement may be signed by minor's *de-facto* or *de-jure* guardian on behalf of the

minor, who has no adverse interest against him. *Satyanarain* v. *Jugal,* A.I.R. 1958 All. 512.

119. Arbitration agreement—Effect on right to sue.—Plaintiff and defendant were members of Bombay Bullion Association. The plaintiff brought a suit for recovery of a sum due to him in respect of forward transactions of a bullion that took place between him and the dependant. Bye-law 38 of the Association provided as follows: "In connection with ready or forward transactions between the members of the company or between members and non-members of the company, in gold, silver and sovereigns, done in accordance with the rules and bye-laws of the Association, or whether a ready or forward transaction in gold, silver and sovereigns has been entered into or not, all the claims or disputes or differences of opinion of any sort arising out of the contracts in respect thereof shall be settled by reference to arbitration.

The bye-law also provided that "only after obtaining an award from the arbitrators in this manner, any party can go to a court of law in order to obtain relief in respect of the said transactions."

Held that (1) bye-law No. 38 amounted in law to an agreement in writing to refer dispute between persons governed by the bye-law to arbitration with the meaning of s. 2(a), Arbitration Act. Hence the claim in suit must be resolved by the domestic tribunal contemplated by the bye-law and a suit in respect of it was not maintainable. *Prataprai* v. *Sheonarain,* A.I.R. 1956 Bom. 97 ; A.I.R. 1947 Bom. 268. (1) Even if it be assumed that the latter portion of the bye-law is invalid, that portion being separate from the rest of the bye-law it could not affect the question of jurisdiction. If there is an arbitration agreement in writing reciting in the rest of the bye-law 38, then the jurisdiction of the Civil Court to entertain the suit is clearly barred ; the domestic tribunal alone can deal with the dispute. *Prataprai* v. *Sheo Narain,* A.I.R. 1956 Bom. 97 ; A.I.R. 1942 Bom. 297.

120. Duties of an arbitrator.—An arbitrator must be a person who stands indifferent between the parties, and has no interest direct or remote in the subject-matter of the controvers) or in the parties. *Re Sanual,* (1848) 10 L.T. (O.G.) 464. *Vide* notes under Section 30.

121. Whether arbitrator should decide according to law.—An award of an arbitrator is final both in fact and law. But where an arbitrator's decision is erroneous on the fact of the award it cannot stand. *Sreela* v. *Madan,* 52 Cal. 100=88 Ind.Cas. 49=A.I.R. 1925 Cal. 399 ; see also A.I.R. 1925 Sind. 186. Award must not exceed submission in substance or in form. *Mohamad Ali* v. *Charat Singh,* A.I.R. 1925 Sind. 51. For further discussion, *vide* notes under Section 30. In *Haigh* v. *Haigh,* (1861) 5 L.T. 507=31 L.J.Ch. 420==3 Deg. K. & J. 157, *Turner L.J.,* obseryed: "The arbitrator being a judge selected by the parties and chosen to decide without appeal, this Court has nothing to do with any mere error in judgment in his part. The parties have chosen him to be their judge and have agreed to abide by his determination, and by that determination, if fairly and properly made, they must be bound ; but on the other hand, arbitrators, like other judges, are bound, when they are not expressly absolved from so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice."

In *Andrew* v. *Mitchell,* (1905) A.C. 78 (80)=74 L.J.K.B. 333=91 L.T. 537, *Lord Halsbury L. C.* said: "I feel the force of what *Mr.*

Lawrence said, namely, that we must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions. I should be anxious myself, and I have no doubt all your Lordships would, to give every effect to these decisions; on the other hand there are some principles of justice which it is impossible to disregard, and, giving every credit to the desire on the part of this arbitration Court to do justice, I think it is manifest that they proceeded far too pastely in this case, and apart from imputing to them any prejudice or any desire to do wrong, I think that the mode in which the whole thing arose and disposed of was so slipshod and irregular that it might lead to injustice." The arbitrators are to act according to the rules of natural justice. *Russell* 15th Edn. p. 106. The first principle is that the arbitrator must act fairly to both parties, and in the proceeding throughout the reference must not favour one party more than another or do anything for one party which he does not do or offer to do for the other. He must observe in this ordinary well-understood rules for the administration of justice. *Russell* 15th Edn. p. 106.

122. Interest in party and subject-matter.—There is undoubtedly a duty cast upon an arbitrator to disclose material facts which might reasonably be held to have prevented any of the parties to the arbitration agreeing to his appointment as arbitrator. If he fails to disclose those facts then the arbitrator is guilty of misconduct. *Jagrup* v. *Kashi*, A.I.R. 1934 All. 658=(1934) A.L.J. 694=148 Ind.Cas. 1169. Once an arbitrator is appointed by a party and he undertakes to discharge his duty as such, he becomes a judge in that case and he is bound to act impartially and with scrupulous regard to the ends of justice. An arbitrator who tries to further the interest of the party nominating him in utter disregard of propriety is guilty of grossly improper conduct. *Gajanand* v. *Phulchand*, A.I.R. 1930 All. 675=(1930) A.L.J. 1373=131 Ind.Cas. 552. Unless the parties have agreed, with full knowledge of the position to accept the decision of a person whose position with regard to them or to the matters referred to him is otherwise, they are entitled to expect from an arbitrator complete impartially and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide, and they are entitled to expect from him, a faithful, honest and disinterested decision. It follows that personal misconduct or any personal interest which will tend to bias an arbitrator's mind which was unknown to either of the parties at the time when the dispute was agreed to be referred, will unfit a person to act as an arbitrator. An interest of which the parties at the date of his appointment were fully aware, will not disqualify him; nor will the fact that he stands in a particular relationship to the parties or to the matters in dispute, if it can be said that the parties selected him with the full knowledge that this was or must be so. *Russell* 15th Edn. p. 101. This preconceived views can be proved from the remarks of the arbitrators. *Catalina* v. *Norma*, (1938) 16 L.I.L. Rep. 360—see *Ibid*. Where reference is made to the engineer of one of the parties with full knowledge, the contractors cannot object on the ground that the engineer is an interested party with a bias. *Crawford* v. *Northern Light House*, (1925) S.C. (H.L.) 22.

123. Arbitrator is confined to terms of submission.—An arbitratator, acting in a written submission must confine himself to the terms

of the submission and nonetheless so, because he may think that possibly the submission ought to have gone further than it does go, and that it may have been a mistake on the part of the parties to limit it in the manner in which it has been limited. *Brijlal* v. *Gobindaram,* A.I.R. 1943 Bom. 201=45 Bom.L.R. 358=I.L.R. (1943) Bom. 366=209 Ind.Cas. 50. An arbitrator cannot abdicate his functions in favour of third party. *Sheokaran* v. *Kanhaya,* A.I.R. 1935 Lah. 113=37 P.L.R. 18=152 Ind.Cas. 1023. Where in a deed of partnership provides for arbitration in respect of all disputes in connection with the partnership or the partnership deed, whether during or after partnership, and a difference has arisen between the partners as to whether rights and liabilities under the partnership deed have come to an end by "efflux" or time or not and whether one of them is discharged from complying with the terms of arbitration agreement or not these disputes should be considered to arise in connection with the partnership or partnership deed particularly when one side is asserting discharge under Art. 106, Iimitation Act, and the other party is denying it. *Brahm Nath* v. *Dhani Ram,* A.I.R. 1956 Punj. 125. An agreement to refer disputes to A or B is invalid. The clause is vague and uncertain. *Delhi Housing* v. *Brij Mohan,* A.I.R. 1956 Punj. 205; *Lakshmi* v. *Krishna,* A.I.R. 1955 Cal. 588. An agreement to refer either to X or to agreement to a named arbitrator because it is not certain who the arbitrator is. But an agreement between A and B to refer the disputes to the arbitration of X or at the option of A to Y is certain because the agreement itself shows who is to have the option, A.I.R. 1955 Cal. 588; A.I.R. 1924 Cal 524; A.I.R. 1924 Cal. 828; A.I.R. 1959 Cal. 430. An arbitration clause in a fire insurance policy that if any difference arises as to the amount of any loss or damage such difference shall independently of all other questions, be referred to the decision of arbitrators, no doubt invests the arbitrators with jurisdiction only to decide the question of loss or damage and nothing more. But the words "independently of all other questions" in the Arbitration clause indicate that although there was a special stipulation in the insurance policy itself that the amount of loss or damage was alone to be the subject of arbitration, that does not deter the parties from submitting to the jurisdiction of the Arbitrators the other question of the liability to pay the amount and who should pay to whom. *N. F. Insce. Co.* v. *Union of India,* A.I.R. 1956 Cal. 11. In a contract the arbitrators are empowered to decide "validity," "construction" or "execution" of a contract. The word 'execution' in the arbitration clause means in the content the entire range of performance and enforcement of the agreement. Enforcement of an agreement would raise question of limitation. The word "validity" would also include the question of limitation because a claim barred by limitation is no longer valid. *Mury* v. *Khailan,* A.I.R. 1956 Cal. 644.

124. Arbitration—agreement—Second reference.—Where the words of agreement are wide enough to cover all disputes concerning the relevant transaction or contract there can obviously be successive reference under its authority regarding different disputes and even in a case where a fresh dispute arises as to the import or effect of the award made a reference of the original dispute, a second reference regarding that dispute can be made. *Baranagar Jute* v. *Hulaschand,* A.I.R. 1958 Cal. 490=62 C.W.N. 734.

125. Optional agreement.—Agreement which gives an option to one of the parties thereto to make a reference to arbitration does not

amount to a submission. *Burjor* v. *Ellerman*, 89 Ind.Cas. 866=27 Bom. L.R. 1098=A.I.R. 1925 Bom. 449=49 Bom. 854; *Marttimma* v. *Burjor*, 54 Bom. 278=A.I.R. 1930 Bom. 185=124 Ind.Cas. 797. But see *Mulchand* v *Radha Kishen*, 90 Ind.Cas. 932=A.I.R. 1926 Sind 27, and *Bulchand* v. *Shambordas*, 118 Ind.Cas. 220=A.I.R. 1929 Sind 83; *Woodal* v. *Pearl Assurance* (1919) 1 K.B. 593 (611)=88 L.J.K.B. 706.

126. Contract referring to another document containing arbitration clause.—When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principles has beeen extended to cases where the contract does not actually contain the terms but a reference is made to another document of contract where those terms are to be found. The reason for holding that those terms must be taken to have been incorporated by reference in their signed agreement is that it was possible for any of them to look into that document and ascertain the terms. This applies as much to an arbitration agreement as to other agreements. Before holding that the parties have agreed in writing to refer their dispute to arbitration and in the absence of such a clause in the agreement actually signed by the parties. there must be at least a specific contract or document containing such a clause in respect of which it might be said that it had been incorporated in the agreement of the parties by reference. *Nagapotha* v. *Balabhadra*, A.I.R. 1954 Mad. 71; see also *Ramadayal* v. *Chandra*, A.I.R. 1951 Mad. 843=(1951) 2 Mad.L.J. 49; *Dwarkadas* v. *Daluram*, A.I.R. 1951 Cal. 10.

The agreement may arise by the incorporation of one document containing an arbitration clause in another under which dispute arises. *Clemants* v. *Devon Insurance*, (1918) I.K.B. 94=87 L.J.K.B. 203; *Russell* 15th Edn. p. 26; see also *Temperley Steam* v. *Smyth*, (1905) 2 K.B. 791, *The Portsmouth*, (1912) A.C. 1=81 L.J.P.C. 17. In the last named case *Lord Atkinson* said: "I concur in the judgment of my noble and learned friend in the woolsack. I think it would be a sound rule of construction to adopt that when it is sought to introduce into a document like a bill of lading—a negotiable instrument—a clause such as this arbitration clause, not germane to the receipt, carriage, or delivery of the cargo, or the payment of freight—the proper subject-matters with which the bill of lading is conversant—this should be done by distinct and specific words, and not by such general words as those written in the margin of the bill of lading". In the same case *Lord Chancellor, Earl Loreburn* said: "I am of opinion that the Court of Appeal rightly relied upon the decision in *Hamilton* v. *Mackie*, 5 T.L.R. 677 that, if it is desired to put upon the holders of a bill of lading an obligation to arbitration because that obligation is stated in the charter party, it must be done explicity". This case of *Hamilton* v. *Mackie*, *supra*, decided that the words "all other terms and conditions as per charter party" had not the effect of bringing the arbitration clause in the bill of lading. See also *London Sack and Bag* v. *Dixon*, (1943) 2 All. 763=170 L.T. 70.

An arbitration clause in a fire insurance policy was: If any difference arise as to the amount of any loss or damage such difference shall independently of all other question be referred to the decision of an arbitrator, to be appointed by the parties in difference.....And it is hereby expressly stipulated that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage if dispute shall be first obtained.

Held that where the Insurance Company was not in a position either to deny the loss or admit it, the dispute between the parties was as to the amount of loss or damage within the arbitration clause. *Great American Insurance Co.* v. *Bodh Raj,* A.I.R. 1953 Punj. 50. In *Baker* v. *Yorkshire Insurance,* (1892) 1 Q.B. 144 the insurance policy had an arbitration clause but was not signed by the assured. The question was whether it amounted to a valid arbitration; *Coleridge C.J.* said: "The plaintiff sues on the policy and by so suing affirms it to be his contract."

127. Present and future difference.—In *Dawood Bhai* v. *Abdul Kader,* A.I.R. 1931 Bom. 164=33 Bom.L.R. 51=130 Ind.Cas. 588, *Wadia J.,* observed: "The existence of a difference or dispute is an essential condition for the arbitrator's jurisdiction: See also the case of *Uttam Chand Saligram* v. *Jewa Mamooji,* 46 Cal. 534=54 Ind.Cas 285. If there is no dispute there can be no right to demand arbitration. The Court must, therefore, be satisfied that there is some real point of difference which has to be submitted to arbitration." See also *Dipchand* v. *Sahibdina,* 5 S.L.R. 92=12 Ind.Cas. 639; *L. & N. W. and G. W. Joint Ry. Co.* v. *J H. Beilington Ltd.,* (1899) A.C. 79=68 L.J.Q.B. 162=79 L.T. 503=15 T.L.R. 97; *Velchand* v. *Lister,* 38 Bom. 638=25 Ind.Cas. 371, *Khusiram* v. *Mathura Das,* 52 M.W.N. 826. A dispute implies an assertion of a right by one party and repudiation thereof by another. *Dawood Bhai* v. *Abdul, supra.* There must be a point of difference or dispute between the parties for the decision of the arbitrator and it is not enough to state what the point of dispute or difference is after the suit has been filed. *Ibid.* See also *Field* v. *Long Cleon,* (1902) 1 K.B. 47; *Machnaghten* v. *Rameswar,* 30 Cal. 831; *Uttam Chand* v. *Mahomed,* 23 C.W.N. 704=46 Cal. 534=54 Ind.Cas. 285. Any question on which the parties join issue, whether the court can legally enquire into it, is a dispute within the meaning of this section. *T. Wang* v. *Sona Wangdi,* 87 Ind.Cas. 633=52 Cal. 559=29 C.W.N. 886=12 C.L.J. 26=A.I.R. 1925 Cal. 812. A dispute before an arbitrator is analogous to a cause to of action before a civil court. *Dipchand* v. *Sahibdina,* 5 S.L.R. 92=12 Ind.Cas. 639.

In *Chandmull* v. *Nippon,* 61 Ind.Cas. 798=33 C.L.J. 545, *Mookerjee J.* observed: "Now dispute implies an assertion of a right by one party and a repudiation thereof by another." A mere failure to pay an admitted debt is not necessarily a difference. *Dawood Bhai* v. *Abdul,* A.I.R. 1931 Bom. 164; *Basiro* v. *Mahomed,* 24 Ind.Cas. 264. Section 145, Cr.P.C. does not contemplate that the question as to who is in actual possession should be referred even with the consent of heirs to an arbitrator *Ahmedullah* v. *Srinivas,* A.I.R. 1941 All. 42=(1940) A.L.J. 758=42 Cr.L.J. 246=192 Ind.Cas. 16. A court has no power to refer to arbitration any question other than those in issue in the suit. *Bhagirath* v. *Sankar Lal,* A.I.R. 1951 M.B. 111. Where by an agreement the parties to a contract for sale of goods refer to arbitration all their disputes in respect of that contract including the question whether the buyer is entitled to reject the goods on account of inferiority of quality, an award by the arbitrator is that the goods should be accepted and paid for by the buyers at the contract rate subject to certain allowance is not without jurisdiction. *Modi Bros.* v. *Mahabir,* 52 C.W.N. 168. Where parties set out specifically what disputes have arisen and what relief is sought in consequence of the alleged default by one party they are the only matters upon which the arbitrator is required to enquire and adjudicate. *Fateh Chand* v. *Debi Dutt,* 52 C.W.N. 635. Where making an order for payment of damage does not come within the scope of reference, such an order is passed by

arbitrator without jurisdiction and is liable to be set aside. *Ibid.* A court has no power to refer to arbitration any questions other than those in question in the suit as such a reference if made would be *ultra vires*. *Bhagirath* v. *Shankar Lal,* 5 D.L.R. (M.B.) 10. The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. A dispute implies an assertion of right by one party and repudiation thereof by another. If there is no dispute there can be no right to demand arbitration at all. A point as to which there is no dispute cannot to referred to arbitration. In order to make out the jurisdiction of the tribunal of arbitrtion, it must be shown that the subject-matter of the reference was some dispute between the parties and that the particular dispute had arisen actually before the matter went before the arbitrators. *Mathura Das* v. *Khusiram,* 53 C.W.N. 873. See also, *Khusiram* v. *Hamutmal,* 53 C.W.N. 505. *Russell* at page 332 of his 12th Edition says : "One of the elements of an agreement to refer to arbitration, or of a submission to arbitration is that the subject-matter to be decided must be a dispute, and the element must exist whether at common law, or under the Arbitration Act." In *London and N. W. Ry.* v. *Bellington* (1899) A.C. 79, *Lord Halsbury L.C.* said : "To my mind, as I have said, the condition precedent to this case coming before us is that there should have been a difference existing before a plaint was issued in the Country Court to recover for those services'. Where the very factum or existence of the contract (containing clause for arbitration) is denied, there is no dispute arising out or in relation to them which could be referred to arbitration and the arbitrators have no jurisdiction to decide whether in fact the contract were or were not entered into *Mahomed Haji* v. *Piroj Shaw,* 138 Ind.Cas. 337=34 Bom.L.R. 697=A.I.R. 1932 Bom. 341 ; *Hormusji* v. *District Local Board,* 28 S.L.R. 223=A.I.R. 1934 Sind. 200 ; *Fazalally* v. *Khimji,* 36 Bom.L.R. 1005=A.I.R. 1934 Bom. 476 ; *Katumal* v. *Adam Haji,* I.L.R. 1939 Kas. 769=A.I.R. 1939 Sind. 357 ; *Guardian Assurance* v. *Shiva Mangal,* I.L.R. 1937 All 234=(1937) A.L.J. 98=A.I.R. 1937 All. 208 ; *Brindaban* v. *Bisheshwar,* I.L.R. (1937) 1 Cal. 606.

128. Arbitration clause—Dispute under or arising out of contract.—Where a party has to have recourse to the contract to establish his case, it is a dispute under the contract. *A. M. Mir* v. *Gordhandas,* A.I.R. 1951 S.C. 9=87 C.L.J. 123=6 D.L.R. (S.C.) 84=1951 A.L.J. (S.C.) 124=1951 S.C.J. 1 (S.C.). In that case *Fazl Ali and Patanjali Sastri J.J.* said : "The principal dispute raised in this case was whether the extension of time for delivery was granted within the time limited in the contract. That dispute is certainly covered by the arbitration clause..... If that is the position, such a dispute, the determination of which turns upon the true construction of the contract, would also seem to be a dispute, under or arising out of or concerning the contract. In a passage quoted in *Heyman* v. *Darwins Ltd.* (1942) A.C. 356, *Lord Dunedin* propounds the test thus : 'If a party has to have recourse to the contract, that dispute is a dispute under the contract'. Here, the respondents must have recourse to the contract to establish their case and, therefore, it is a dispute under the contract."

129. Rules of body referred as arbitrator.—As the rules of a body to which the agreement of arbitration is referred to by the parties should be deemed to have incorporated in the contract by virtue of the agreement of parties it has necessarily to be held that on a matter of procedure the relevant factors should be the rule as existing at the time of the reference

and not at the genesis of the contract. *Husian Kasam* v. *Vidyanagaram,* (1954) 1 M.L.J. 27=A.I.R. 1954 Mad. 528; 33 Cal. 1237: See also *Sriram* v. *Cotton Seed,* I.L.R. (1954) Nag 126=1954 Nag. L.J. 262=A.I.R. 1954 Nag. 236; *Bhiwimdiwala* v. *Lakshmandas,* A.I.R. 1954 All. 750; *Huseim* v. *Kasardeo,* 92 C.L.J. 224=A.I.R. 1954 Call. III (as regards the interpretation of Rule 7 of the Bengal Chambers of Commerce).

Where any adaptotions are made in a printed form of a contract for the purposes of a particular contract, they must have been deliberately made and if a good an intelligible reason can be found for the use of a certain expression, it will not be right to discard that expression as a surplusage instead of giving it is meaning which it may appropriately bear in the contract of the facts. *Bharat Construction* v. *Union of India,* A.I.R. 1954 Cal. 606.

130. Disputes and differences, meaning of.—The phrase 'all disputes arising of a contract does not cover dispute as to whether contract was entered into at all, or whether it was void *ad initio* or whether it sets out the true intention of the parties. But if the parties are agreed that a binding contract was made, and it is necessary to have recourse to the contract to settle the dispute that has arisen, then it is a dispute arising out of the contract. *Heyman* v. *Darwin,* (1942) A.C.=356 (1942) 1 All.E.R. 337=111 L.J.K.B. 241=166 L.T. 306. The dispute or difference which the parties to an arbitration agreement agree to refer must be of a justiciable issue triable civilly. A fair test is whether the difference can be compromised lawfully by way of accord and satisfaction. Thus an indictment for an offence of a public nature cannot be the subject of an arbitration agreement nor can disputes arising under agreements void under the Gaming Act 1845. Equally disputes leading to a change of status as a petition for divorce cannot be referred, nor, it seems, can any agreement purporting to give an arbitrator the right to give a judgment *in rem.* Similarly there is no dispute within the meaning of an agreement to refer disputes where there is no controversy in being as when a party admits liability he fails to pay or when a cause of action has disappeared owing to the application, where it now continues to apply, of the *maxim actio personalis mortiar cum persona* Halsbury's Laws of England, 3rd Ed. vol. 2 § 10. A dispute as to whether there had been a contract at all, cannot be a dispute arising out of or concerning a contract and, therefore, for an agreement to refer to such a dispute the language of the arbitration clause cannot be appropriated. *Albion Jute* v. *Jute and Gunny Brokers,* A.I.R. 1953 Cal. 458; but see *Produce Brokers* v. *Olympia.* (1916) A.C. 314=85 L.J.K.B. 160. In the case *Earl Loreburn* said: "With all respects, it seems to me that a court plainly usurps the function of an arbitrator when it claims a right to decide that issue for itself on a submission such as we find here." See also observation of *Lord Wright* in *Heyman* v. *Darwins, supra. Kruse* v. *Questier & Co. Ltd.,* [1953] 1 All. E.R. 954, not applying *Hirji Mulji* v. *Cheong Yue.* But the Judicial Committee of the Privy Council in *Hirji Mulji* v. *Cheong* (1926) A.C. 365=85 L.J.P.C. 121, held that if the objects of the contract which contain an arbitration clause are completely frustrated by causes beyond the control of the contracting parties the arbitration clause comes to an end, and arbitrator has no jurisdiction to deal with any question which may be raised, although neither party exercised any power of cancelling the contract under a clause contained. It is well settled that in India, in case of conflict between the decisions of House of Lords and those of Privy Council, the court should follow the decisions of the Privy

Council. A.I.R. 1946 Lah. 116 (123) F.B. The rule is the same even after independence. Vide Article 225 of the constitution which preserves the authority of the Privy Council cases decided by 26-1-50. The English law on the subject is however different. The fact that a contract is frustrated does not in itself determine every possible operation of an arbitration clause refering to arbitration disputes arising out of the contract; for example, one party may not agree that there has been frustration and a difference on the issue would be within an appropriate arbitration clauses whether the contract is partly executed or wholly executory is immaterial. *Halsbury, Laws of England,* 3rd Ed., Vol. 2 § 42.

Phrases "all disputes" or "all claims" by itself is wider than "all disputes arising out of the contract". *Russell,* 15th Edn. 39; see *Re Hohenzo Meru etc.* (1886) 54 L.T. 596. A clause providing for arbitration "if the customers make any claim upon or counter claim to any claim made by the contract" was held by the Court of Appeal to cover claims framed in tort when connected with transaction, which is the subject of contract. *Woolf* v. *Collins,* (1948) 1 K.B. 11=(1947) 2 All. E.R. 260. The court in that case observed: "It speaks simply of 'claims'. This, of course, does not mean that the term applies to claims of every imaginable kind. Claims which are entirely unrelated to the transaction covered by the contract would no doubt be excluded; but we are of opinion that, even if the claim in negligence is not a claim 'under the contract', yet there is a sufficiently close connection between that claim and that transaction to bring the claim within the arbitration clause, even though technically framed in tort." See also *Re Polimis and Furness & Co. Ltd.,* (1921) 2 K.B. 560, where a similar interpretation was given to an agreement to refer "all disputes" between parties to a contract.

131. Dispute whether may include time-barred dispute.—A claim time-barred according to the Limitation Act at the time of making the reference can validly form the subject-matter of a reference to arbitrator. *Balmukund* v. *Uttam Chand,* A.I.R. 1927 Sind. 177=100 Ind.Cas. 890; but see *Official Receiver* v. *Kerosondas,* A.I.R. 1926 Sind. 299=85 Ind. Cas. 750. In *Uttam Chand* v. *Balmukund,* A.I.R. 1929 Sind. 55=107 Ind. Cas. 435, *Rupchand A.J.C. said*: "Where the agreement between the parties falls within the four corners of the exception I to S. 28, Contract Act which is based upon the ruling in *Scott* v. *Avery,* 5 H.L.C. 811=25 L.J.Ex. 303, no question of limitation can arise for, in that case the claimant has no cause of action for instituting a suit so long as his damages has not been ascertained by recourse to arbitration. In such a case no question of limitation arises and the observation of the learned Additional Judicial Commissioner would indubitably apply. As an authority for that proposition references may be made to the cause of *Cyzer, Irvine & Co. Ltd.* v. *Board of Trade,* (1927) 1 K.B. 260. But different consideration apply to an ordinary submission clause contained in a commercial contract, which provides for a reference to arbitration of disputes arising out of the contract and does not purport to bar the right of a party to enforce his claim in court before he has obtained an award in respect thereof. In that case a cause of action immediately arises to the aggrieved party and if he wishes to enforce his claims he should be vigilant. He may take early steps either to enforce his claim by arbitration or by a regular suit. If he sleeps over his right for over the statutory period prescribed for the institution of his suit, he is liable to be defeated by the plea as his claim is time-barred by limitation and as no suit is maintainable in respect thereof, there is no subsisting dispute

under or arising out of the contract which may be enforced by arbitration. This was the view taken by me in *In the matter of Arbitration* A.I.R. 1962 Sind. 209=19 S.L.R. 24." See also *Hirji Mulji* v. *Cheong,* (1926) A.C. 497=95 L.J.P.C. 121.

Where an arbitration clause in a contract provides for reference of disputes "relating to the contract" or "in connection with the contract" the words used are sufficiently wide to cover a dispute as to whether the contract has been frustrated or not. *Chundanmull* v. *Clive Mills* I.L.R. (1948) Cal. 297 ; see also *Mohim* v. *Atul,* 85 C.L.J. 188. Disputes regarding a contract need not necessarily be disputes arising directly under the contract. *Mohin* v. *Atul, supra.*

It is well established that if one of the parties to a reference disputes the factum or existence of the contract in respect of which disputes arise and which dispute the arbitrator has got to determine, then the arbitrator has no jurisdiction to decide the question whether in fact the contract was entered into or not. *Mahasukram* v. *Keshavdew,* 51 Bom.L.R. 499=A.I.R. 1949 Bom. 343 ; see also *Ruija* v. *Gulamally,* 4 D.L.R. (Bom.) 91.

"To constitute a submission proper, there must be a difference. If there is no difference there is nothing for an arbitrator to arbitrate about, and in the case of an agreement to refer future disputes to arbitration, the arbitrator's jurisdiction does not arise until a dispute has arisen. It might be seen, therefore, that if the agreement between the parties is in effect an agreement to prevent disputes from arising and not an agreement as to how they are to be settled, then it is neither an agreement to refer to arbitration nor a submission to arbitration, and it is not within the Act". *Russell* 15th Edn., page 28 citing *Re Carus Wilson,* (1886) 18 Q.B.D. 7. But in *Chambers* v. *Gold Thrope* (1901) 1 K.B. 629 ot 635, *A. L. Smith M.R.* said : "It was argued that there was no dispute between the parties prior to the plaintiff giving his certificate, and that unless there was a dispute the plaintiff could not be in the position of on arbitrator. I do not see why there should not be an arbitration to settle matters, as to which, even if there was on actual dispute, there would probably be a dispute unless they were so settled. In the case of *Tharais Sulphur Co.* v. *Loftus,* L.R. 8 C.P. 1 there was no more a dispute than in the present case. There, a ship having incurred a general average loss, an average adjustment had to be made. There was apparently no actual dispute as to the proportions of the loss to be borne by the parties interested respectively, but those amounts had to be settled, just as in this case it was necessary on the completion of the works to ascertain what was payable by the building owner to the builder, and the matter was therefore put into the hands of an average adjuster." But *Romer L.J.* in giving his dissenting judgment said : "I regret to say that I differ from the *Master of the Rolls* and my brother *Collins* in this case.....Suppose a person undertakes for reward to value or estimate for another work about to be done for his principal by a third person ; in my opinion, he does not, so far as his principal is concerned, become in the position of an arbitrator in regard to his valuation or estimate, merely because he knows that his principal and the third person have by contract between them agreed that, in default of dispute previously arising with regard to the matter, his valuation or estimate is to be taken as conclusive, and as determining the prices to be paid by his principal for the work to be done by the third person". For further discussion of this topic, vide Section 21 *infra* under the heading matter in difference between the parties.

132. Section 28 of the contract Act.—Section 28 of the Contract Act runs thus : Every agreement by which any party thereto is restricted

absolutely from enforcing his rights under or in respect of any contract, by usual legal proceedings in the ordinary trabunals or which limits the time within which he may there enforce his rights, is void to the extent. *Exception* 1—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. *Exception* 2—Nor shall this section render illegal any contract *in writing* by which two or more persons to agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to reference to arbitration." Commenting on this section *Chief Justice Garth* said : "This section applies to an agreement which wholly or partially prohibit the parties from having recourse to a Court of law. If, for instance, a contract were to contain a stipulation that no action should be brought upon it, that stipulation would, under the part of Section 28, be void, because it would restrict both parties from enforcing rights under the contract in the ordinary legal tribunals, and so if a contract were to contain a double stipulation that any dispute between the parties should be settled by arbitration, and that neither party should enforce his rights under it in a Court of law ; that would be valid stipulation so far as regard its first branch, *viz.*, that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of ousting the jurisdiction of the Court, but the latter branch of stipulation would be void because by that the jurisdiction of the Court would be necessarily excluded." *Coringa Oil Company Ltd.* v. *Koegler*, (1876) 1 Cal. 466 (468) on appeal from 1 Cal. 42 ; see also *Mulji Tej Sing* v. *Ransi Devaraj*, (1909) 34 Bom. 13. But where a party to a contract agrees to submit to an arbitration of the Bengal Chamber of Commerce, the rules of the Chamber are imported in to the contract and that party is bound by those rules. *Chaitram* v. *Bridhichand*, 30 Ind.Cas. 681=19 C.W.N. 820=21 C.L.J. 584 ; see also *Ganges Manufacturing Co., Ltd.* v. *Indra Chand*, 33 Cal. 1169 ; *Champsey* v. *Gill*, 7 Bom.L.R. 805. In *Chaitram* v. *Bridhichand, supra, Woodroffe J. said* : "The fact that the Chamber of Commerce has framed rules for its arbitration is, I should have thought, well-known to every trader in Calcutta, particularly to those accepting contracts stipulating for arbitration by the Chamber of Commerce. However that may be, I entirely agree with the judgment of *Mr. Justice Harrington* in the case referred to (33 Cal 1169) by the Chief Justice that if a party in a contract agreed to submit to an arbitrator of the Bengal Chamber of Commerce, he must be held to be bound by the rules of that Chamber."

An agreement between the parties to a suit on a contract that the suit should be decided in accordance with the result of another suit between the same parties is void under this section, as it restricts the parties absolutely from enforcing their right by the normal legal proceedings. *Raja* v. *Chinta*, 15 Ind.Cas. 378=37 Mad. 408. For further discussion in this subject *vide* notes Section 34 under the heading "Scope of Section 28 of the Indian Contract Act."

133. Arbitration clause in contract.—The general prevailing impression that the mere existence of a clause providing for arbitration is a bar to a suit in Court is an erroneous one. The *Punjab Province* v. *Lakshmi*, A.I.R. 1944 Lah. 149=46 P.L.R. 50. But where the Court finds an

agreement to refer, it is binding on parties. *Chhabildas* v. *Damodar,* A.I.R. 1943 Bom. 199 & 45 Bom.L.R. 387=212 Ind.Cas. 189.

134. Agreement confirmed by Legislation.—Where an agreement is "approved, ratified, confirmed and declared valid and binding on the parties" thereto by an Act of the Legislature, the effect of the statutory confirmation is to render every provision and stipulation of the agreement as obligatory and binding on the parties as if those provisions had been repeated in the form of statutory sanctions. *International* v. *Naigara,* A.I.R. 1937 P.C. 214=169 Ind.Cas. 562 (P.C.).

135. Agreement must not be uncertain.—Where the reference is to a local Chamber of Commerce, but it is not clear as to which of several local Chambers of Commerce is to arbitrate, as there are several local Chambers of Commerce, it is impossible to say that the parties were *ad idem* with regard to the person or body of persons which is to arbitrate in this dispute and the arbitration clause is vague and uncertain and is not, therefore, a valid and legal arbitration clause. *Karanji* v. *Indo China,* 56 C.W.N. 763. When the arbitration agreement is vague and when the dispute is not specified, the award bound upon Such vague reference is equally vitiated and cannot be set aside. *Deep Narain* v. *Dharneshwari* 1959 Pat L.R. 262=A.I.R. 1960 Pat. 201 But where in a contract with military farms department, the District Commander concerned shall be the arbitrator, the contract is not unenforceable on the ground of uncertainty. *Basantilal* v. *Dominion.* A.I.R. 1952 Cal. 340. A clause in an arbitration agreement which say that "in the matter of dispute the case shall be referred to the Superintending Engineer of the circle" clearly means the gentleman holding the office when the dispute arises. If and when the dispute arises the case is to be referred to the officer holding the post at the time. *Daulat* v. *State,* A.I.R. 1958 Punjab 19 following A.I.R. 1952 Cal. 340. The arbitration clause spoke of disputes to be referred to arbitration in accordance with the rules of Millowners' Association, Bombay : *Held* that the arbitration clause suffered from no vagueness or uncertaintly. *Kamala Mills* v. *Ganapati* 63 C.W.N. 57 not following 85 C.L.J. 136. An arbitration agreement that disputes are to be settled by arbitration in New York, according to the rules of the American Arbitration Society, does not suffer from any infirmity of vagueness of indefiniteness. *Michel* v. *Serajuddin,* 63 C.W.N. 128. Generally refereneces are made to arbitration where dispute arises and the parties thereafter formulate when necessary, their disputes before the arbitrators and seek their decision on those points of differences. Thus where the parties to the reference merely say that there was some dispute in regard to certain brick kila and that the arbitrators were to decide the dispute in any manner they thought proper, the arbitration agreement cannot be said to be so vague and uncertain as to be uneforceable. Meaning of the agreement is not in any sense uncertain and even if there is any slight uncertainty that is capable of being made certain at the time of hearing. *Radha Kishan* v. *Shattar.* A.I.R. 1957 All. 406. An arbitration agreement which ousts the jurisdiction of court be treated on a footing different from ordinary commercial agreements. Such an arbitration agreement should be strictly construed. Clear language should be used in arbitration agreement which will have the effect of ousting the jurisdiction of the rules and regulations of an Association provide that differences arising between members or between members and non-members should be referthe court, *Re Arbitration, Seth Kesorimal,* A.I.R. 1959 Cal. 430. Where the rules and regulations of an Association provide that differences arising between members or between members and non-members should be refer-

red for decision to the arbitrators mentioned in the pannel of arbitrators nominated by the Association, and persons signing applications for membership agree thereby to observe and follow the rules and regulations of the constitution, both present and future, it must be held that there is a binding agreement or arbitration in respect of every difference which may arise *Chimanram* v. *Vandravandas*, 49 Bom.L.R. 431.

136 Arbitration agreement—strict construction.—A reference to arbitration deprives a party of his right to restort to the ordinary tribunals, it must be strictly construed, more so, agains the party who is responsible for the reference being drawn up in a particular manner. *In re Srikrishna Khanna*, A.I.R. 1934 Sind. 29=148 Ind.Cas. 977. As a submission to arbitration deprives a party of the right accorded to him by common law to have the disputes decided by a Court of law it must be strictly construed, and before any stay is granted, it must clearly appear, from the terms of the submission that with reference to the point in issue in the suit, the plaintiff has deprived himself of the right of having it decided by Court. Although the Court is bound to start with a strong bias in favour of maintaining the special bargain between the parties, it must at the same time, consider all the circumstances of the case with vigilance to see that it is not driving either of the parties to a tribunal where there is a likelihood of not getting substantial justice. *Hormusji* v. *District Local Board*, 28 S.L.R. 223=A.I.R. 1934 Sind 200=153 I.C. 911; *Tara Chand* v. *Paras Ram*, A.I.R. 1930 Sind. 202=123 Ind.Cas. 696; *Bindeswari* v. *Janku*, 16 Cal. 482. Aribitration agreement should be strictly construed. Clear language should be introduced into any contract which is to have the effect of ousting the jurisdiction of the Courts and compelling the parties to have recourse to arbitration for decision of disputes. An arbitration agreement which is vague and uncertain is invalid. *Ganapatrai* v. *Moody*, 85 C.L.J. 136. In order to oust the jurisdiction of the Court the words of the Arbitration clause conferring sole jurisdiction on the arbitrators must be clear, precise and unambiguous, for as a rule, the arbitrator cannot clothe himself with jurisdiction. *Pramada* v. *Sagar*, A.I.R. 1952 Pat. 352=B.L.R. 1952 Pat. 216. *In re Sri Krishna Khanna and Brothers*, *supra*, *Rupchand* A.J.C. said: "In interpreting the contract I have to take it as a whole, and I cannot treat the words used in print as meaningless or modified in the manner suggested unless it is absolutely necessary to do so. As far as possible, it is my duty to reconcile the words in ink and in print, and to see if the intention of parties can be gathered by reading both together. This is a mercantile contract and in the words of *Lord Cairns* in *Bowes* v. *Shand* (1887) 2 I.L.Cas 455 (463)=46 L.J.Q.B. 561=36 L.T. 857, 'merchants are not in the habit of placing upon their contracts stimulation to which they do not attach some value or importance.....No evidence has been led to show that the words 'as the case may be' were intended to be used in any sense other than that ordinarily attaching to them and the golden rule enunciated by *Lord Wensleydole* in*Grey* v. *Pearson*, (1857), 6 H.L.C. 61 (106)=26 L.J.Ch. 237 applies. I must give effect to these words according to their grammatical and ordinary sense and I cannot without any rhyme or reason interpret clause (14) as giving an option to the respondents No. 1 to sefer the disputes at their choice to arbitrators residing in one of these places mentioned there". But see *Jordes Son & Co.* v. *Stora Kobbar Bergs*, 41 L.I.L. Rep. 201. An arbitration agreement is to be construed accrding to its language and in the light of circumstances in which it is made to determine if the dispute is covered by it. *Punjab*

State v. *Moji Ram*. 59 Punj. L.R. 867=A.I.R. 1957 Punj. 223; A.I.R. 1953 S.S. 182=1953 S.C.J. 217=(1953) 1 M.L.J. 605.

137. Arbitration clause—Effect of total breach.—Where the arbitration clause is distinct from the other clause of the contract, total breach of the substantive stipulation even when it is accepted by the other party does not abrogate the arbitration clause and even the party in default may invoke that clause. But the parties are not bound to have recorse to arbitration. They may settle the disputes directly and agree not to invoke the arbitration clause for that purpose. The arbitration clauses cease to exist with reference to the disputes which are thus settled. They may also enter into a substituted agreement in complete supercession of the original contract and thereby abrogate the contract and the arbitration clause contained in it. *Union of India* v. *Kishori* Lal, A.I.R. 1953 Cal. 642. In that case the Court observed : "The arbitration clause is distinct from the other clauses in the contract. It is collateral to the substantive stipulation of the contract. It is merely procedural and ancillary, it is a mode of settling disputes.....It.....depends on there being a dispute or difference in respect of the substantive stipulation". See Per *Lord Wright* in *Heyman* v. *Darwin's Ltd.*, 1942 A.C. 356 (377)=111 L.J.K.B. 341. The parties to a contract can agree that an arbitration clause in it remains alive even where there has been frustration of the contract, *Brajaraj* v. *Bengal Jute*, I.L.R. (1946) 1 Cal. 312; but see *Hirji Mulji* v. *Cheong*, (1926) A.C. 497. The clause in an insurance policy read as follows : "If any difference arises as to the amount of any loss or damage, such difference shall, independently of all other questions, be referred to the decision of an arbitrator." It was agreed that the total repudiation of the liability on the part of the company took the dispute between the parties out of the scope of the clause. *Held*, that it did not make any difference whether the company said that no damage or loss at all had been caused, or whether it said that some damage had been caused but not as much as was claimed by the insured. In either case it was quite obvious that there was a dispute between them as to the amount of loss or damage and therefore the present dispute between the parties fell within the scope of the arbitration clause in the policy. *Great American Insurance Co.* v. *Dina Nath*, 27 Com Cas 4=A.I.R. 1957 Punj. 152. A clause in a policy of insurance was as follows : "or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection .....all benefit under this policy shall be forfeited." *Held*, that the period of three months should be deemed to start from the date on which the repudiation of the claim was actually conveyed to the policy holder. *Ibid.*

138. Contract—Arbitration clause—Contract becoming void—Effect.—In a contract containing an arbitration clause there is (1) a promise by one party to do an act for a consideration furnished by the other party, and (2) an agreement to refer disputes arising out of that to arbitration. Section 56 of the Contract Act applies to the former and not to the latter agreement. Referring a dispute to arbitration is not a duty to be performed under a contract and there is hardly any question of the performance of the duty being rendered impossible. Whether a contract is frustrated or not is itself a dispute that arises under a contract and if the contract contains an arbitration clause that dispute must be referred to arbitration Hence even if a contract is said to be frustrated the arbitration clause remains operative. *Municipal Board* v. *Eastern U. P. Electric*. A.I.R. 1958 All. 506. In the above case (1942) 1 All. E.R. 337 followed and (1926) A.C. 497 not followed.

139. Parties to contract under mutual mistake—Validity of arbitration clause.—A mutual mistake of parties to a contract as to an existing fact will render the contract void *ab initio*. In such an event, the arbitration clause contained in the contract would necessarily have no existence. On the other hand, if the mistake is as to some future event, a binding contract is entered into between the parties, although it may be avoided or rescinded at some future date if the expected event does or does not happen. In such a case the contract including arbitration clause contained in it is not void *ab initio*....*Chundanmull* v. *Clive Mills,* I.L.R. (1948) 2 Cal. 297. If the contract is invalid, the arbitration agreement which is a part of the contract is also invalid. *Ganapathi* v. *Moody,* 85 C.L.J. 136 ; see also *Tolaram* v. *Birla Jute,* I.L.R. (1948) 2 Cal. 171.

140. All parties interested not consenting—effect of.—Where all the person interested to the matter of dispute were not parties to the arbitration agreement and he agreement is not consented to by all, such an agreement is invalid and cannot give the arbitrators jurisdiction to decide the dispute and the award given on the strength of such void reference does not bind even the consenting parties. It is void altogether. *Deepnarain* v. *Dhaneswari* A.I.R. 1960 Pat. 201=1959 Pat L. R. 262 (AIR 1946 P.C. 72 followed).

141. Arbitration agreement—form of.—The appointment of an arbitrator, or of arbitrators or an umpire need not be in any particular from and unless formalities are prescribed by an arbitration agreement. *Russell* 15th Edn. p. 174. All that is required that there should be an agreement and that agreement be reduced to writing. *Utoomal* v. *Haridas,* 7 *Ind.Cas.* 595=4 S.L.R. 26 ; *Gauri* v. *Rambehari,* A.I.R. 1948 Pat. 430=29 P.L.T. 106 ; *J. Belli* v. *Joghi,* A.I.R. 1951 Mad. 683 ; *Suraj* v. *Harduttrai,* A.I.R. 1951 Ajmer. 53 ; *Firm Narain Das* v. *Bhagwan Das,* A.I.R. 1951 All. 860. To constitute an arbitration agreement within the meaning of Section 2 of the Act, it is necessary that there should be a formal agreement, or that the terms should be contained in one document. All that is necessary that the parties should *agree* in writing to submit present and future differences to arbitration. Where two members of an association (Bombay Bullion Exchange) has applied though at different times, to be enrolled as members of the association, agreeing by the very terms of their applications signed by them, to be bound by the current rules and regulations of the association, which include a rule that all disputes between them, present or future, would be submitted to arbitration, it must be held that there is an agreement to submit present or future differences to arbitration, which constitutes an arbitration agreement falling within section 2. *Mohan Lal* v. *Bisseswar Lal,* 44 Bom. L.R. 686 ; see also *Chaitram* v. *Bridhi Chand,* 19 C.W.N. 820. Where contract containing a bye-law of the East India Cotton Association which provides for compulsory arbitration are sent by one party to the contract to the other, and they are accepted by other party either by signing the confirmation notes or by his conduct, it would be sufficient arbitration agreement within the meaning of Section 2 of the Act. It is absolutely unnecessary that there should be a confirmation note signed by the party receiving the contract notes in favour of the other. It is sufficient if the Court, on the materials before the Court, is satisfied there was an acceptance by conduct. The party so accepting the note, would be bound by the agreement even when he is not a member of the Association, when the other is a member of the Association. *L.W, Farnandez* v. *Jivatlal,* 48 Bom.L.R. 678=A.I.R. 1947 Bom. 65. The Arbitration Act is exhaustive of the law relating to arbitration in India. An award therefore, passed on oral submission can

neither be filed and made a rule of Court under the Act. nor enforced apart from the Act. *Belli Gowder* v. *Joghi,* 1950 M.W.N. 783=(1950) 2 M.L.J. 639.

When Section 2(a) which defines an arbitration agreement, speaks of an agreement in writing, all that it means is that the terms of the agreement should be expressed in writing and that the agreement should be such that it binds both the parties and that the actual signatures of both the parties on the agreement is not essential. The agreement may be in the form of a signed decument by both the parties containing all the terms or a signed document by one party containing the terms and a plain acceptance, signed or orally accepted by the other party, or it may be an unsigned document containing the terms of a submission to arbitration agreed to orally by both the parties. It is sufficient if one of the parties signs the submission and the other accepts it. The acceptance may be by word of mouth or may be by conduct. *Mangal Chand* v. *Payre Lal,* 50 P.L.R. 253=A.I.R. 1949 East Punj. 199=4 D.L.R. (Simla) 162. See also *John Bott & Co.* v. *Kanoolal,* 53 Cal. 65=A.I.R. 1926 Cal 938; *Radhakanta* v. *Baerlin Bros.,* 56 Cal. 118=A.I.R. 1929 Cal. 97; *Baker* v. *Yorkshire Fire,* (1892) 1 Q.B. 144=61 L.J.Q.B. 838; *Hickman's Case,* (1915) 1 Ch. 881=84 L.J. Ch. 688; *Anglo Newfound Land* v. *The King* (1920) 2 K.B. 214=89 L.J.K.B. 570; *Mohanlal* v. *Bisseswarlal,* 48 Bom.L.R. 686.

In *Sriram* v. *Mohanlal,* A.I.R. 1940 Bom. 93=I.L.R. (1940 Bom) 249, *Kania, J.* was of opinion that Arbitration Act requires a submission in writing and that merely sending contract notes by a party to another without confirmation notes signed by the other party does not amount to a submission in writing as required by the Arbitration Act. But the decision was adversely criticised in a latter case of the Bombay High Court by *Bhagwati, J.* in the case of *Lewis W. Fernandez* v. *Jivallal, Partapsi & other,* I.L.R. 1946 Bom. 777=A.I.R. 1947 Bom. 65, and it was held that if the Court on the materials before it comes to the conclusion that the contract notes having been sent by one party to another were accepted by the latter either by signing the confirmation notes or by his conduct, it would be a sufficient arbitration agreement within the meaning of the definition thereon in the Arbitration Act.

In *Shankar Lal* v. *Jainy Brothers,* 53 All. 384=A.I.R. 1931 All. 136, *Sulaiman, J.* observed : "It is clear on the authorities both in England and in India that the terms of a written agreement may be collected from a series of documents, and written agreement does not mean that each party has to sign a document containing the terms. The plain acceptance of the terms is sufficient."

After discussing the conflicting English cases Mr. N. N. Sarkar in his "Law of Arbitration in British India" made the following remark : "The weight of authority, therefore, appears to support the view that the submission need not be signed by the party charged, unless the contract itself is one which the law required to be signed—but the point cannot be looked upon as finally settled."

Where trading member of a company maintaining an exchange for the business of buying and selling commodities wrote to the company when he applied for membership in the company that "We undertake that all disputes arising out of the dealing effected by us in accordance with and subject to the bye-laws of the Exchange shall constitute a reference under the Arbitration Act." On the question whether the words were sufficient to constitute an arbitration agreement within the meaning of Section 2(a) of the Act, held that there was an arbitration agreement in view of the term of the letter. *Upper India* v. *Haji Habib,* I.L.R. (1948) All. 443.

It is not necessary for a valid submission to arbitration in the United Provinces that the agreement of reference should expressly state that the reference was being made under the Arbitration Act. The object of defining "submission" in the U.P. Arbitration (Amendment) Act, 1912, as meaning a written agreement to submit present or future disputes to arbitration under the Indian Arbitration Act, 1899, was to make it clear that every submission to arbitration, whether it proposes to be under the Arbitration Act, or not must of necessity be under the Act. *Firm Gulal Chand* v. *Kishen Narain,* A.I.R. 1931, All. 703=133 Ind.Cas. 417.

The essence of an agreement to refer to arbitration, though it need not be in any particular form, is that it should make out that there is a dispute, indicate what that dispute is and should also contain a binding clause. The absence of particulars of disputes is also fatal to the validity of the reference agreement and an award made in such a reference. *Laxman* v. *Ram,* A.I.R. 1952 V.P. 25.

142. Super-session of agreement to refer.—An arbitration agreement may be supreseded by a new agreement which has the effect of extinguishing the existing agreement or by performance of the terms of the new agreement entered into satisfaction of the prior agreement. *Kartar Singh* v. *Meher Singh,* I.L.R. (1957) Punj. 382=59 Punj.L.R. 115=A.I.R. 1957 Punj. 40.

143. Documents embodying terms of agreement not signed by parties.—A document embodying the terms of an agreement to refer to arbitration, which is not signed by or on behalf of both parties, does not come within the purview of a submission as defined Section 4 the Indian Arbitration Act of 1899. There is an essential difference between a written agreement and a document which merely embodies the term of an agreement. Such document may be evidence of the agreement, but is not the agreement itself. If one party only attaches his signature, then it is a document embodying the terms of an agreement to which one party has expressed his assent in writing, but it is not a written agreement in writing unless the assent of both parties has been expressed *J. Lenz* v. *Lalchand,* 19 Ind.Cas. 925=6 S.L.R. 278. An agreement is an act in the law where two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other f them. *Pollock Contracts,* p. 2. And a written agreement is an instrument whereby this act is performed through the process of writing. *J. Lenz* v. *Lalchand, supra.* In *Aitken* v. *Batchaler,* (1893) 62 L.J.Q.B. 193=68 L.T. 530, it was held to be good submission where counsel on each side an endorsement on his brief containing the full terms of the agreement. See also *Mahomed* v. *Sirajul,* A.I.R. All. 771=1949 A.L.J. 288; 22 A.L.J. 67.

An entry by a broker in the *noond* of each contracting party embodying the terms of the contract signed by the broker is nothing more a written intimation by the broker to each party that a contract has been effected. *J. Lenz* v. *Lalchand, supra.* In the above case the learned Judge made the following remarks:

"*Mr. Rupchand* contends, on the authority of certain passages in the Judgment of *Caerleon in Tinplate Co.* v. *Hughes,* (1891) 60 L.J.Q.B. 640 =65 L.T. 118 that bought and sold notes may constitute a written agreement to refer within the Arbitration Act. But a perusal of the whole report will make it clear that both learned Judges were careful to avoid committing themselves to any admission that bought and sold notes cons-

tituted an agreement of the parties." *Denman, J.* says :—"In my judgment there can be no written agreement unless in writing signed by both the parties."

In *Ram Dutt* v. *E. D. Sassoon,* 43 Cal. 77=33 Ind.Cas.938, by a contract dated 2nd March 1914, plaintiffs, a firm of jute bailers in Calcutta, sold 500 bales of jute to the defendant firm for being exported to London. The contract form used was that of the Calcutta Baled Jute Association, and it contained a clause known as "Home guarantee" to this effect "weight, condition and quality guaranteed by sellers at port of destination." Defendant sold the jute to a London buyer who however refused to take delivery owing to its inferior quality. The matter was referred to arbitrator in London in accordance with the terms of the London Jute Association's contract and an award was given against the defendants. Plaintiffs sued in Calcutta to recover the price of the 500 bales of jute from the defendants. *Held,* that as the goods were not invoiced back and the defendant had not asked for the stay of the suit pending an award in London, the plaintiffs were entitled to a decree for their value. *Held* also, that according to the Home Guarantee Clause a contention about quality between the plaintiffs, and the defendants may have been referred to arbitration in London, an award on a submission by the defendants and the London purchaser in accordance with the rules and conditions of the London Association Contract Act of 1913 would not be binding in a dispute between the defendants and plaintiffs who were not a party to that submission. The Court observed : "To make such an award binding upon a total stranger to the London submission there should be a clear and unambiguous agreement to that effect."

In *Joylal* v. *Manmatha,* 35 Ind.Cas. 3=20 C.W.N. 365, an award made by the Bengal Chamber of Commerce was sought to be set aside by the defendents in Court, on the ground that the Chamber acted in exercise of jurisdiction in having made the award in favour of the plaintiff, disregarding the fact that the contract in question was by plaintiffs as brokers, although in fact the plaintiffs had no principals and the contract was not, therefore, enforceable. The plaintiffs alleged that there was a custom in the market in respect of gunny, hesian and manufactured jute goods by which brokers are held liable upon such contracts and such custom being well-known to the chamber, the contract was properly made and valid. The Court allowed evidence of customs and usage to be given and held that there was such a custom and that the defendants knew it. *Held,* that the usage being known to the chamber the matter was within their jurisdiction and the award properly made.

144. Express agreement and instructions for the guidance of contractors.—Where there was express agreement between the parties that the arbitrator should be nominated by the General Manager of the North Eastern Railway, the General Manager must nominate the arbitrator, and the general rules contained in the *instructions* for the guidance of the contractors must be subject to specific agreement between the parties. A.I.R. 1957 Pat. 697.

145. Arbitration agreement—Vagueness—what amounts to.—A clause in an arbitration agreement which says that "in the matter of dispute, the case shall be referred to the Superintending Engineer of the Circle" clearly means the gentleman holding the office when the dispute arises. If and when any dispute arises the cause is to be referred to the officer holding the post at the time. As the nomination of the arbitrator is not

by name, but by virtue of his office, on the transfer or retirement of the Superintending Engineer, one who is entitled to act *i.e.* his successor is to take his place as the arbitrator. There is no uncertainty or ambiguity as regards the identity of the arbitrator. *Daulat Ram* v. *State,* I.L.R. (1957) Punj. 1760=A.I.R. 1958 Punj. 19.

But an arbitration agreement is uncertain, where there is omission to state actual point of dispute. *Radha Kishen* v. *Sapattar,* A.I.R. 1957 All. 406.

146. Fire Insurance Policy—Construction—Submission to arbitration of question not specifically referred to in arbitration clause— Vide A.I.R. 1956 Cal. 11.

147. Terms to be used in a reference to arbitrator.—In order that a clause in an agreement may constitute an arbitration agreement within the meaning of Section 2, it is not necessary that the words "arbitration" "arbitrator" or "arbitration agreement" should appear in the clause, so long as the parties can be found to have to allow the matter to be decided by a person of their own selection whose decision was to be final, conclusive or binding on them. If the matter in dispute between them are left to be decided by a person of their choice whose decision is to be final and conclusive, the person so chosen or appointed cannot but be regarded as an arbitrator despite the fact, that he is an employee of one of the parties. *Governor-General* v. *Simla Bank,* 226 Ind.Cas 444= A.I.R. 1947 Lah. 215=(1946) Lah. (Rul.) 450.

148. Procedure.—There is no special procedure by the Arbitration Act in respect of application filed in Court under the Act. They have got to be decided generally in accordance with the provisions of C. P. Code. *Vishambar Lal* v. *Gulamally,* 4 D.L.R. (Bom.) 91. The Arbitration Act applies to proceedings in Revenue Court. *Kunwar Sigh* v. *Mabe.* 1949 R.D. 300. The parties to an arbitration may in large degree themselves determine the procedure to be followed and the powers the arbitrators are to have, as well as the constitution of the arbitration tribunal. *Russell.* 15th Edn., p. 1.

Stamp duty on arbitration agreement.—For detailed discussion on the subject *vide* notes under Section 4 under the headings "Stamp" and "Arbitration Agreement on unstamped or insufficiently stamped document effect on award."

149. Registration of Arbitration agreement.—An agreement to refer to arbitration recited *inter alia* "the executant have agreed and consented to decide the estate in dispute and accordingly they appoint..... arbitrators and an umpire and agree that the arbitrators shall partition the estate and thereupon executant shall proprietary possession of his respective share as declared by the arbitrators." It was found on evidence that this agreement was the only record of matters which had been settled before it was executed and there was no evidence of any agreement, independent of the instrument, to partition the estate. *Held,* that this agreement was inadmissible evidence for want of registration. *Raghubir* v. *Umrao,* 13 Ind.Cas. 500.

WHAT MATTERS MAY BE REFERRED TO ARBITRATOR.

150. Civil matters in dispute.—All matters which may from the subject-matter of civil litigation affecting private rights, or in other words, all disputes between parties relating to private rights or obligations which Civil Courts may take cognizance within the meaning of Section 9 of the

Civil Procedure Code of 1908, may be referred to arbitration. *Banerjee's Law of Arbitration,* 3rd Edn., p. 19 ; *Redman,* 5th Edn., p. 24. In *Isribai* v. *Pevribai,* A.I.R. 1930 Sind 195=121 Ind.Cas. 164, the court observed : "It has been held by a Bench of this court that there is no bar to refer to arbitration under the provisions of Schedule II of the Civil Procedure Code a suit which relates to personal rights between the parties, *e.g.* a question of marriage which is cognizable by a Civil Court : *Umar* v. *Dadli,* A.I.R. 1926 Sind 128=20 S.L.R. 116=98 Ind.Cas. 550." In the last-named case, the court observed : "The main point argued before us in this application is that the learned Sub-Judge had no jurisdiction to refer the matters in dispute in the suit in question to arbitration ; that such a reference amount to a contract which was opposed to public policy and that it is against public policy that suits which relate to the personal relations between the parties should be referred o arbitration. The learned pleader who appears for the applicant has been unable to refer us to any authority directly on the point. He has referred us, however, to certain passages in the *Law of Arbitration by Gopaldas* to the effect that the matters covered by the Divorce Act or the Insolvency Act cannot be referred to arbitration. We do not consider that there is any analogy whatever between proceedings covered by the aforesaid Acts and suits cognizable by a Civil Court to which the provisions of the Civil Procedure Code apply. Paragraph 1 of the Second Schedule of the Civil Procedure Code (=Section 21) states in perfectly wide terms that any suit may be referred to arbitration. We do not think, therefore, that there is any substance in the point raised by the learned pleader." See also, *Muhammad Ibrahim* v. *Ahmad said* : 32 All. 503=7 A.L.J. 761=6 Ind.Cas. 219. Unless forbidden by statute or public policy, all matters of controversy or litigation, whether of law or of equity jurisdiction can be submitted to arbitration. *Banerjee's Law of Arbitration,* 3rd Edn., p. 19, citing *Encyclopaedia of Law and Procedure by Mack and Nash,* Vol. III, p. 589.

"It has long been a principle in our law that disputes affecting civil rights, in which only damages are claimed, may be referred to arbitration." *Russell,* 15th Edn., p. 8. Arbitrators are competent to give awards in all cases of breaches of contracts including breaches of promise of marriage. *Heyman* v. *Darwin,* (1942) A.C. 356. The overseers of a parish and party rated cannot by agreement refer to arbitration the validity of the rate. *Thorpe* v. *Gole,* 4 Dowl 457=2 G.M. & R. 367=1 M. 531=5 L.J.Ex. 24, 281. Under the terms of a submission, the arbitrators may have power to dispose of a debt not due, but accruing between the parties. *Brown* v. *Watson,* 8 D.P.C. 22=6 Bing. (N.C.) 118.

In England any disputes relating to real property may be decided by arbitration. *Ross* v. *Clifton,* 9 Dowl.P.C. 356 ; *Morris* v. *Rosses,* 3 East. 15 ; *Downs* v. *Cooper,* (1841) 2 Q.B. 256. In suit by attorney-general for breach of trust in charity, Court will permit reference, if attorney-general consents ; but otherwise in a question on construction of will. *Attorney-General* v. *Fea,* 4 Mad. 274.

151. Pure question of law or questions of law and fact.—Pure questions of law may be referred to the decision of an arbitrator. *Russell,* p 3, citing *Ching* v. *Ching,* 6 Ves. 281 ; *Young* v. *Walter,* 9 Ves. 364 ; *Mathew* v. *Davis,* 1 Dowl. N.S. 679 ; *Stiff* v. *Andrews,* 2 Madd. 6 ; *Jupp* v. *Grayson* (1834) 3 Dowl. 199 ; *Ashloud* v. *Poynter,* (1834) 3 Dowl. 206 ; *Rowe* v. *Crossley* (1912) 108 L.T. 11 ; *Ghulam Khan* v. *Muhammad Hassan,* 29 Cal. 167=29 I.A. 51=6 C.W.N. 226. Where a pure question of law is specifically referred his award will not be set aside merely upon

the ground that his decision is wrong. *Absalom Ltd.* v. *Great Western,* (1933) A.C. 592 at p. 607. An arbitrator may be called upon to determine the liability of a party on a promissory-note or to put his construction on the effect of a will. *Wilkins* v. *Page,* 1 *Hare.* 276 ; *Stiff* v. *Andrews,* 2 Madd. 6 ; *Soudamini* v. *Gopal,* 21 C.L.J. 273 & 28 Ind.Cas. 557. Parties may refer to arbitration whether a judgment has been properly obtained, whether it has been satisfied, or whether it is void or erroneous. *Russell,* p. 2, citing *Barry* v. *Grogan,* 16 W.R. 627 (Eng.). In *Gulzari Lal* v. *Busi,* A.I.R. 1953 Cal. 621, the Court observed : "The first and the obvious answer is that the question whether such rate was permissible or not was a question of law and could not be submitted to the arbitrators ; as laid down by the Privy Council in *Government of Kelantin* v. *Duff Development Co., Ltd.,* (1923) A.C. 395=92 L.J.Ch. 307. As I understand the law on the point if there is a due submission on a question of law before the arbitrators, it is not only proper for them to decide it, it is also their duty to do so." When the question of construction of a deed is the matter referred to arbitration, the award cannot be set aside only because the Court considers that the arbitrator is mistaken in the construction of the deed, unless it appears on the face of the award that he has proceeded upon evidence which was inadmissible, or upon wrong principles of construction, or has been guilty of some other error in law. *Government of Kelatin* v. *Duff Development, supra.* In the above case *Lord Chancellor Viscount Cave* observed : ".....unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted .....The above view is fully supported by authorities. In *Adams* v. *Great North of Scotland Railway,* (1891) A.C. 31, *Lord Halsbury* treated the point as settled. After referring to *Lord Thurlow's* judgment in *Knox* v. *Symonds* (1791) 1 Ves. 369 he proceeds (1891) A.C. at pp. 39, 40 : 'And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it, in their own language the parties had agreed to accept the arbitrator's decision upon the question of law, as well as the decision upon the facts [*Stimpson* v. *Emmerson,* (1847) 9 L.T. (O.S.) 199]. In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the Court in the decision of such question.' To the same effect are the decisions of this House in *Holmes Oil Co.* v. *Pumpherston Oil Co.* (1891) 18 Rattie (H.L.) 52 and of the Judicial Committee of the Privy Council in *Att.-Gen. for Manitoba* v. *Kelly* (1922) 91 L.J.P.C. 101=(1922) A.C. 268 ; and in *King and Duveen, In re,* (1913) 82 L.J.K.B. 733=(1913 2 K.B. 32. *Channel, J.* stated the rule concisely as follows [82 L.J.K.B. at pp. 734, 735=(1913) 2 K.B. at pp. 35 ; 36)] : "It is no doubt a well-established principle of law, that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad and can be set aside..... but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator." See also *Race Course Betting* v. *Secretary of State,* (1944) Ch. 114 (125)=113 L.J.Ch. 129=170 L.T. 29—(1944) 1

All.E.R. 60=T.L.R. 147 ; *R.* v. *Northumberland,* (1951) 1 K B. 711= (1951) 1 All.E.R. 268=(1951) 1 T.L.R. 270 ; *Hodgkinson* v. *Fernie* (1857) 3 C.B. (N.S.) 189 ; *Amir Begam* v. *Badruddin,* 23 Ind.Cas. 625=95 All. 336 =12 A.L.J. 537=16 Bom.L.R. 413=18 C.W.N. 755=19 C.L.J. 194=27 M.L.J. 181 (P.C.) ; *Dutton Massey* v. *Jammadar,* 78 Ind.Cas. 230=A.I.R. 1925 Sind 186=19 S.L.R. 54 ; *James Finlay* v. *Gurdayal,* 76 Ind.Cas. 660= A.I.R. 1924 Sind 91=17 S.L.R. 93 ; *Tulsiram* v. *Jhanaklal,* A.I.R. 1936 Nag. 195. In *Madhowram* v. *Mitsui Bhusan,* 78 Ind.Cas. 230=A.I.R. 1925 Sind 186=19 S.L.R. 54, the Court observed : "Where a specific question of law is specifically referred by the parties to the arbitrators who arrive at a wrong decision of law, their award cannot be challenged though error of law is apparent on the face of the award itself. Where, however, a specific question of law is not so referred an erroneous decision of law may be attacked provided such error appears on the face of the award itself, or any document so closely connected as to form part of the award."

152. Frustration of contract.—Under s. 56 of the Contract Act, a contract to do an act which after the contract was made, becomes impossible, becomes void. It is therefore, only that contract which is for doing an act that becomes frustrated. An agreement to refer a dispute to arbitration arising out of a contract cannot be said to be a contract to do an act. In a contract containing an arbitration clause there is (1) a provision by one party to do an act for a consideration furnished by the other party and (2) an agreement to refer disputes arising out of that contract to arbitration. Section 56 of the Contract Act applies to the former and not to the latter agreement. Referring a dispute to arbitration is not a duty to be performed under a contract and there is hardly any question of performance of the duty being rendered impossible. Moreover, whether a contract is frustrated or not is itself a dispute that arises under a contract and if the contract contains an arbitration clause that dispute must be referred to arbitration. Hence even if a contract is said to be frustrated the arbitration clause remains operative. *Municipal Board* v. *Eastern Electric,* A.I.R. 1958 All. 506 ; *Hyman* v. *Darwins,* (1942) 1 All. E.R. 335=(1942) A.C. 356. In the above case, the Court observed : "Learned Council for the opposite party contended that as the arbitration clause is but a part of the contract and unles it is concluded in such terms as will except it out of the result which follow from frustration, generally, it of *Hirji Moolji* v. *Cheong Yne,* (1926) A.C. 497=95 L.J. P.C. 121 .....Inspite however of the House of Lord's decision to the contrary the decision in *Hirji Moolji* continued to be binding on the Courts in India. The position however is different now and the decision of the Judicial Committee of the Privy Council have no more than pursuasive value for us." It submitted that the above categorical statement as regard P.C. divisions is not maintainable in view of Art. 225 of the constitution. For further discussion on the subject vide under Preamble the topic "the binding effect of Privy Council decision after 26-1-50." By giving Art. 225 of the Constitution its proper construction the Court will not be allowed to avoid the above conclusion that the Privy Council decisions which had absolute binding force on all High Courts upto 25-1-50 suddenly becomes of no force on 26-2-50.

In a very recent case (*Tothasilatama* v. *State,* A.I.R. 1959 Andhra Pra. 359) it has been held that on a perusal of the various provisions of the constitution, it would appear that the law settled by the Federal Court will continue to be applicable even after the advent of the Constitution

till it is altered by the Supreme Court or by competent authority. That is what is contemplated by Arts. 372 and 225 and also Arts. 374 (2). See in this connection the English Law stated under the heading "Disputes and Differences, meaning of" *Ibid.* See also *Heyman* v. *Darwin Ltd.*, [1942] A.C. 356 and *Kruse* v. *Ouetier & Co. Ltd.*, (1953) 1 All. E.R. 954 not applying *Hirji Mulji* v. *Cheong Yne S. S. Co.*, (1926) A.C. 497 P.C.

153. Duration or arbitration clause—effect of repudiation etc.— The general rule is that arbitration clause expires by efflux of time if not extended by Court. But it also determines where the contract itself becomes inoperative or where the contract is repudiated. *Jureidini* v. *National British,* 83 L.J.K.B. 640=(1915) A.C. 499. If the object of the contract which contains an arbitration clause are completely frustrated by causes entirely beyond the control of the contracting parties the arbitration clause comes to an end, and an arbitrator has no jurisdiction to deal with any question which may be raised, although neither party exercised a power of cancelling the contract under a clause contained in it. *Hirji Mulji* v. *Cheong Yne,* (1926) A.C. 497=95 L.J.P.C. 127=134 I.T. 737. In *Heyman* v. *Darwin,* (1942) A.C. 356=111 L.J.K.B. 241=166 I.T. 306, the agreement contained the following arbitration clause : "If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout, the same shall be referred for arbitration." A dispute arose between the parties and the appellants having intimated to the respondents that their letters showed that they had repudiated the agreement, issued a writ against them, claiming a declaration that the respondents had repudiated the agreement and damages under a number of heads. The respondent claimed that the action should be stayed pursuant to the Arbitration Act, 1889, section 4, in order that the matter might be referred under the arbitration clause. The appellants contended that, the respondent having repudiated the contract, as a whole and the appellants, by the issue of the writ, having accepted the repudiation, the contract has ceased to exist for all purposes, and the respondents could not afterwards rely on the arbitration clause. The *House of Lords* unanimously held that "the dispute between the parties was a dispute within the arbitration clause and the appellants' action might be stayed. Where there has been a total breach of contract by one party so as to relieve the other of his obligation under it, an arbitration clause, if its terms are wide enough, still remains effective. This is so even where the injured party has accepted the repudation, and, in such circumstances, either party may rely on the clause". A.I.R. 1946 Lah. 116 (F.B.). In the original case of *Heyman* v. *Darwin, supra, Lord Simon L.C.* said : "If one party so acts or so expresses himself as to show that he does not mean to accept and discharge the obligation of a contract any further the other party has an option to the attitude he may take up. He may, notwithstanding the so called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts and end to further performance. Alternately, the other party may rescind the contract, or (as it is sometimes expressed) 'accept the repudiation' by so acting as to make plain that, in view of the wrongful action of the party who has repudiated, he claims to treat the contract at an end, in which case he can sue at once for damage." *Ramnarain Lal* v. *Volkart Brother,* A.I.R. 1946 Lah. 116 (F. B.). So where a contract is repudiated, it survives for the purpose of measur-

ing the claims arising out of the breach and the arbitration clause contained in it survives for determining the mode of settlement of claims. The repudiating party is not prevented from invoking the arbitration clause in the contract for the purpose of settling all questions to which his repudiation has given rise. It is not correct to say that the arbitration clause will be given effect to only if the contract comes to an end by virtue of some clause in the agreement but not when the contract is ended by something *dehors* the agreement. *Radhakishin* v. *General Construction,* A.I.R. 1947 Sind. 57. Where an agreement containing an arbitration clause is determined (by something arising outside the contract, the arbitration clause is determined) with it. *De La Grade* v. *Worshop,* 96 L.J.Ch. 446=(1928) Ch. 17 ; *Zine Corporation* v. *Hirsh,* (1916) 1 K.B. 541 ; *Bank Line* v. *Capel & Co.,* 88 L.J.K.B. 211=(1919) A.C. 435. Commenting on the first case, *Russell* says : "*De La Grade* v. *Worshop & Co.* (1928) Ch. 17=96 L.J.Ch. 446, (which according to him) is the authority of this proposition. 'The test in such cases has been said to be whether the contract is determined by something outside itself, in which case the arbitration clause is determined with it, or by something arising out of the contract, in which case the arbitration clause remains effective and can be 'enforced, This case, in so far as it purports to follow *Hirji Mulji* v. *Cheong Yne S. S. Co.* (1926) A.C. 497 must be regarded as of doubtful authority since *Heyman* v. *Darwins Ltd.* (1942) A.C. 356 ; but a similar view appears to have been taken by the Court of Appeal in *Woolf* v. *Collins Removal Service* (1948) 1 K.B. 11." But in India no such remark is applicable, because here the Privy Council ruling is binding on Indian Courts. In A.I.R. 1946 Lah. 116 (E.B.) at page 123, *Harries C.J.* said : "The second point taken by the appellants was that the House of Lords case [*Heyman* v. *Darwins* (1942) A.C. 356] is in conflict with (1926) A.C. 497 and as the latter is a decision of their Lordships of the Privy Council, this Court must follow the latter case. It is true that the House of Lords doubted the correctness of many of the observations contained in the judgment in (1926) A.C. 497 and in fact their Lordship were of opinion that (1926) A.C. 497 was wrongly decided. If however, (1926) (A.C.) 497, governs the present case, it must be followed in spite of the criticism levelled at the decision in the speeches of their Lordship's in (1942) A.C. 356=1 All.E.R. 537."

Russell in his Law of Arbitration, 15th Edition, at the footnote of page 58 has stated that the Court of Appeal in *Woolf* v. *Collins Removal Service,* (1948) 1 K.B. 11, has taken similar view as has been erpressed in *De La Grade* v. *Worshop & Co.* (1928) Ch. 17. So the *Woolf's* case is very important so far as India is concerned.

In that case [*Woolf* v. *Collin's Removal Society,* (1948) 1 K.B. 11] the plaintiff contracted with the defendants to store the goods in their Warehouse at M. The contract contained an arbitration clause requiring any claim or counter-claim by the customer (but not claims by the warehouse men) to be submitted to arbitration, and making an award a condition precedent to any right of action by the customer. The defendants, the plaintiff alleged, stored the goods, not in their warehouse at M, but in a disused piggery, unsuitable for the purpose, with the result that some of the goods were lost and other damaged. The plaintiffs issued a *writ* claiming damages for breach of contract and or negligence. The defendants moved to stay proceedings.

Held (1) that a breach of a term going to the root of a contract (of which deviation in a contract of carriage is an example), though it entitles

the other party to treat the contract at an end, does not of itself have any effect on the existence of the contract, all the clauses of which, including the arbitration clause, remains of full force and effect if the party not in default elects to treat the contract as still in existence (1); but.

(2) that if the party not in default chooses to treat the contract as terminated, all further performance of the obligations of each party towards the other comes to an end, and the party in default looses the benefit of all clauses (called "exceptions") inserted for his protection by way of variation or limitation of his common law liability.*

(3) That it is fallacious to treat an arbitration clause (which is not one of the purposes of the contract, but mere machinery for settling dispute) as being on the same footing as an "exception", even when it is unilateral and apparently inserted for the benefit of one party only;

(4) That an arbitration clause therefore survives the acceptance of a breach as a repudiations;

(5) That the alteranative claim in negligence did not take the plaintiff's case out of the arbitration clause, for the obligation of the diligence in the contract was apparently co-extensive with the non-contractional obligation, and the claim in negligence, like the alternative claim under the contract, arose out of acts before the issue of the writ, which constituted the acceptance of repudiation.

In delivering the judgment, the Court observed after quoting from *Lord Macmillian* and *Lord Porter* in *Heyman* v. *Darwin's Ltd.*, (1942) A.C. 356, 374; "Ergo, in the event of a repudiation, the arbitration clause, subject to any exceptional wording, will servive."

In *Sanderson* v. *Armour*, (1922) S.C.H.L. 117=91 L.J.P.C. 167=127 L.T. 597, *Viscount Finlay* said: "The proposition that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advtanage of an arbitration clause is unreasonable in itself, and there is no authority to support it."

In *Woodal* v. *Pearl Insurance*, (1919) 1 K.B. 593=88 L.J.K.B. 706, *Bankers L.J.* said: "The determination to maintain the right to go to arbitration is, in my opinion, entirely inconsistent with the idea of repudiating the contract in the sense of insisting that there was no binding agreement between the parties at all." In *Johannesburgh* v. *Stewrat* (1909) S.C. (H.L.) 53 (58), *Lord Shaw*, said: "It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated." See also the observation of *Lord Haldane in Juriedini* v. *National British*, (1914) 84 L.J.K.B. 640=(1915) A.C. 499=(1915) W.C. & Ins.Rep. 239. One cannot at the same time affirm and repudiate a contract. *Davis* v. *Starr*, (1889) 41 Ch.D. 242. In a suit to enforce the arbitration clause, he must prove that at the commencement of the action he was ready and willing to do everything necessary for the proper conduct of the arbitration. *Davis* v. *Starr*, (1889) 41 Ch.D. 243.

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*(1) *Vide Flora Edrige* v. *Rustomji*, A.I.R. 1933 P.C. 233=60 I.A. 368=38 C.W.N. 145=65 M.L.J. 873=36 Bom.L.R. 127, where *Lord Wright* said: "But a wrongful repudiation by one party cannot except by the election of the other party as to treat it cannot put an end to the obligation; if the other party still insists a performance of the contract the repudiation is what is called *brutum fulmen*, that is the parties are, left with their rights and liabilities as before."

But by pleading that the arbitration is out of time, he does not cease to be "ready and willing." *Bruce Ltd.* v. *Strong,* (1951) 2 K.B. 447= (1951) 1 All. E.R. 1021. The applicant for a stay must show that he is now, but also that he was at the time of commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. *Russell* 15th Edn. 65.

In *Mulchand* v. *Radha Kissen,* A.I.R. 1926 Sind 27 (30), Court said : "In para 3(b) he contended that the contract was void on account of commercial adventure and on account of change of circumstances. In other words as was pointed out by *Duke L.J.* in the Court of Appeal in the case of *Woodall* v. *Pearl Assurance Co.* (1919) 1 K.B. 593 (611)=88 L.J.K.B 706=120 L.T. 556, 'the defendant found himself upon the contract and not upon repudiation of the existence of the contract'. As was pointed out by *Lord Reading C.J.,* in *Stubbing's case,* (1917) 2 K.B. 433 'the material question upon this matter of repudiation is what is alleged by the defendants is something which gives the go-by to their contract, that is to say, which arises outside and exists independently of the contract and avoids it by its own force or whether what is alleged is some ground of defence arising upon the contract itself. In the present case the ground upon which it is said that the plaintiff has no claim is spelt out of the language of the contract itself. Taking this view it seems to me that *Juriedini's Case* (1915) A.C. 499, which depended entirely upon repudiation of the contract by the defendant has no application. The distinction between those case where the defendant alleges circumstances existing independently of the contract, and avoiding it by their own force and cases where the defendant alleges a ground of defence arising upon the contract itself was emphasized by *Raymond, A.J.C.* in *Jivarai Lakshmi* v. *Tapkundas,* 14 S.L.R. 91=58 Ind.Cas. 790. If the text referred to in the above case and in *Woodall* v. *Pearl Assurance Co. supra,* is applied to the present case it is abundantly clear that the present case belongs to the latter group of cases in which the defendant seeks to avoid the contract by a ground of defence arising upon the contract itself. For there is nothing in the contract itself to offend against public policy or morality or any other extraneous circumstances which would render the contract inherently void in itself or immpossible of performance."

So the arbitration clause in a contract can be regarded as a thing apart from the main conditions of the contract and it is not a necessary clause in the contract. The main contract deals with the performance of mutual obligations and how they are to be performed, whereas the arbitration clause deals creates no liability. It embodies the agreement of both parties that, if any dispute arises with regard to the obligation which the one party has undertaken to the other, such a dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in an ordinary contract the obligation of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specially enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement. *Firm Kasan Narain* v. *Volkart Bros.,* A.I.R. 1946 Lah. 116 (F.B.).

Where an agreement containing an arbitration clause is determined by something arising outside the contract, the arbitration is determined with it ; and any dispute as to the cause of such determination cannot be brought to arbitration by virtue of the arbitration clause. But where such

determination is due to something arising directly out of the contract itself the arbitration clause is not made ineffective, and the dispute can be referred to arbitration *De La Grade* v. *Worsnot & Co.*, 96 L.J.Ch. 446 = 13 L.T. 478 = (1928) Ch. 17 cited with approval by *Banerjee J.* in *State of Bombay* v. *Adamjee Maji,* A.I.R. 1951 Cal. 147 = 6 D.L.R. (Cal) 102. In *Albion Jute* v. *Jute and Gunny Brokers,* A.I.R. 1953 Cal. 458 (S.B.) *Chakravarty C.J.* said : "On the only ground urged by the learned Advocate-General, he referred to the provisions of Section 5 (2) of the Act (6 of 1951) by which all contracts of the specified kind, not entered into in manner prescribed by Section 6, were declared to be void and of no effect. That present contract being of the specified kind and not having been entered into in compliance with Section 6 was therefore void if it was void and of no effect, an award in relation to it was also void. Besides the contract being void, the arbitration clause, contained in it was also void and accordingly there was no valid arbitration agreement under which there could be a valid reference and no valid reference upon which there could be a valid award." It has already been stated that in case of frustration of a contract, the arbitration clause ceases to exist. *Hirji Mulji* v. *Cheong* (1926) A.C. 467. In *Bank* v. *Chapel* (1919) A.C. 435 (452) = 88 L.J.K.B. 221, *Lord Summer* said : "I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration ; indeed such conduct might give the other party the option to treat the contract as repudiated." See A.I.R. 1935 P.C. 123. Where the arbitration clause is distinct from the other clauses in the contract, total breach of the other substantive stipulations even when accepted by the other party does not abrogate the arbitration clause and even the party in default may invoke the clause. But the parties are not bound to have recourse to arbitration. They may settle the disputes directly and agree not to invoke the arbitration clause for that purpose. The arbitration clauses to exist with reference to the disputes which are thus settled. They may also enter into a substituted agreement in complete supression of the original contract and thereby abrogate the contract and the arbitration clause contained in it. *Union of India* v. *Kishrilal,* A.I.R. 1952 Cal. 642 ; *Heyman* v. *Darwins Ltd.* (1942) A.C. 356 (377) = 111 L.J.K.B. 241.

154. Ultravires contract.—Where two public companies had entered into an agreement which was clearly *ultravires* and dispute which had arisen thereunder had been agreed to be referred to arbitration, the Court will interfere at the instance of dissatisfied shareholder of the company, to restrain the further proceedings under such agreement to refer. *Maunsell* v. *Midland G. W. Ry.* 1 H. 130 = 32 L.J.Ch. 513 = 8 L.T. 345.

155. Void contract.—To constitute an arbitration agreement which will bring a reference under the Act, there must be agreement—that is to say the parties must be *ad idem. Caerlton Tinblate* v. *Hughes,* 60 L.J.Q.B. 640 ; *Anglo-Newfound Land Development Co V. R.* (1920) 2 K.B. 214. A contract which is itself void, cannot be the basis of an arbitration agreement. *Albion Jute* v. *Jute and Gunny Brokers,* A.I.R. 1953 Cal. 458 : *Joe Lee Ltd.* v. *Lord Dalmeny,* (1927) 1 Ch. 300. In the above case it has been held that the arbitration clause in a wagering contract is not enforceable.

156. Contract void or voidable.—An arbitration clause contained in a contract was in the following terms : "All matters, questions, disputes, differences, and/or claims arising out of and/or concerning and or in

connection with and/or in consequence of or relating to this contract whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated shall be referred to arbitration. *Held* that there was no limit in the scope and ambit of the arbitration clause except that it contemplated a contract. If a contract was never entered into because for example, the parties were not *ad idem*, or the contract was void *ab initio*, *e.g.*, *by* reason of illegality or mutual mistake of fact essential to the contract, that clause would not be available, for there being no contract there could not be any dispute arising out of if. But if once it is found that there was a contract, then although the contract might have come to an end by reason of frustration or rescission or breach of condition or by being avoid for fraud or miserpresentation or coercion, the arbitration clause clearly survived. *Tolaram* v. *Nathumal*, I.L.R. (1948) 2 Cal. 171. Where the very existence of a contract is denied, there is no dispute to be referred to arbitration and the arbitrators have no jurisdiction to decide whether the contract was entered into or not. In a case where contracts had been repudiated, and acceptance not proved ; *held* that the arbitrators had no jurisdiction to enter upon a consideration of the matters which could not be referred to them. *Mahomed* v. *Piroj shaw*, 34 Bom.L. 697 = A.I.R. 1932 Bom. 341 = 138 Ind.Cas. 237. A dispute as to the validity could be the subject matter of an agreement of arbitration in the same manner as a dispute relating to a claim under the contract. But such an agreement would be effective and operative only when it is separated from and independent of the contract which is impugned as illegal. When, however, it is a term of the very contract whose validity is in question, it has no existence apart from the impugned contract and must perish with it. An agreement for arbitration is the very foundation in which the jurisdiction of the arbitrators to act rests, and where that is not in existence at the time when they enter on their duties the proceedings must be held to be wholly without jurisdiction. *Waverly Jute Mills* v. *Raymons Co* (p) *Ltd* A.I.R. 1963 S.C. 90. In order to constitute as arbitration agreement within the meaning of S. 2 (a) of the Arbitration Act, there must be a valid agreement to submit present or future difference to agreement and the agreement must be in writing and must be accepted by the parties. It is however not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor is required to be signed to the parties. But where the Dominion of India was a party to the arbitration agreement which is a contract within the meaning of S. 175 (3) of the Government of Indian Act 1935, it must, to bind the Dominan of India, be made in the form prescribed by that Section. *Union of India* v. A.L. *Ralia Ram* A.I.R. 1963 S.C. 1685.

157. Arbitration clause in a contract whether assignable.—An arbitration clause in a contract being a personal covenant, rights under it are not assignable, and an assignment of interest in a contract such rights do not pass as a legal or other remedies "within the meaning of Section 156 (1) of the Law of Property Act, 1925." *Cottage Club Estates* v. *Woodside Estates Co.*, 97 L.J.K.B. 72 = (1928) 2 K.B. 463 = 139 L.T. 353 = 44 T.L.R. 20. An arbitrator has jurisdiction to deal with a dispute between the parties to a contract in the terms of an arbitration clause in the contract, notwithstanding that one of the parties has by assignment divested himself of his rights to claim under the contract, but in dealing with the dispute the arbitrator must merely consider the terms of the

contract within the limits of the document, but must consider the application and enforcement of those terms having regard to the legal position which has been created by the assignment. *Ibid ;* but see *Smith* v. *Jones,* (1842) 1 Dowl. (N.S.) 526 ; *Halsbury's Laws of England,* Vol. I p. 1074, where the law is stated as follows : "The parties to an arbitration agreement is bound by the contract. It stands to reason that their representatives and those who derive their titles from them are also bound by such agreement. Where the subject-matter of contract for reference is capable of assignment the assignees of a party are also bound by such contract." *Russell* says : "An arbitration agreement will bind not only the actual parties to it, but also an assignee of a contract containing it. *Shaylor* v. *Woolf* (1946) Ch. 320". *Russell* 15th Edn., pp. 34, 60. Again at page 60 the learned author says : "The arbitration clause will bind the valid assignee of a contract containing it and the presence of an arbitration clause will not normally cause a Court to hold that the contract is not assignable (*Shaylor*) v. *Woolf, supra*). The benefit of such a clause will however not pass to the assignee of a debt arising out of the contract containing it."

In *Shaylor* v. *Woolf,* (1946) 1 Ch. 320 = (1946) 2 All. E.R. 54 = (1947) 71, *Lord Greene* M.R. said : "The question whether an arbitration clause prevents a contract from being assignable must depend on the intention of the parties, and the nature of the contract, will of course, be very important. Quite apart from an arbitration clause, if the nature of the contract is one which makes it incapable of assignment, owing to its personal nature, there is no question of course, of the assignability of the arbitration clause ; but that an arbitration clause is assignable in its nature seems to me to be quite clearly contemplated by section 4 of the Arbitration Act, 1889, and it has been recognised in this Court in one of the authorities referred to, namely, *Aspell* v. *Seymour,* (1929) W.N. 152. As I have said, apart from this arbitration clause, the agreement in this case is, in my opinion, quite assignable, and it seems to me that the result of that must necessarily be that the arbitration clause also follows the assignment of the subject-matter of contract. There is nothing, I conceive, in principle or authority which would prevent that from taking place."

In the same case *Morton, L.J. said* : "I entirely agree with the judgment which has been delivered and I wish to add a few words upon one submission made by *Mr. Hewins.* He submitted boldly, as a general proposition, that the benefit of an arbitration clause could never be assigned; and this view appears to be put forward by *Russell* on *Arbitration and Adward,* 13th Edition, p. 46, where the learned author says : 'A submission is defined as a written agreement to submit present and future differences to arbitration. It is a personal covenant and cannot be assigned.'

"That general statement appears to be based upon an observation of *Wright, J.* in the case of *Cottage Club Estates Ld.* v. *Woodside Estates Co. (American) Ltd.* (1928) 2 K.B. 463, 466. He said in that case : "The arbitration clause is a personal covenant and cannot be transferred ; nor, indeed, was it transferred in any sense, in this case.' In my view, in that sentence. *Wright, J.,* was dealing with the facts in the case before him, and did not intend to lay down any such general proposition as is contended by *Mr. Hewins* and set out in the 13th Edn. of *Russell.* As my Lord has said, any such general proposition would appear to be contrary to

the provision of section 4 of the Arbitration Act and, in my view cannot be sustained."

Somervell, L.J., said : It seems to me that on any ordinary principle it certainly is not a personal covenant in the sense in which the adjective 'personal' is ordinarily used in the context." *Russell* in the 15th Edn. of his book citing *Shaylor* v. *Woolfe* (1946) Ch. 320 observes : "An arbitration agreement will bind only the actual parties to it, but also an assignee of a contract containing it." *Vide* page 34 of the above book.

158. Matters illegal and purely criminal not arbitrable.—Where the subject-matter is clearly illegal *Steers* v. *Lastley* (1794) 6 T.R. 61=1 Esn. 166 ; *Joe Lee Ltd.* v. *Lord Dalmeny and ors.* (1927) 1 Ch. 300, or so purely criminal that it cannot under any circumstances be made the subject of a civil action [*Bac. Ab. Arb.A. ; R.* v. *Bardel* (1836) 5 A. & E. 619=2 H. & W. 401=44 R.R. 520=6 L.J.K.B. (N.S.) 30=5 Dowl. 238 ; *R.* v. *Hardey* (1850) 14 Q.B. 529=19 L.J.Q.B. 196=14 Jur. 649] or an offence of a public nature for which no private person can recover compensation [*Keir* v. *Leeman* (1844) 6 Q.B. 308=13 L.J.Q.B. 259=8 Jur. 824=66 R.R. 392 ; affirmed (1846) 9 Q.B. 371=15 L.J.Q.B. 360=10 Jur. 742=72 R.R. 298 ; *Edgecombe* v. *Rodd* (1804) 5 East 294=7 R.R. 700 ; *R.* v. *Blackmore* (1850) 14 Q.B. 544=80 R.R. 297], it cannot be referred. *Redman,* p. 18

"Causes criminal are not arbitrable, because they ought to be punished for the common good" (Bac. Ab. Arb. A.). "If the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." Per, *Denman, L.J.* in *Keir* v. *Leeman, supra.*

"This is still correct law" says *Russell* 'with regard to all felonies and all matters where the offence is of a public nature. *Russell,* 15th Edn., p. 12. In *Baker* v. *Townsend,* 7 Taunt. 422=1 Moore 129, *Gibbs, C.J.* said : "They have referred to several assaults ; these may be referred. They have referred the right of possession ; that may be referred. The reference to all matters in dispute refers all other civil rights, which well be referred ; and the case cited by the counsel for the plaintiff recognises the principle which we establish. I am of opinion, therefore, that nothing is referred but what may properly be a matter of reference."

In *R.* v. *Bardell, supra,* the question was whether, that being a criminal prosecution any of the parties had power, notwithstanding that 3 & 4 Will IV. C. 42, S. 39, to revoke their submission, it was held that State. 3 & 4 Will IV, C. 42, S. 39 (1) which takes away the power of revoking a submission to arbitration, does not extend to a reference agreed to on the trial of an indictment ; but where such reference has been made at *Nisi Paries,* with a proviso for making the order a rule of Court, either party may, by himself or attorney, still revokes the submission. "So criminal offences which 'are personal such as assault, etc., for which an action of damages would lie, may be submitted to arbitration." *Patterson, J.* in *Ibid. For further discussion on this topic vide notes under S. 21 infra.*

159. Arbitration agreement—Vagueness.—A clause in an arbitration agreement which says "in the matter of dispute, the case shall be referred to the Superintending Engineer of the circle" clearly means the gentleman holding the office when the dispute arises." *Daulat* v. *State,* A.I.R. 1958 Punj. 19.

160. Express agreement and instruction for guidance.—Where there was express agreement and instruction for guidance of the parties, former to be acted upon. A.I.R. 1957 Pat. 697.

161. Application of Arbitration Act in other proceedings.—*Vide Section* 21 *infra* under the above heading.

162. Matters which cannot be referred to arbitration.—*Vide Section* 21 *infra* under the above heading.

163. Application of this Act to probate proceedings.—*Vide Section* 21 *infra.*

164. Construction of will whether can be referred to arbitration —*Vide Section* 21 *infra* under the above heading.

165. Matters in guardianship has proceedings.—*Vide Section* 21 *infra* under the above heading.

WHO MAY REFER MATTERS TO ARBITRATION

166. Capacity of persons to enter into arbitration agreement.— In *Saudamini Ghosh* v. *Gopal Chandra,* 28 Ind.Cas. 557=21 C.L.J. 227= 19 C.W.N. 948, *Mookerjee J.* said : "It is an elementary rule that as a submission to arbitration in a contract, the parties thereto must not only have a *general legal capacity to contract,* but they must also have such power in relation to the subject-matter of the submission as will enable them to carry into effect any order which could be legally and properly laid upon them by the award. To put the matter briefly, capacity to make a submission in co-extensive with capacity to contract ; every person capable of entering into a contract may be a party to a submission ; conversely, he who cannot contract, cannot make a submission ; and, as a necessary corollary, in the case of persons whose capacity to contract is restricted, the power of making a submission is, in the same manner and to the same extent, limited. Consequently, if parties enter into a submission concerning subject-matter over which one of them has no authority or only a restricted power of disposition, an award ordering such party to do that which he cannot lawfully do will be of no legal effect whatever." See aiso, *Wyatt* v. *Benson*, 23 *Barb.* (N.Y.) 327 ; *Wood* v. *Griffith,* 1 Swans. 43 ; *Turner* v. *Swainson,* 1 M. & W. 572=46 R.R. 402 ; *Rean* v. *Farman,* 6 Pickering (Mass.) 269.

167. Who may enter into arbitration contract.—"Every person who has a right of which he can dispose is competent to submit questions effecting that right to arbitration and any disability that affects the right of disposal will equally affect his right of submission." *Russell,* 15th Edn., p. 14. Now the question is what would be the fate of an award, where the reference is by some of the members interested in the property. In *Dialaram* v. *Nihali Bai,* A.I.R. 1936 Pesh. 96, Court observed. "All the persons interested in a property may not be available for reference or may be indifferent to the dispute, but there is no reason why those who are anxious to get their dispute between themselves decided should be debarred from referring the matter to arbitration, simply because the others who are indifferent or unavailable do not or cannot join." See also *Dharanidhar* v. *Sukharam,* A.I.R. 1921 Nag. 176=71 Ind.Cas. 860 : *U.Po. Hlang* v. *Daw.—Ngwe* A.I.R. 1941 Rang. 22=129 Ind.Cas. 683. But *Bhide, J.* in *Abdul Ghani* v. *Sirajuddin,* A.I.R. 1939 Lah. 154, dissenting from the above view observed : "When a number of persons are jointly interested in the subject-matter of the dispute, it would obviously not be possible, to decide the dispute properly, unless all the interested persons are represented. It is true that it may not be convenient or even possible at times to get the consent of all the parties, owing to some of them

being absent or for other similar causes. But in that case the proper course to adopt would, I think be to institute a suit. In the case of a suit a Court of law has always jurisdiction to decide the dispute, provided proper notice is given according to law. In the case of arbitration, on the other hand, the authority of the arbitrators to decide the dispute is founded on the consent of the parties." In *Jnanendra* v. *Jitendra,* A.I.R. 1928 Cal. 275=107 Ind.Cas. 70=32 C.W.N. 108, all that was held was that an award in so far as it interfered with rights of strangers would not be binding on them. It seems from the cases that where effective award can be made by the arbitrators without joining all the parties, such award is valid. But where no such award is possible as in the partnership dispute, award is not valid. See also *Kirkwood* v. *Maung Sin,* 89 Ind.Cas. 773=(1925) 5 Rang. 186=A.I.R. 1925 P.C. 216. *Vide* Section 21 *infra, under the heading "Validity of award where some of the parties join"* and *"parties in partnership suit."*

168. Undue influence, coercion, fraud, etc.—effect of.— Arbitration agreement obtained by undue influence, coercion or fraud will vitiate such an agreement. *Ghulam Hussein* v. *Sakinabai,* 19 Ind.Cas. 374=6 S.L.R. 146; see also *Ali Baksh* v. *Kadir,* 28 P.R. 1868; *Kazu* v. *Hajoo Adeeny,* 52 P.R. 1869.

169. Arbitration agreement by a minor.—It has already been stated that capacity to make a submission is co-extensive with capacity to contract. *Soudamini Ghosh* v. *Gopal Chandra,* 28 Ind.Cas. 557=19 C.W.N. 948=21 C.L.J. 273. According to English law "it would seem that a submission made by an infant could not be enforced against him during his infancy, and would be voidable by him on attaining his majority; but submission by infants out of court are very rare, the case reported being cases in which references was held pursuant to an order of the court." *Halsbury,* 2nd Edn., Vol. I, p. 625. But according to Indian law a contract entered into with an infant is not voidable, but void. 30 Cal. 539 (P.C.); 27 Ind. Cas. 733; 32 C.L.J. 214 (P.C.); 46 Ind.Cas. 765; 46 All. 568; 23 P.R. 1888. A minor is not estopped from pleading his minority. 21 C.W.N. 257 (P.C.); 9 Ind.Cas. 124; 31 All. 21=1 Ind.Cas. 704; 60 Ind.Cas. 267; 54 Ind.Cas. 876; 38 Mad. 1071; A.I.R. 1924 Lah. 294. But minority must be proved. 45 Cal. 909 (P.C.); 89 Ind.Cas. 108. *Vide* notes under Section 21 *infra.*

170. Arbitration agreement by guardian of minors.—In *Ramji Ram* v. *Salig Ram,* 11 Ind.Cas. 481=14 C.L.J. 188, the court observed: "It need not be disputed that, as an infant is unable to bind himself by contract, he cannot enter into a submission which will render the award absolutely binding over him; and this position may possibly by maintained even though the submission has been made under a rule of court [*Rudston* v. *Yates,* (1642) March II at p. 141; *Cavendish* v. *Cavendish,* (1876) 1 Ch.Cas. 279; *Evans* v. *Cogan,* (1727) 2 P.Wms. 450, and *Stone* v. *Knight,* (1628) Noy. 93]. But there is authority for the propsition that in the case of pending suit, the court may authorise a submission to arbitration so as to render the award binding on the infant [*Dowse* v. *Coxe,* 3 Ring. 20; *Davis* v. *Page,* 9 Ves. 350; *Proudfoot* v. *Boyle,* 15 M. & W. 198 and *Fagan* v. *Fagan,* 12 Ir E.R. 483]. In case before us, however the submission to arbitration, if any, has not been by the infant himself, but by his *de facto* and *de jure* guardian his father, the head of the *Mitakshara family* of which the infant was a member. Now, it is indisputable that a guardian may submit to arbitration on behalf of his ward so as to bind

himself and the ward; though no doubt, where the guardian is, in his individual capacity, a party to the submission and his interest in the controversy submitted happens to be adverse to that of his ward, he has no power to submit on behalf of his ward." See also, *Weed* v. *Ellis*, (1805) 3 Caine N.Y. 253; *Temakkal* v. *Subbammal*, 2 M.H.C.R. 47; *Sanyasi Rao* v. *Venkata Rao*, 47 Mad. 30=44 M.L.J. 263; *Lenkhapoli* v. *Kassi*, A.I.R. 1929 Mad. 144; *Ramautar Sha* v. *Langat Singh*, A.I.R. 1931 Pat. 92=130 Ind.Cas. 810; *Ramon Kissen Sett* v. *Hurro Lal Sett*, 19 Cal. 334; *Pannaya* v. *Suppamat*, A.I.R. 1946 Mad. 391=(1946) 1 M.L.J. 303; *Magyi* v. *Maung Po*, 8 Ind.Cas. 439 (L.B.); *Vesudeva* v. *Sundaraja*, A.I.R. 1930 Mad. 38=124 Ind.Cas. 209. So where an award on a private reference has been by the consent of all parties made a rule of Court and a decree passed in terms thereof and a minor party has been throughout represented by his guardian, he is not entitled to file a suit for a declaration that the decree is void and of no effect as it was based upon an unregistered award. 1941 A.W.N. (H.C.) 371=1941 A.L.W. 1095. Where a guardian *ad litem* has been appointed for the minor, it is that guardian alone who can represent the minor in all proceedings in that suit. If without any reference to the guardian *ad litem* of the minor the other parties to the suit defer their disputes to arbitration the minors' uncle professing to act as the guardian, the award cannot bind the minor. *Hanuman* v. *Ramlakhan*, A.I.R. 1930 All. 646=128 Ind.Cas. 437=1930 A.L.J. 923.

171. Arbitration agreement by de facto guardian of a Mahomedan minor.—A *de facto* guardian of minors is not competent under the Mahomedan law to enter on their behalf into an agreement to refer to arbitration any dispute, even where there is no *de jure* guardian of the minor as such agreement would necessarily, if acted upon, involve dealings with the immovable properties of the minors. *Shah Mohammad Jamil* v. *Shah Mohammad Hafizata*, A.I.R. 1928 Oudh 449=5 O.W.N. 847=112 Ind. 552. See also. *Imambandi* v. *Mutsaddi*, A.I.R. 1918 P.C. 11=45 Cal. 878=45 I.A. 73=47 Ind.Cas. 513 (P.C.); *Moshiruddin* v. *Kabiruddin*, 47 Cal. 713=57 Ind.Cas. 947=26 C.W.N. 246. But if the scheme of distribution promulgated in the award is in no way perverse or unfair or influenced by any corruption or misconduct of the arbitrator, and has been followed without any objection whatever for a long period extending over 14 years, it can be recognised as a family settlement. Even if the agreement and the award based thereon are both legally inoperative documents, the settlement relating to the family property laid down in the award should be considered to be valid family settlement. *Amir Hussain* v. *Mohammad*, A.I.R. 1929 Oudh 134=6 O.W.N. 51=177 Ind. Cas. 456. But the above case was reversed on appeal in *Mohammad Ejaz Hussain* v. *Mohammad Iftikhar Husain*, A.I.R. 1932 P.C. 76=9 O.W.N. 180=(1932) A.L.J. 199=36 C.W.N. 381=136 Ind.Cas. 97=62 M.L.J. 410 35 M.L.W. 435=59 I.A. 92=55 C.L.J. 157=34 Bom.L.R., 528 7 Luck. 1=33 P.L.R. 403. In the above case *Sir Lancelot Sanderson* said: "Their Lordships are of opinion that if Faiyaz-un-nissa was not competent to enter into the agreement of reference so as to bind the plaintiffs, who were minors at the time, with respect to their share in the immovable property of their father, it must follow that she was equally incompetent to agree to the disposal of the infant plaintiffs' share in any part of the immovable property of their father by adopting the award and by calling the transaction a family arrangement." It seems that the case reported as *Muhammad Ramjan* v. *Sardar Begam*, 52 Ind.Cas. 847=71 P.R. 1919,

has been overruled by the above-named Privy Council case. A Mahomedan sister is not a natural guardian of her minor brother. *Rasidun-nissa* v. *Mohammad,* 36 I.A. 168=31 All. 572=11 Bom.L.R. 1225. But the mother of the minor as the natural guardian of a Mahomedan, who had been on the date that the reference was made, though not on the date of the application, guardian appointed by the court, can deal with the minor's property by referring dispute to arbitration. *Golnur Bibi* v. *Abdus Samad,* A.I.R. 1931 Cal. 211=52 C.L.J. 298=35 C.W.N. 238=120 Ind. Cas. 209=58 Cal. 628. In the above case *Mukerji J.* said : "The cases upon which the learned Subordinate Judge has relied in this connection have no application in such circumstances. The case of *Imambandi* v. *Mutsaddi,* A.I.R. 1918 P.C. 11=47 Ind.Cas. 513=45 I.A. 73=45 Cal. 878 (P.C.) deals with the powers of a Mahomedan mother, to bind her minor child's property, and in no way governs the powers of a guardian though she may be a Mahomedan mother appointed by the court."

172. Power of reference by a certified guardian of a Mahomedan minor.—In *Said-un-nisa* v. *Rukya,* A.I.R. 1931 All. 307=(1931) A.L.J. 170=130 Ind.Cas. 201=53 All. 428, *Sulaiman, J.* observed : "There can be no doubt that a Muslim mother who assumes the position of a *de facto* guardian of her minor child has no power to transfer his property and such a transfer is not only voidable but void. *Imambandi* v. *Mutsaddi,* A.I.R. 1918 P.C. 11=47 Ind.Cas. 513=45 I.A. 73=45 Cal. 878 (P.C.) The learned advocate for the appellant contends that the same principle applies to a reference by a Muslim mother to arbitration and relies on the cases of *Mohsiuddin Ahmed* v. *Kabiruddin Ahmad,* 47 Cal. 713=57 Ind.Cas. 945, *Shah Muhammad Jamil Ata* v. *Shah Muhammad Hafiz Ata,* A.I.R. 1928 Oudh 449=112 Ind.Cas. 522, and *Ameer Hussain* v. *Muhammad Aijas Hussain,* A.I.R. 1929 Oudh 134=117 Ind.Cas. 456. In none of these cases, however, the mother, who referred the dispute to arbitration was certificated guardian duly appointed by the court, nor does it appear that she was the legal guardian of the minor under the Muhammadan law. In these cases there was a further distinguishing feature that the award had not terminated in a decree of the court to which the minor had been made a party.

"Conceding that a Muslim mother is disqualified from dealing with the property of her minor child, there can be no doubt that certain powers have been conferred upon her under section 27 of the Guardians and Wards Act, when she is duly appointed a certificated guardian. Under Section 27, a guardian is entitled to deal with the property of the minor as a man of ordinary prudence would deal with it if it were his own and may do all acts which are reasonable and proper for the realisation, protection or benefit of the property. Section 29, however, contains an exception which restricts his power by compelling the guardian to obtain the previous sanction of the court before mortgaging, charging, transferring by sale, gift, exchange or otherwise, any part of the immovable property of the ward or leasing it for a term exceeding five years. There is no prohibition against the guardian's referring a dispute, in which the minor's property is involved, to arbitration. In this sense it could be said that Mt. Walan Bibi was not disqualified from signing the agreement for reference to arbitration as the guardian of her minor daughter. At the same time she could have approached the District Judge and asked for his opinion, advice or direction on this matter under Section 33 of the Act. We think that it was the most prudent, reasonable and proper course for her to adopt when the minor's property was in dispute. It was an unwise act on her part to submit to the arbitration of private individuals, the result of which might

be to cause serious prejudice to the minor and jeopardise her property. Although, therefore, Mt. Walan Bibi had authority to represent the minor as her guardian, she did not act in a prudent manner in referring the dispute to private arbitration without previous reference to the District Judge."

173. Reference to arbitration by properly constituted guardian in other cases.—A reference to arbitration made by a properly constituted guardian in good faith and for the benefit of the minor binds him. *Mohan Singh* v. *Gur Devi,* A.I.R. 1931 Lah. 728=12 Lah. 767=131 Ind.Cas. 738=33 P.L.R. 196; *Temakkal* v. *Subbamal,* 2 M.H.C.R. 47; *Sankarappa* v. *Shivappa,* 35 Bom. 153=8 Ind.Cas. 647; *Hardeo Sahai* v. *Gouri Sankar,* 28 All. 35=2 A.I.J. 493. But where the right of a minor is surrendered, the minor is not bound by the award. *Sanyasi Rao* v. *Venkata Rao,* A.I.R. 1923 Mad. 301=47 Mad. 30=73 Ind.Cas. 470; *Srikishin* v. *Rahumal,* 34 Ind.Cas. 845; *Lutawan* v. *Lachaya,* 6 All. 69 (F.B.).

174. Power of a natural guardian to enter into an arbitration in suits on behalf of a minor.—An arbitration can be entered into on behalf of a minor by his natural guardian, provided it is for his benefit, or reasonable and proper for the protection of his property, but the award would not be binding if that were not the case. *Sadasiva* v. *Trimbak,* 56 Ind.Cas. 399=22 Bom.L.R. 266=44 Bom. 202; *Mg. Po.* v. *Ma,* 8 Bur.L.T. 122=29 Ind.Cas. 800; *Ramji* v. *Salig,* 14 C.L.J. 188=11 Ind.Cas. 481. But see *Shantilal* v. *Munshilal,* A.I.R. 1932 Bom. 498=139 Ind.Cas. 820=56 Bom. 595=34 Bom.L.R. 862; *Chettyar Firm* v. *Ma Thaung Sheve,* 142 Ind.Cas. 189=I.R. 1933 Rang. 35. In *Ramautar Sha* v. *Langat singh,* A.I.R. 1931 Pat. 92=130 Ind.Cas. 810, *Kulwant Sahaly J.* said: "It is next contended that, assuming that he signed it on behalf of the guardian of Ramautar Sha, the guardian herself had no authority to make a submission to arbitration, and reference has been made to the decision of the privy Council in *Mir Sarwarjain* v. *Fakhruddin,* 39 Cal. 323=39 I.A. 1=13 Ind.Cas. 331 (P.C.). In that case it was held by the Judicial Committee that it was not within the competence of the guardian of a minor to bind the minor's estate by a contract for the purchase of immovable property. That case is, therefore, no authority for the proposition that a guardian cannot make a valid reference to arbitration. On the other hand, we have got direct authority on the point and I may refer to one only of them, *viz.,* the decision in *Romon Kissen Sett* v. *Hurrolall Sett,* 19 Cal. 334, where it was held that a natural guardian has power to submit to arbitration. The reference to arbitration by the guardian of a minor was not illegal."

Under the Hindu law all acts of a natural guardian which the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by the guardian. A natural guardian has, therefore, power to submit a dispute to arbitration on behalf of a minor, if the submission is for the benefit of the minor; and the minor would in such a case be bound by the award made by the arbitrators on such submission. *Punuswami* v. *Veeramuthu,* 91 Ind.Cas. 676=3 Rang. 452=A.I.R. 1926 Rang. 31; *Romon Kissen* v. *Hurrolall,* 19 Cal. 334; *Sankarappa* v. *Shivappa,* 8 Ind.Cas. 647=35 Bom. 153=12 Bom.L.R. 984; *Temakkal* v. *Subammal,* 2 M.H.C.R. 47. A partition by arbitration may be binding on a minor but only when he is not injuriously affected thereby, when it is fair and when he has been duly represented. *Ma Gyi* v. *Mung Po,* 3 Bur.L.T. 45. A minor represented in a suit by a guardian whose interest is adverse to the minor, is not represented at all and any decree passed

in the suit is a nullity so far as the minor is concerned. *Sellappa* v. *Masa*, 76 Ind.Cas. 1018=(1923) M.W.N. 775=45 M.L.J. 675=18 L.W. 838=33 M.L.T. 126.

175. Benefit of the minor.—In *Romon Kissen Sett* v. *Hurrolall Sett*, 19 Cal. 334, a natural guardian had on behalf of her minor sons submitted certain matters to arbitration. An application was made, on notice calling upon certain persons to show cause, under Section 525 of the Civil Procedure Code of 1882, why an award should not be filed. *Thevelyan J.* in passing orders in that case observed : "The cases appear to show that a minor can set aside an award on coming of age, and that a natural guardian has power to submit to arbitration. I think the best course to pursue is to make a reference to Registrar to enquire and report whether submission to arbitration, and the award, is or is not, for the benefit of the infants". The validity of an award must be determined by the consideration of circumstances as they existed at its date, and not as they transpired some years after it had been passed by the arbitrators. An award cannot be disturbed on the ground of inequality of benefit which either party may eventually have received from it. *Sankarappa* v. *Shivappa*, 8 Ind.Cas. 647=12 Bom.L.R. 984=35 Bom. 153, following *Rajendra Narain* v. *Bijai Gobind*, 2 M.I.A. 181 (249) ; *Mohan Lal* v. *Gur Devi*, A.I.R. 1931 Lah. 728=12 Lah. 767=131 Ind.Cas. 738=33 P.L.R. 196 ; *Jainath* v. *Kamala*, 7 Ind.Cas. 31 ; *Balaji* v. *Nama*, 27 Bom. 287 ; *Emnabai* v. *Fakir Mahomed*, 65 Ind.Cas. 50=15 S.L.R. 165=A.I.R. 1922 Sind 1.

176. Where reference to arbitration in a pending suit by a next friend or a guardian ad litem of a minor is subject to Order 32, Rule 7, of Civil Procedure Code.—This rule contemplates the existence of a guardian and a pending litigation. *Vithaldas* v. *Dattaram*, 26 Bom. 298. See also, *Vishram* v. *Gangaram*, A.I.R. 1935 Sind 235 ; A.I.R. 1921 Sind 61 ; A.I.R. 1918 Bom. 123. But there was a conflict of opinion as to the application of this rule to agreements to refer to arbitration made by a next friend or guardian *ad litem* of a minor. All the other High Courts and Chief Courts except the Calcutta and Allahabad High Courts were of opinion that this rule applies to such reference. According to the former courts the matter in dispute cannot be referred to arbitration or compromise under the provision of Order 32, rule 7, Civil Procedure Code, without the leave of the court. *Ramanathan* v. *Kumarappa*, A.I.R. 1940 Mad. 650=(1940) M.W.N. 191 ; *Umar* v. *Mahabir*, A.I.R. 1940 Pat. 59=(1939) P.W.N. 631=183 Ind.Cas. 799=18 Pat. 708 ; *Umar Gul Allahdin* v. *Abdul Manan*, A.I.R. 1940 Pesh. 12 ; *Kedarnath* v. *Basantlal*, 18 Pat. 271=183 Ind.Cas. 422 ; *Ramnarain* v. *Atal Behari*, A.I.R. 1939 Pat. 387=180 Ind.Cas. 733 ; *Samad* v. *Mohd. Ramzan*, 40 P.L.R. 498=A.I.R. 1938 Lah. 582 ; *Visharam* v. *Gangaram*, A.I.R. 1935 Sind 235 ; *Chena* v. *Veeraswami*, 38 L.W. 927=A.I.R. 1933 Mad. 862=65 M.L.J. 755 ; *Muriam* v. *Amina*, A.I.R. 1937 All. 65=(1936) A.L.J. 1333 (F.B.) ; *Chimbhanbhai* v. *Keshavlal*, A.I.R. 1923 Bom. 402=25 Bom.L.R. 443=73 Ind.Cas. 464=47 Bom. 721 ; *Mir Miyan* v. *Hadayat Khatun*, 1 S.L.R. 160 ; *Sadasivappa* v. *Sangappa*, A.I.R. 1931 Bom. 500=134 Ind.Cas. 1221=23 Bom.L.R. 1033 ; *Pragdas* v. *Girdhari Das*, 26 Bom. 76=3 Bom.L.R. 431 ; *Atmaram* v. *Bhila Ganpat*, 19 Ind.Cas. 424=15 Bom.L.R. 223 ; *Sadasiv Ram* v. *Trimbak*, 56 Ind.Cas. 399=22Bom.L.R. 266=44 Bom. 202 ; *Malak Sorab* v. *Anokh Rai*, 18 P.R. 1891 (F.B.) ; *Chhaju Mal* v. *Tarloki*, A.I.R. 1926 Lah. 665=8 Lah.L.J. 414=96 Ind.Cas. 748=27 P.L.R. 729 ; *Baktawar* v. *Keshar Singh*, 59 Ind.Cas. 31=5 P.W.R. 1921 ; *Muhammad* v. *Allah Baksh*, 52 Ind.Cas. 327=145 P.R. 1919=1 Lah.L.J. 138 ; *Ganesh* v. *Mulchand*, 95 P.R. 1912=15 Ind.Cas. 161 (F.B.) ; *Lakshmana* v. *Chinna Thambi*, 25

Mad. 326; *Loung Tahir* v. *Ram Singh*, A.I.R. 1940 Sind 178=I.L.R. 1940 Kar. 327=191 Ind.Cas. 291; *Vijaya Ramayya* v. *Venkata Subba Rao*, A.I.R. 1917 Mad. 672=32 Ind.Cas. 881=39 Mad. 853=30 M.L.J. 465; *Davuluru* v. *Davuluru*, 32 Ind.Cas. 881=30 M.L.J. 465=39 Mad. 853; *Hanuman* v. *Jagadish*, 35 Ind.Cas. 675; *Sagar Mal* v. *Hira*, 91 Ind.Cas. 799=7 P.L.T. 264=A.I.R. 1926 Pat. 164; *Rani* v. *Amrit*, 17 C.P.L.R. 147; *Emnabai* v. *Fakir*, 65 Ind.Cas. 50=A.I.R. 1922 Sind 1; *Gunnomal* v. *Gurdinomal*, A.I.R. 1921 Sind 61; *Umer* v. *Dadi*, A.I.R. 1926 Sind 128 (129)=98 Ind.Cas. 550=20 S.L.R. 116; *Siva Kumar* v. *Thakur Prosad*, A.I.R. 1930 Oudh 432=128 Ind.Cas. 748=7 O.W.N. 815. Now the Calcutta and Allahabad High Courts have also accepted the majority opinion (*vide* next two topics).

177. Latest decision of the Allahabad Full Bench on the point— The above question was fully considered by a recent Full Bench case of the Allahabad High Court in *Mt. Murium* v. *Mt. Amina*, A.I.R. 1937 All. 65=(1936) A.L.J. 1333=167 Ind.Cas. 99=I.L.R. 1937 All. 137. There the question referred to the Full Bench was, whether para. 1, Schedule II, Civil Procedure Code, is subject to the provisions of Order 39, rule 7. para 1, Schedule II, corresponds to section 21 of the new act. In answering the question *Sulaiman C.J.* observed: "(1) I would answer the first question in the affirmative and say that para. 1 of Schedule II and Order 32, rule 7, should be read together and each governs the other. There is, however, this distinction. Where the guardian of a minor has agreed to join in the reference to arbitration, the requirements of para 1 of Schedule II, are complied with, but unless and until the leave of the court has been obtained and expressly recorded in the proceedings the requirements of Order 32, rule 7, are not fulfilled. (2) In view of the imperative provisions of Order 32, rule 7, as interpreted by their Lordships of the Privy Council, the answer to the second question should be that the leave of the court must be obtained before the reference is made so that the attention of the court should be directed to the matter that there is a minor concerned and the court should be asked to consider whether the reference is in the interest of the minor and for his benefit, and if so, it should expressly record the granting of the leave in the proceedings. (3) (*a*) the omission of the next friend or the guardian *ad litem* of a minor party to obtain such leave would render the order of reference and the award and the decree based upon it voidable at the option of the minor as against all the parties, but not voidable at the option of the other parties thereto, as against the minor. The adult members are bound by it despite the fact that the leave of the court had not been obtained, if the award is in favour of the minor or is not challenged on his behalf. But if the minor's guardian or next friend repudiates the award or the minor on attaining majority does not accept it, the reference can be avoided and therefore the award and the decree would fall to the ground so far as the minor is concerned. (*b*) It is open to the minor to bring the matter up in revision to the High Court or get a declaration in a separate suit that for want of leave the reference, the award and the decree are not binding upon him, or to take such a plea in any suit in which he may be impleaded as a defendant." See also, *Vijaya Ramayya* v. *Venkasubba Rao*, A.I.R. 1917 Mad. 672=32 Ind.Cas. 881=39 Mad. 853=30 M.L.J. 465: *Chhajju* v. *Tarloki*, A.I.R. 1926 Lah. 665=96 Ind.Cas. 748=27 P.L.R. 729: *Sadashivabpa* v. *Sangabpa*, A.I.R. 1931 Bom. 500=134 Ind.Cas. 1221=33 Bom. L.R. 1033; *Golnur Bibi* v. *Abdus Samad*, A.I.R. 1931 Cal. 211=130 Ind. cas. 209=37 C.W.N. 238=58 Cal. 628; *Kedar* v. *Basanta*, 18 Pat. 271=183

Ind.Cas. 422=A.I.R. 1939 Pat. 278; *Sripad* v. *Dattatraya,* A.I.R. 1939 Bom. 296=41 Bom.L.R. 485; *Chenna* v. *Veeraswami,* 38 L.W. 927=A.I.R. 1933 Mad. 862=65 M.L.J. 755; *Ghulam* v. *Shahabal,* 3 P.R. 1905; *Jita Singh* v. *Man Singh,* 15 Ind.Cas. 161=95 P.R. 1912 (F.B.); *Jumno Mal* v. *Gurdiamal,* 83 Ind.Cas. 913=17 S.L.R. 211; *Umar* v. *Mahabir,* A.I.R. 1940 Pat. 59.

Order 32, rule 7, Civil Procedure Code, does not require any particular formula to be used by the court in granting leave to a guardian of a minor to enter into an agreement to refer the suit to arbitration. So long as an application is made to the court for leave and the court exercises its judicial discretion to permit the guardian to enter into an agreement on behalf of the minor, the reference to arbitration is binding even though there is no record expressly granting the court's leave. *Ramnarain Singh* v. *Atal Behari Singh,* 180 Ind.Cas. 733=A.I.R. 1939 Pat. 387. Even if a natural or a certificated guardian appointed by the District Judge, is appointed guardian *ad litem,* he is bound by the provisions or Order 32, rule 7, Civil Procedure Code. *Raj Bahadur* v. *Jamna Kuer,* 184 Ind.Cas. 609=(1939) A.L.J. 624=A.I.R. 1929 All. 607. But a reference to arbitration out of court at a time no suit was pending in court, does not require the sanction of any court. *Nana* v. *Dalpat,* 41 Bom.L.R. 1208. Where a reference, in which property of minor is involved, is under the Arbitration Act and not with reference to a pending suit, no leave of court is necessary. *Vishram* v. *Gangaram,* A.I.R. 1935 Sind 235.

178. Calcutta High Court.—The views taken by the Calcutta High Court are not uniform on this point. In *Anno Krishna* v. *Jogendra,* 8 C.L.J. 294, *Maclean C.J.* was of opinion that no consent of the court was necessary. See also, *Dubiruddin* v. *Amina Bibi,* A.I.R. 1925 Cal. 475=78 Ind.Cas. 335. But in *Golnur Bibi* v. *Abdus Samad,* A.I.R. 1931 Cal. 211=52 C.L.J. 298=35 C.W.N. 238=130 Ind.Cas. 209=58 Cal. 628, it was taken for granted that such consent is necessary. In delivering his judgement in the above case *Mukherjee J.* observed: "In the case of a compromise decree it has always been held that non-observance of the condition as to leave does not render the decree void, but it is only voidable and that too at the option of a minor, that no other party to the suit can call it in question, and that the minor may do so either on attaining majority or before then through a next friend. It has been held by this court that the proper course for a minor to set aside a compromise entered into by his guardian without the leave of the court and the decree based upon it, is by way of an application for review in the first court or by a separate suit, but not by way of appeal from the compromise decree: *Rakhal Moni* v. *Adwyta Prasad,* 30 Cal. 613=7 C.W.N. 419, and *Biraj Mohini* v. *Chinta Moni,* 5 C.W.N. 877. I do not see why the same principle should not apply to the case of a decree based on an arbitration award." See also, *Rajkumar* v. *Sivaprasad Gupta,* 184 Ind.Cas. 553=A.I.R. 1939 Cal. 500. Where a dispute to which minors are parties is referred to arbitration and a party makes an application for an order directing the arbitrators to file the award and a decree in accordance therewith, and the guardian *ad litem* of the minors makes a petition that they have no objection to the decree, the provisions of Order 32, rule 7, are not attracted and the court is under no necessity to sanction anything as a condition precedent to filing the award and passing a decree upon it. *Ibid.* In delivering the judgment *Lord Williams J.* said: "But in my opinion, these facts do not show that the decree was a consent decree. In a consent

decree it should be and generally is stated that it is 'by consent'. But there is nothing in the decree to suggest that it was made by consent. Such a statement is necessary and important because section 96, Civil Procedure Code, provides that no appeal shall lie from such a decree. To constitute consent there must be a bargain between the parties and not a mere acceptance of the order offered. *Davis* v. *Chanter,* 2 Phill. 545=78 R.R. 178, *Aldam* v. *Brown,* (1890) W.N. 116, and *Hadida* v. *Fordham,* (1893) 10 T.L.R. 139.....The provisions of Order 32, rule 7, therefore were not attracted, and in such circumstances the court was under no necessity to sanction anything as a condition precedent to filing the award and passing a deree upon it. *Hanamatram* v. *Shivnarayan,* A.I.R. 1918 Bom. 123=48 Ind.Cas. 238=43 Bom. 258=20 Bom.L.R. 970 (F.B.); *Venkata Narasimha* v. *Bhashyakarlu,* 22 Mad. 538." As regards Hindu Guardian's power as regards the property of the minor see new Act XXXII of 1956 given *infra.*

179. Effect of application made subsequently.—The making of the application under Order 32, rule 7, subsequent to application for reference to arbitration does not render the reference, made actually after the grant of permission under Order 32, rule 7, invalid and there has been a sufficient compliance with the rule. *Babu Prasad* v. *Mahabir,* A.I.R. 1951 Pat. 294.

180. Power of guardian to apply for setting aside award.—According to the Madras High Court the question of legality of reference and that of an award can be raised on behalf of the minors by the same guardian who had agreed to refer the matter to arbitration both in the suit and in the appeal. *Ram Nathan* v. *Kumarappa,* I.L.R. 1940 Mad. 650=1940 M.W.N. 191. But the Calcutta High Court in the case of *Golnur Bibi* v. *Abdus Samad,* 58 Cal. 628=35 C.W.N. 238=A.I.R. 1931. Cal. 211 took a contrary view. See also, *Chenna Kera Valu* v. *Veera Sami,* A.I.R. 1933 Mad. 862.

181. Privy Council decision.—This point has been set at rest by the decision of the Judicial Committee in the case of *Chabba Lal* v. *Kalulal,* A.I.R. 1946 P.C. 72=73 I.A. 52=M.R. (1946) All. 193=223. Ind. Cas. 567=1946 A.L.J. 254=27 P.L.T. 163=48 Bom.L.R. 457=50 C.W.N. 465=(1946) 1 M.L.J. 339 (P.C.). In that case approving the Full Bench decision of the Allahabad High Court in the case of *Mariam Bibi* v. *Amina Bibi,* A.I.R. 1937 All. 65=I.L.R. (1937) All. 317=166 Ind.Cas 99 (F.B.), it has been held that Rule 7 of Order 32, C. P. Code, is imperative and its terms must be strictly complied with. The rule applies to an agreement to refer matters in dispute to arbitration. Such an agreement which removes the decision of a matter in dispute from the jurisdiction of the court and refers to some outside party is clearly an agreement with reference to the suit and not only falls within the terms of the rule, but comes within the mischief at which the rule appears to be aimed. If the minors successfully challenge an agreement to refer to arbitration as not made in compliance with Sub-section 1 of Rule 7 of Order 32, it is avoided against all parties under Sub-section 2. *Ibid.*

182. Order 32, Rule 7—Whether applicable.—The proceeding that was pending in another Court was for leave to bring certain suits as paupers, and the minor who was one of the parties to an award was involved in the proceedings. But there was nothing to show that the subject-matter of those proceedings was the same as covered by the award. *Held* that neither S. 141 nor S. 32, rule 7, applied, and the award was not invalid

because no permission was obtained from the other Court. *Saraswati Debi* v *Jagan Nath*, A.I.R. 1939 Lah. 308.

183. Reference by a father or a manager of a joint Hindu family. —It is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration the partition of the joint family property, and the award made on such a reference, if in other respects valid, will be binding on the sons. *Jagan Nath* v. *Manu Lal*, 16 All. 231. See, *Pitam Singh* v. *Ujgar Singh*, 1 All. 651 ; *Raja Ram* v. *Gopi Nath*, A.I.R. 1931 All. 721=133 Ind.Cas. 416. *Balaji* v. *Nana*, 27 Bom. 287=5 Bom.L.R. 95 ; *Basudeva* v. *Sundararaja*, A.I.R. 1930 Mad. 38=30 M.L.W. 689=53 Mad. 838. The minor sons of a Hindu father are bound by a *bona fide* compromise of a doubtful claim entered into by their father as manager of the joint family. *Venkatagiri* v. *Subbarayalu*, 24 Ind.Cas. 491. See also, *Sarabjit* v. *Indarjit*, 27 All. 203=2 A.L.J. 720 =(1904) A.W.N. 244 ; *Mussamat Husan Bibi* v. *Fazal Kadir*, 4 *Ind.Cas.* 954=106 P.W.R. 1909=139 P.L.R. 1909 ; *Ramdas* v. *Chabildas*, 7 Ind.Cas 134=12 Bom.L.R. 621 ; *Kamal Kumari* v. *Narendra Nath*, 1 Ind.Cas. 573=9 C.L.J. 19 ; *Rai Gajendra Narain* v. *Rai Harendra Narain*, 12 C.W.N. 687 ; *Maharaj og Jeypore* v. *Jaya Kota* 11 M.L.J. 70 ; *Khunni Lal* v. *Kunwar Gobinda Krishna*, 10 Ind.Cas. 477=15 C.W.N. 454=8 A.L.J. 552=13 C.L.J. 575=13 Bom.L.R. 427=10 M.L.T. 25 21 M.L.J. 645=38 I.A. 87=33 All. 356 (P.C.) ; *Natesa Iyer* v. *Rama Iyer*, 10 Ind.Cas. 221=5 M.L.T. 498—(1911) M.W.N. 145 ; *Prakkiri Parkum* v. *Koram*, 14 Ind.Cas. 295=(1912) M.W.N. 532 ; *Ram Kuber Pande* v. *Mussammat Ram Dasi*, 20 Ind.Cas. 44=35 All. 428=11 A.L.J. 645 ; *Dangal Ram* v. *Jaimangal*, A.I.R. 1926 Pat. 364=5 Pat. 480=95 Ind.Cas. 1051. A father or other manager has power to refer to arbitration disputes relating to joint family property provided such reference is for the benefit of the failmy. The other members of the family including minors are bound by the reference and by award made upon it. If the minor is a member of a joint family governed by the *Mitakshara* law, the father as *karta* (manager) is entitled to the management of the whole coparcenary property including the minor's interest. *Raj Kumar* v. *Shiva Prosad*, A.I.R. 1939 Cal. 500= 184 Ind.Cas. 553 ; *Ganpat Rai* v. *Bhagwat*, (1937) A.L.J. 1141=(1937) A.W.R. 805. Where the *karta* of a joint Hindu family authorises one of the coparceners who is also managing members of the joint family firm, to refer certain dispute between the parties to the the joint family firm, to refer certain dispute between the parties to the arbitration of a particular individual, such coparcener can make a valid reference so as to bind other copraceners. *Nawal Kishore* v. *Sardar Singh*, 158 Ind.Cas. 1038=37 P.L.R. 572=A.I.R. 1935 Lah. 667. See also *Dharup Raj* v. *Ram Audhesh*, 157 Ind.Cas.928=A.I.R. 1935 All. 452=(1935) A.L.J. 693. It is not correct to hold that a minor son is not bound by an award made on a reference to arbitration made by his father. A clear distinction has to be made between a case where a minor has a right in property and the case where he claims his right through his father. In a case where the father has entered into an agreement of reference under which the joint family estate is affected, it may be open to the minor son to challenge the reference and the award on the ground that, as he has an interest in the joint family property in his own right, any agreement made by his father in derogation of his own rights would not be binding on him But where the minor son has no rights of his own, that is, where the father considers himself entitled to certain property, and considers, in his own interest, that the dispute between him and another who

contests his right should be settled by arbitrators, the case becomes altogether different. The father is perfectly entitled to refer such a dispute to arbitration ; and if he loses this case, it would no longer be open to his minor son to come forward and re-agitate the matter. *Ganpat Roy* v. *Bhagwat Dayal,* (1937) A.L.J. 1141. Family arrangements or reference to arbitration entered into in good faith by the manager or a joint Hindu family or by a father in such a family bind the other members or the minor sons in the absence of fraud or other good reasons to the contrary. *Dwarka Das* v. *Krishna Kishore,* 61 Ind.Cas. 628=2 Lah. 114 ; *Jai Nath* v *Kamala Nath,* 7 Ind.Cas. 31 ; *Ramdas* v. *Chabildas,* 7 Ind.Cas. 134= 12 Bom.L.R. 621 ; *Ramdyal* v. *Motiram,* 24 Ind.Cas. 863=10 N.L.R. 74 ; *Mithamal* v. *Shiv Ram,* 60 Ind.Cas. 484 ; *Ramji Ram* v. *Salig Ram,* 14 C.L.J. 188 (201) ; *Uppara* v. *Gaddam,* 9 L.W. 314=50 Ind.Cas. 471. But a Hindu mother has no power on behalf of her minor son to refer disputes relating to the joint family property to arbitration in the absence of an order of court. *Shanti Lal* v. *Munshi Lal,* 139 Ind.Cas. 820=34 Bom.L.R. 862=A.I.R. 1932 Bom. 498. The senior members of a Joint Hindu family can bind the junior members by arbitration proceedings carried on by them in good faith. *Chinna Poochiammal* v. *Ganga Naicker,* 9 M.L.J. 34. See now section 12 of the Hindu Majority and Guardianship Act, 1956 (Act XXXII of 1956).

In *Ganesh Row* v. *Tulja Ram,* 19 Ind.Cas. 515=17 C.W.N. 765=11 A.L.J. 589=18 C.L.J. 1=15 Bom.L.R. 363=25 M.L.J. 150=36 Mad. 295 (P.C.), *Amir Ali J.* observed : "No doubt, a father or managing member of a joint Hindu family may, under certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the court. Section 462 of the Code of Civil Procedure (=Order 32, rule 7 of C. P. Code of 1908) expressly provides that."

184. Hindu Minority and Guardianship Act.—The Hindu minority and Guardianship Act of 1956 (XXXII of 1956) which received the assent of the President on the 25th August, 1956 now governs the extent of powers which guardian can exercise over the property of the minors. So now the cases as regards the powers of guardian over the minor's property are to be read subject to the provisions of that Act.

185. Section 4 of the Hindu Minority and Guardianship Act.—In this Act—(a) "minor" means a person who has not completed the age of eighteen years ; (b) "guardian" means a person having the care of the person of a minor or his property or of both his person and property, and includes—(i) a natural guardian, (ii) a guardian appointed by the will of the minor's father or mother, (iii) a guardian appointed or declared by a Court and (iv) a person empowered to act as such by or under any enactment relating to any Court of Words ; (c) "natural guardian" means any of the guardians mentioned in section 6.

"6. Natural Guardian of a Hindu minor.—The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in the joint family property), are—(a) in the case of a boy or an unmarried girl—the father and after him, the mother : provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother ; (b) in the case of an illegitimate boy or an illegitimate

unmarried girl—the mother, and after her, the father ; (c) in the case of married girl—the husband : Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—(a) if he has ceased to be a Hindu or (b) if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an asectic (*yati or sanyashi*).

Explanation—In this section, the expression "father" and "mother" do not include a step-father and a step-mother."*

"7. Natural Guardianship of adopted son.—The natural guardianship of an adopted son who is a minor passes on adoption, to the adoptive father and after him to the adoptive mother."*

186. Arbitration by a lunatic.—A person of unsound mind is incapable of entering into a contract. The law or the subject is thus stated by *Russell* : "It would seem, therefore, that a lunatic may submit to arbitration, and so long as he is not, to the knowledge of the other party, so insane as not to know what he is doing, the submission will bind him, unless he has been found lunatic by inquisition." *Russell,* 15th End., p. 15. Where insanity is set up as the defence to an action for breach of contract, it must be alleged and found that at the time of the contract the plaintiff had knowledge of such insanity. *Imperial Loan Co.* v. *Stone* (1892) 1 Q.B. 599=61 L.J.Q.B. 499. An agreement to refer to arbitration in a case where a minor or lunatic is concerned is an "agreement' within the meaning of Order 32, Rule 7, C. P. Code, and have before the matter could be referred to arbitration the leave of the court must be expressly got recorded in the proceedings. Before granting the leave, the court exercised a judicial discretion as to the propriety of the reference to arbitration in the interest of the minor or lunatic. All the available materials should be placed before the court and the materials must satisfy the mind of the court that the action proposed is for the benefit of the lunatic or minor. *Ramgopal* v. *Shanta Lal* 1941 A.L.J. 596 ; see also *Rhodes* v. *Southern Bank,* (1889) 22 Q.B.D. 577.

"8. Powers of natural guardian.—(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necesasry or reasonable and proper for the benefit of minor or for the realization, protection or benefit of the minor or for the realization, protectin or benefit of the minor's estate : but the guardian can in no case find the minor by a personal covenant.

(2) The natural guardian shall not without the previous permission of the Court,—

(a) mortgage or charge, or transfer by sale, gift or exchange or otherwise, any part of the immovable property of the minor, or

(b) base any part of such property for a term exceeding five years or far a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No Court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in the case of necessity or for an evident advantage to the minor.

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*Sections are of the Hindu Minority and Guardianiship Act (12 of 1956).

(5) The Guardian and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the Court under sub-section (2) in all respects as if it were an application for obtaining the permission of the Court under section 29 of the Act, and in particular—

(a) Proceedings and conviction with the application shall be deemed to be proceeding under that Act within the meaning of section 4A thereof ;

(b) the Court observe the procedure and have the forms specified in sub-section (2), (3) and (4) of section 31 of that Act ; and

(c) an appeal shall lie for an order of Court referring permission to the natural guardians to do any of the acts mentioned in sub-section (2) of this section to the Court to which appeals ordinarily lie from the decisions of that Court.

(6) In this section, "court" means the City Civil Court or a district court or a court empowered under section 4A of the Guardian and Wards Act, 1890, within the local limits of whose jurisdiction the immovable property in respect of what the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate."*

"9. Testamentary guardian and their powers.—(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or respect of both.

(2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of the minor legitimate children may, by will, appoint a guardian for any ot them in respect of the minor's legitimate children by reason of the fact that the father has become disentitled to act as such, may by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions if any, as are specified in this Act and in the will.

(b) The right of the guardian go appointed by will shall, where the minor is girl, cease on her marriage."*

"11. De facto guardian.—After the commencement of this Act, no person shall be entitled to dispise of, or deal with, the property of a Hindu minor merely on the grounds of his or her being the *de facto* guardian of the minor.

"12. Guardian not to be appointed for minors' undivided interest in joint-family property.—Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest.

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect if such interest."*

187. Sureties.—An award against a principal debtor will not bind a surety in the absence of a special agreement on the part of the surety : *Ex. P. Young* (1881) 17 Ch.D. 668. *Russell* 15th Edn. p. 18.

188. Power of agent to refer.—The recognised agent of a party has power to refer the matter in dispute to arbitration. *Hari Singh* v. *Mussamat Lachmi,* 1 P.R. 1882 ; *Thomas* v. *Bani Ram,* 3 S.L.R. 5=1 Ind.Cas. 937 ; *Unniraman* v. *Chatham,* 9 Mad. 451 : *Bhagwan* v. *Nanda,* 12 Cal. 173 ; *Ahmed* v. *Bhagban,* 170 P.R. 1883. When a principal is aware of the reference to arbitration on the application of his agent not authorised to do so, and tacitly ratifies the action of the agent in applying for such reference, he cannot then question the legality of the order of reference. *Satrujit* v. *Dulhir,* 24 Cal. 469, but see *Miller Gibb* v. *Smith* (1916) K.B. 419 ; *Unniraman* v. *Chathan* 9 *Mad.* 451. Persons acting under Notification 1225 of 26th September, 1886, are recognised agents, and their principals are bound by the agents' submission to arbitration. *Chooper Sigh* v. *Jeet Sigh,* 64 P.R. 1870. A party to a suit may file an application to refer the case to arbitration through a recognised agent, who need not specially be authorised like a pleader. *Ram Das* v. *Abbas Khan,* 51 P.R. 1893. So an agent who is authorised by his principal, may enter into a submission on behalf of his principal. *Halsbury's Laws of England,* Vol. 1, 2nd Edn., p. 625, citing *Goodson* v. *Brooke,* (1815 4 Camp. 163 : Cf. *The City of Calcutta,* (1898) 79 L.T. 517 (C.A.) ; *The Margony,* (1902) p. 157. The authority of an agent to make a submission may be express or implied. Authority to act as agent conferred in general terms is construed as authority to act only in the usual way and according to the ordinary course of business. *Russell* 15th Edn. p. 18 ; *The City of Calcutta* (1898) 79 L.T. 517 ; see also *Hancock* v. *Reid* 21 L.J.Q.B. 78 ; *Banfill* v. *Leigh,* 8 T.R. 571.

189. Power of counsel to refer to arbitration.—In *Swinfern* v. *Lord Chelmsford,* 5 H. & N. 890=29 L.J.Ex. 382. *Pollock C.B.* thus described the powers of a counsel : "We are of opinion that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incidental to it—such as withdrawing the record, withdrawing a junior, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial—we think he has not, by virtue of his retainer in the suit, any power over matters, that are collateral to it." But in *Nando Lal Bose* v. *Nistarini Dassi,* 27 Cal. 428 =4 C.W.N. 169, *Maclean C.J.* observed : "There cannot, I think, be any reasonable doubt at the present day that counsel possesses a general authority, which must be taken to continue until notice be given to the other side by the client that it has been determined, to settle and com-

*Sections are of the Hindu Minority and Guardianship Act (12 of 1956).

promise the suit in which he is actually retained as counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of his particular case in which he is so retained." He also refers to *Strauss* v. *Frances*, (1866) 1 Q.B. 370=35 L.J.Q.B. 133, *Swinfern* v. *Swinfern*, 1 C.B. (N.S.) 364=3 Jur. (N.S.) 85, and *Mathews* v. *Munster*, (1887) 20 Q.B.D. 141, for authority of a counsel to compromise on behalf of his client. In *Muthiah* v *Karuppan*, A.I.R. 1927 Mad. 852 =26 M.L.W. 465=39 M.L.T. 240=50 Mad. 786=53 M.L.J. 606=105 Ind. Cas. 5, *Kumaraswami Sastri J.* said : "(1) A counsel has authority to make admissions in court on behalf of his client on matters of fact relevant to the issues in the case in which he is engaged. *Admissions on questions of law would not bind the client.* (2) A counsel has authority to confes judgment, withdraw *or compromise, or refer to arbitration the suit in which he is instructed, if his doing so is for his client's advantage or benefit, even though he has no express authority from his client.* (3) A counsel cannot without express authority agree to compromise or refer to arbitration matters unconnected with the subject-matter of the suit in which he is instructed. (4) Where in the course of a suit, a counsel makes an admission as to a collateral matter or gives up a doubtful claim which is not a subject-matter of the suit, there is a presumption that the counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client. (5) It is a question of fact in each case whether the counsel acts under instructions when he compromises or refers to arbitration matters not involved in the suit the court on a consideration of the probabilities and the circumstances of the case find that the counsel acted on instructions even though there is no direct evidence on the point. (6) A counsel has no power to make an admission in or compromise or refer to arbitration a suit if he instructed not to do so, without express authority from his client." See *Jang Bahadur* v. *Shankar Rai*, 13 All. 272 ; *Nilmoni Chaudhuri* v. *Kedar Nath Dogra*, 1 Pat. 489=67 Ind.Cas. 96=3 P.L.T. 371=A.I.R. 1922 Pat. 489 ; *Bhut Nath Sircar* v. *Ram Lal Sircar*, 6 C.W.N. 82 ; *Chuni Lal* v. *Hira Lal*, A.I.R. 1928 Cal. 378=32 C.W.N. 44=106 Ind.Cas. 309 ; *Amir Sha* v. *Abdul Aziz*, A.I.R. 1932 Lah. 373=136 Ind.Cas. 712=33 P.L.R. 388 ; *Jamshedji* v. *Sorabjji* 85 Ind.Cas. 504=A.I.R. 1921 Bom. 414. In *Askaran Choutmal* v. *E. I. Ry. Co.*, 52 Cal. 386, *Page J.* pointed out that there is no distinction between the authority of a Barrister and that of other Advocates practising on the original side of High Court.

In *Chunilal* v. *Hiralal*, A.I.R. 1928 Cal. 378=106 Ind.Cas. 309=32 C.W.N. 44 *Chotzner J.* observed . "It is, I think a well-established principle that learned counsel is vested with full authority to deal with all matters in his control relating to and affecting the interests of his client. Cases may arise and have arisen, as in the case of *Neal* v. *Gorden Lennon*, (1902) 1 A.C. 465=66 J.P. 757=87 L.T. 41=71 L.J.K.B. 939, where learned counsel went beyond the powers that had been given to him and it was there pointed out that when learned counsel exceeded his authority the court would not ratify it."

In *Sourendra Nath* v. *Tarubala*, A.I.R. 1930 P.C. 158=34 C.W.N. 453=(1930) A.L.J. 489=58 M.L.J. 551=32 Bom.L.R. 645=51 C.L.J. 309=123 Ind.Cas. 545=11 P.L.T. 461=31 M.L.W. 803=57 I.A. 133=57 Cal. 1311=31 P.L.R. 884, *Lord Atkin* said: "They are of opinion that Mr. Sircar, as an advocate of the High Court, had when briefed on behalf of the defendant in the Court of the Subordinate Judge of Hooghly, the implied authority of his client to settle the suit. Their Lordships

have already said that he must be treated as though briefed on the trial of the suit. Their Lordships regard the power to compromise a suit as inherent in the position of an advocate in India. The considerations which have led to this implied power being established in the advocates of England, Scotland and Ireland, apply in equal measure of India. It is a power deemed to exist because its existence is necessasry to effectuate the relations between advocate and client, to make possible the duties imposed upon the advocate by his acceptance of the cause of his client". See also *Amir Sha* v. *Abdul Aziz,* A.I.R. 1932 Lah. 373=136 Ind.Cas. 712=33 P.L.R. 388=13 Lah. 775. But according to Mr. Sarkar "however large the powers of the lawyer engaged in the case may be, such powers are confined to the conduct of the proceedings in the tribunal before whom he has been authorised to appear. He has no power to refer to arbitration, which means sending the matter to another tribunal for disposal". *Sarkar, The Law of Arbitration* p. 46.

190. Power of solicitors to refer matter to arbitration.—"I would seem" says Russell that a solicitor has no implied authority to bind a client by submission to arbitration, for, by analogy, he has no implied authority to commence an action or suit, nor to compromise a claim before an action has begun. *Macaulay* v. *Polley,* (1897) 2 Q.B." *Russell* 15th Edn., p. 20. But a solicitor authorised to appear for a party in an action has, incidently, authority to refer it without any fresh authority to that effect, *Faviell Vic* v. *Eastern Counties,* 2 Ex. 344=6 D. & L. 54= 71 I.J.Ex. 223 ; *Smith* v. *Troup,* 6 & L. 679=7 C.B. 757=18 L.J.C.P. 209. Even where there was an affidavit by the defendant that she had expressly desired her attorney not to consent to any reference, and no step had been taken by the arbitrator except to appoint a meeting, the court refused to set aside the reference, and said that the defendant's remedy was by action against her attorney. *Fitmerr* v. *Delber, 3 Taunt,* 486=12 R.R. 688 ; see also *R.* v. *Hill,* (1819) 7 Price. 636. Where a solicitor has appeared for a Corporation to the knowledge of the directors, the Corporation is bound by his act in referring the action, and cannot show that he was not authorised to appear by any authority under the corporate seal. *Faviell* v. *Eastern Counties.* 2Ex.34. In a suit by the next friends of infants. the solicitors for the next friends have no authority to refer so as to bind the next friends or the infants for the performance of the award by the infants. *Beddel* v. *Dowse,* 6 B. & C. 255. But this implied authority, given to an attorney does not extend to his clerk. *Re Hodson,* (1838) 7 Dowl. 569. But it seems that the managing clerk of the attorney, who is in charge of the conduct of the suit may exercise this power. *Prestwick* v. *Poley* (1865) 18 C.B. (N.S.) 806—*Russell* 15th Edn., p. 20. But *Sarcar* in his *Law of Arbitration* said : "On the otherhand a solicitor engaged in a case has no implied authority to refer the submission of the dispute to arbitration. *Wright* v.*Sastle,* (1817) 3 Minn. 12 and *Atkinsons* v. *Abbott,* (1855) 3 Drew. 251"—*Sarkar's* T.L.L. p. 47.

191. Power of vakil or pleader to refer to arbitration.—Section 506 of the old Code of 1882, which corresponds to Schedule 11, para. 1. required special authority for pleader to make reference to arbitration. But in the present Code the words "special authority" have been omitted. Hence *Pratt J.C.* said : "In England an attorney who had been duly authorised to appear has incidentally authority to conduct the case and to refer it. *Faviell* v. *Eastern Counties Rly. Company,* 2 Ex. 344=17 L.J.Ex. 297. So here a pleader duly appointed to act for a party has

authority under Order III, rule 1, to make any application including an application for a reference to arbitration. If he does so against the wishes of his client, he is responsible to his client but the client is nevertheless bound. There is a dictum to the contrary in *Sadashiv Rayaji* v. *Maruti Vithal,* 14 Bom. 455. But there the powers of the pleader seem to have been limited to those of the agent who employed him. *Srikrishin* v. *Relumal,* 34 Ind.Cas. 845 (848)=9 S.L.R. 183; *Thadhomal* v. *Menghraj,* A.L.R. 1930 Sind 190=123 Ind.Cas. 694; *Aziz* v. *Motram,* A.I.R. 1926 Lah. 563; *Amir Sha* v. *Abdul Aziz,* A.I.R. 1932Lah. 373=136 Ind.Cas. 712=33 P.L.R. 388. In delivering the judgment of the court in *Thadhomal* v. *Menghraj,* A.I.R. 1930 Sind 190=123 Ind.Cas. 694, the court observed: "The learned First Class Sub-Judge has held on the ruling of this court in *Srikrishin* v. *Relumal Pariomal,* 34 Ind.Cas. 845, and *Sardar Khan* v. *Muradal,* 9 S.L.R. 218=34 Ind.Cas. 628, that the reference was a good one. In the first of these rulings it was remarked that under section 506 of the old Civil Procedure Code, 1882, a pleader could not apply for an order of reference without special authority from his client, that this provision had been omitted in the present Sivil Procedure Code and that he could, therefore, now apply for a reference in the present Civil Procedure Code and that he could, therefore, now apply for a reference on the strength of an ordinary *vakalatnama.* This ruling was approved in the subsequent authority referred to and has been followed without objection in this Province since 1915. The learned pleader for the applicant, however, refers to four cases, the first of which is *Sheo Das Misser* v. *Brij Nandan Pershad,* 7 C.W.N. 343. That case was, however, with respect to section 506 of the old Civil Procedure Code, and as pointed out in the ruling in *Srikrishin* v. *Relumal Pariomal,* 9 S.L.R. 183, the wording of the corresponding section in the new Code has been altered. The second ruling relied on in *Ramjiwan Ram* v. *Kalicharan Singh,* 29 All. 429=4 A.L.J. 342=(1908) A.W.N. 136, is also with respect to section 506 of the old Civil Procedure Code. The third ruling in *Fanindra Nath Roy* v. *Dwarka Nath Roy,* 24 C.W.N. 832, follows the case reported in *Ramjiwan Ram* v. *Kalicharan Singh,* 29 All. 429, and is, therefore, based on the wording of section 506 of the old Civil Procedure Code. The last case has cited, *Hussainbhai Bhora* v. *Bansilal,* A.I.R. 1924 Nag. 338, also follows the Allahabad ruling and that reported in *Sheo Das Misser* v. *Birj Nandan Pershad,* 7 C.W.N. 343. This being the case it would seem that there is no difference of opinion of the other courts as to the correctness of the ruling in *Srikrishin* v. *Relumal Parimal,* 9 S.L.R. 183, which has been followed without objection since 1915."

But a quite different view was taken by *Jwala Prosad J.* in *Jaipal* v. *Tapehwari,* 45 Ind.Cas. 321, where he observed: "The power of a pleader is defined in the *vakalatnama* or power of attorney given to him. A pleader has no right to compromise on behalf of his client unless expressly authorised to do so; nor is he empowered to refer a matter to arbitration except by an express authority in that behalf. The principle appears to have been recognised in the case of *Jagapati Mudaliar* v. *Ekambara Mudaliar,* 21 Mad. 274=8 M.L.J. 40, and in *Thakoor Prosad* v *Kalka Prosad,* 6 N.W.P. H.C.R. 210. In the case of *Ramjiwan Ram* v. *Kalicharan,* 4 A.L.J. 342=(1907) A.W.N. 136=29 All. 429, it was held that a pleader should not apply for an order for referring a case to arbitration unless he has been expressly authorised to do so." See also, *Theval Ammal* v. *Sokammal,* 41 Ind.Cas. 429=41 Mad. 233; *Dwarka* v. *Fanindra,* 49 Ind.Cas. 262; *Ahmad* v. *Sardara,* A.I.R. 1929 Lah. 171=114 Ind.Cas. 712; *Rajendra* v. *Panna Lal,* A.I.R. 1932 Cal. 343=36 C.W.N.

8=138 Ind.Cas. 386. But a pleader expressly authorised to refer to arbitration cannot delegate his power to refer to arbitration to another pleader without express authorisation to that effect. *Aziz Din* v. *Moti Ram,* A.I.R. 1926 Lah. 565=96 Ind.Cas. 277. See also, *Amir Sha* v. *Abdul Aziz,* A.I.R. 1932 Lah. 373=136 Ind.Cas. 712. Where power of attorney authorising pleader to refer suit for arbitration has already been given, further consent before actual reference is not necessary: *Hari Sankar* v. *Amraoti,* 46 P.L.R. 108=A.I.R. 1944 Lah. 280. Absence of a party's signature on the application for reference will not invalidate the award where the pleader, who was conducting the case on his behalf and who had been especially authorised in the *Vakalatnama,* to refer the suit to arbitration, had actually affixed his signature to the application and the party had appeared before the arbitrator during the proceedings. *Guran Ditta* v. *Pokar Ram,* A.I.R. 1927 Lah. 362=104 Ind.Cas. 202=8 Lah. 693=9 L.L.J. 569.

It has been ruled by the Privy Council that in the absence of specific authority, a pleader ordinarily employed cannot enter into a compromise on behalf of his client, and if he does so the compromise is not binding on the client. *Sarat Kumari* v. *Amullyadhan,* A.I.R. 1923 P.C. 13 (15) =(1923) M.W.N. 392=32 M.L.T. 137=71 Ind.Cas. 632=27 C.W.N. 629= 25 Bom.L.R. 548=37 C.L.J. 501: *Sourendra Nath* v. *Heramba Nath,* A.I.R. 1923 P.C. 98=45 M.L.J. 453=(1923) M.W.N. 734=33 M.L.T. 294 84 Ind.Cas. 721 (P.C.). So by analogy it can be said that without special authority a pleader is not competent to refer a suit to arbitration. If a *vakaltanama* confers very wide power in very general terms on the vakil and authorise him to conduct the case and to take other proceedings and expressly states that whatever is done by a vakil should be accepted by the litigant, and specifies particularly important power like those of appointing arbitrator and compromise disputes, the power to abide by the statement of any witness whether under the Oaths Act or by way of agreement or compromise is by necessary implication implied. *Hemlata* v. *Jamboo,* A.I.R. 1959 All. 382.

192. Persons with joint interest.—Where a person submits on behalf of himself and others jointly interested in the matter in dispute, he will be bound though the others will not. *Mudy* v. *Osman, Co.* Lif. 30; *Wood* v. *Thomson, Roll. Ab.Arb.* 11—*Redman* p. 10 "If one or more interested parties submit a dispute to arbitration, they cannot bind the other interested parties wihout express authority, but will bind themselves nonetheless effectually for that, and if they undertake that such other parties shall perform the award the fact that those parties are not bound will form no cause for the breach of that undertaking." *Russell* 15th Edn., p. 18.

193. Partner's power to refer.—The Indian Partnership Act (IX of 1932), lays down the law relating to partnership. Section 18 enacts that a partner is the agent of the firm for the purposes of the business of the firm. Section 19 enacts that the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of a partner to bind the firm conferred by section 19 of the Parnership Act is called his implied authority. Sub-section (2) of that section enacts that in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to submit a dispute relating to the business of the firm to arbitration, in making changes as regards this section the Select Committee observed: "As regards subclause (2) of clause 19 [now sub-section (2) of this section],

it is clear from the opinions received that, in Calcutta particularly, it is a trade custom that the partners make contracts of sale containing a clause referring disputes to arbitration. The sub-clause as it stands will make this principle impossible in the absence of a contract between the partners, and it may also perhaps lay open to challenge the arbitration clauses in many existing contracts. It seems desirable therefore, to relax the provisions of this sub-clause to some extent, and we propose to modify them by inserting at the begginning of the words in the absence of any usage or custom or trade to the contrary'. These words are taken from section 1 of the Indian Contract Act."—*Report of the Select Committee.* The rule is the same in English law. There also one partner cannot bind the others by a submission to arbitration even as regards matters arising out of the business of the firm. *Adams v. Bankhart,* E *Cr. M.* & R. 681 ; *Stead* v. *Salt,* 3 *Bing.* 101 ; *Strangford* v. *Green,* 2 Mod.Rep. 228 ; *Autram* v. *Chace,* 15 East 209 ; *Hatton* v. *Royle,* 3 H. & N. 500 ; *Russell* 15th Ed.., p. 17. Even before the passing of the Indian Partnership Act of 1932, by which the matter is now governed, the law as laid down in certain cases was the same. *Vide Ram Bharose* v. *Kallu Mal,* 22 All. 135 ; *Firm Radha Kissen* v. *Firm Ashamal,* A.I.R. 1926 Lah. 91=7 Lah. L.J. 603 ; *Dartoobhoy* v. *Valli Mahomed,* 1 Bom.L.R. 828 : *Haji* v. *Dwarka,* 11 C.L.J. 658=14 C.W.N. 1106=6 Ind.Cas. 63, on appeal 18 C.W.N. 1025 (P.C.)=24 Ind.Cas. 307 ; *Punia* v. *Sree Venugopala,* 43 Ind.Cas. 508=(1918) M.W.N. 51 ; *Vallavdas* v. *Keshavlal,* A.I.R. 1927 Bom. 428=104 Ind.Cas. 94=29 Bom.L.R. 660 ;*Bhagva Manaji* v. *Hiraji Premji,* I.R. 1932 Bom. 599=140 Ind.Cas. 519=34 Bom.L.R. 1112=A.I.R. 1932 Bom. 516. So it is now settled that one partner of a firm cannot enter into an agreement to refer a matter in dispute to arbitration on behalf of the firm unless all partners join in it. *Jaskoram Das* v. *Ram Chand,* 148 Ind.Cas. 1080=35 P.L.R. 417=A.I.R. 1934 Lah. 483 ; *Rajendra* v. *Panna,* 36 C.W.N. 8=138 Ind. Cas 386=A.I.R. 1932 Cal. 343 ; *Arunachela* v. *Louis,* A.I.R. 1928 Mad. 107=107 Ind.Cas. 793 ; *Radha Kissen* v. *Abramal,* 92 Ind.Cas. 705. But other partners may be bound by their conduct. *Thomas* v. *Atherton,* (1878) 10 Ch.D. 185. Where the submission to an arbitration on behalf of a firm is unauthorised and there has been no ratification of the submission by all the partners of the firm, any award based on such a reference cannot be enforced as a decree even as against any individual partner who may have ratified. *Madangopal* v. *Sanwaldas,* I.L.R. (1947) Kar. 206=A.I.R. 1948 Sind. 79. A dispute arising out of certain contracts was submitted to arbitration and the award made in favour of unregistered firm, one of the parties to the dispute, was sought to be filed by an application under paras 20 and 21 of Schedule II of C. P. Code. An objection was raised that the firm could not enforce its right under the award as it was an unregistered firm. *Held* that there was nothing illegal on the face of the award within para (c) of Schedule 2, Civil P. C. and it was only by reference to section 69, Partnership Act and by reference to the facts of the case that it could possibly be held that the firm was not entitled to enforce the award ; *Satish Chandra* v. *P. N. Das,* A.I.R. 1938 Pat. 231=175 Ind.Cas. 468=19 P.L.T. 549=16 Pat. 742. If a firm enters as such into a contract containing the clause for submission of dispute to arbitration the award may be made against the firm's name. *Manilal* v. *Bharat Spinning,* 38 Bom.L.R. 941=A.I.R. 1933 Bom. 433. Although the initial reference to arbitration of a dispute relating to the business of a firm is made by one of the partners of the firm without any express or implied authority from his other partners, there is nothing to prevent such partners from ratifying his act which was unauthorised at its incep-

tion. Ratification need not be by any express act or declaration and may be implied from conduct. It may be inferred from mere acquiescence or silence or in action on the part of the party concerned. *Hanuman* v. *Seth Jessa Ram,* 50 P.L.R. 181. That the question whether the legal personal representatives of the deceased partner was bound by the agreement to refer and by the award was not a simple question of law to be decided without reference to the facts of the case or any evidence which might have been available if it had been raised at the proper time. *Dwarka Nath* v. *Haji Mahomed,* 18 C.W.N. 1025=21 C.L.J. 1 (P.C.)=24 Ind.Cas. 307, *per Lord Parker of Waddington.*

194. Executor's authority to refer.—Section 6 enacts that arbitration agreement is not to be discharged by the death of a party thereto, but shall in such event be enforceable by or against the legal representative of the deceased. But that rule is to be applicable only in cases where the right of action is not extinguished by the death of a person. When the right of action continues the executor is competent to proceed on the submission by the testator. But the question is whether an executor can submit a matter to arbitration. Under the English law, under the Trustees Act (56 & 57 Vict., c. 53), an executor or administrator, or two or more trustees, acting together may compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing relating to the testator's or intestate's estate or the trust, and for any of those purposes may enter into, give, execute, and do such agreements of composition or arrangement, release, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith. (*Vide* section 21 of *Ibid.*) But under the Indian Succession Act no power is specifically given to an executor to refer matter to arbitration.

An executor against whose application for probate a caveat has been entered cannot submit to arbitration whether the will propounded by him was duly executed by the deceased. *Ghellabhai* v. *Nandubai,* 21 Bom. 335 ; *Hem Chunder* v. *Sarat Chandra,* 3 C.W.N. lxxviii ; *Monmohini* v. *Banga Chandra,* 31 Cal. 357=8 C.W.N. 197 ; *Soudamini* v. *Gopal,* 19 C.W.N. 948=28 Ind.Cas. 557.

An executor cannot legally make any reference to arbitration which will go against the terms of the will. *Jnanendra* v. *Jitendra,* A.I.R. 1928 Cal. 275=32 C.W.N. 108=107 Ind.Cas. 70. In *Gopi* v. *Baijnath,* A.I.R. 1930. All 840=128 Ind.Cas. 817=(1930) A.L.J. 1589, *Sulaiman J.* said: "It seems to us that the learned Judge had no jurisdiction to allow the dispute relating to the genuineness of a will in a probate proceeding pending before him to be referred to the arbitration of an arbitrator. The order granting probate is a judgment *in rem* and, so long as it is not revoked, is operative against the world. Before such an order is passed the court has got to be satisfied in its own mind that the will as a genuine document and that probate ought to be granted. It cannot delegate its proper functions to a private individual and decide the point through him. If such a course were permitted, a door for fraud and collusion would be opened which it is against public policy to permit.

"The point is not *res integra* but is covered by authority. We may refer to the case of *Ghellabhai* v. *Nandubai,* 21 Bom. 335, in which *Farran C.J.* at page 342 remarked that the court had no authority to refer the *factum* of the will to arbitration and that clearly it would not refer such a matter

in which there were beneficiaries interested whose consent had not been obtained, that the Probate Court could not grant probate on the vicarious finding of an arbitrator but must itself be satisfied by admissible evidence that the will was the will of the testator and that the relevant provisions of the Code of Civil Procedure were not applicable to probate proceedings, and, on the other hand, the provisions of the Probate Act preclude the possibility of a judge referring the question of the execution of a will to an arbitrator, particularly if all the beneficiaries had not appeared before him and consented to that course, even which was doubtful. We agree with these observations and hold that the District Judge could not act upon the award which was the result of a reference to arbitration, without even the consent of many of the beneficiaries. The same, principle has been applied to compromises regarding the genuiness of the will in probate proceedings: *Vide Manmohini Guha* v. *Banga Chandra Das*, 31 Cal. 357=8 C.W.N. 197, and *Sarada Kanta Das* v. *Gobinda Mohan Das*, 6 Ind.Cas. 912. We have, therefore, both on principle and on authority, no doubt whatsoever in our minds that the order of the judge was quite illegal."

195. Powers of executors to refer in other matters.—In *Soudamini* v. *Gopal Chandra*, 28 Ind.Cas. 557=21 C.L.J. 273, *Mookerjee J.* said: "The parties to the submission were executors to the will of the testator; they had applied for probate of the will which was shortly afterwards issued to them. They are bound by the terms of the will and it is their duty to administer the estate in accordance therewith, subject to the control of he Probate Court. They proceeded, however, by means of a reference to arbitration, to arrange for the administration of the estate as if they were not joint executors, had for its possession and enjoyment independently of the provisions of the will. They expressly authorised the arbitrators to substitute for the provisions of the will, which might seem to them indefinite or illegal, other provisions agreeably to what might be imagined to have been the intention of the testator; in other words, the executors, in their submission, authorised the arbitrators to make a new will for the testator.....The question, consequently, arises whether an award of this character, based on a submission which was clearly beyond the competence of the parties should be enforced by the court.....Consequently, if parties enter into a submission concerning a subject-matter over which one of them has no authority or only a restricted power of disposition, an award ordering such party to do that which he cannot lawfully do will be of no legal effect whatever. This is well-illustrated by the case of *Wyatt* v. *Benson*, 23 Barb. (N.Y.) 327.....We must not be taken, however, to countenance the proposition that an executor or administrator is not competent under any circumstances to make a reference to arbitration; such right cannot be disputed when exercised within the limits of his authority [*Bean* v. *Farman*, 6 Pickering (Mass.) 267; *Halsbury's Laws of England*, Vol. I, Art. 943].

196. Powers of several executors or administrators exercisable by one.—Where there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration. *Vide Section* 311 of the *Succession Act*.

197. Reference by a trustee.—Power is given to a trustee to submit to arbitration by section 43 of the Indian Trust Act. *Vide section* 43(*c*) of the Indian Trust Act. (II of 1882). Where the instrument creating

the trust authorises a sole trusee to execute the trusts and the powers thereof, he is a sole acting trustee within the meaning of section 43 of the Trust Act, and a compromise of a doubtful claim effected by him is within his powers conferred thereunder. *Rajrajeswar* v. *Kuppasami,* (1921) M.W.N. 722=41 M.L.J. 474. See also, *Doorga Pershad* v. *Tarra Pershad,* 4 M.I.A. 452.

198. Reference in case of bankrupt's estate.—Under the English law there is no objection to a bankrupt making a submission any more than there is to his making any other agreement. *Re Milnes and Robertson,* (1854) 15 C.B. 451. See also *Halsbury* vol. 2, 3rd Edn., § 19. In Presidency-towns in British India by section 68 (1) (*h*) of The Presidency-towns Insolvency Act (III of 1909), the Official-Assignee is given powers to "refer any dispute to arbitration, and compromise all debts, claims and liabilities on such terms as may be agreed upon." Similarly in other places the Receiver by section 59 (*h*) of the Provincial Insolvency Act (V of 1920), is given such powers. *Vide Ram Devi* v. *Ganesh Lal,* A.I.R. 1926 All. 501=24 A.L.J. 480. 95 Ind.Cas. 416=48 All. 475 ; *Vide S. 7 infra.*

199. Clause in a partnership deed—Scope of reference.—Where partnership deed provides that if any disputes were to arise concerning the partnership business, they should be referred to arbitrator whose decision would be binding on the two partners, they should be referred to arbitrator whose decision would be binding on the two partners, the claim of a partner that certain sums were advanced by him for investment in the partnership business will be a proper matter for reference and it will be for the arbitrator to decide whether or not these sums could be taken into consideration in settling the partnership accounts. *Batika Devi* v. *Kedar Nath,* A.I.R. 1956 All. 37.

200. Powers of Hindu Widows to bind reversioners.—In the absence of collusion or fraud a compromise decree obtained by a widow is binding on the reversioner. *Kishori* v. *Kumar Chandra,* A.I.R. 1939 Pat. 572=182 Ind.Cas. 188 ; *Manmatha* v. *Gobinda,* 68 C.L.J. 173 ; *Bhuboneswari* v. *Secretary of State,* 169 Ind.Cas. 756=18 Pat. L.T. 945= A.I.R. 1937 Pat. 374 ; *Khuni* v. *Gobinda,* 33 All. 356 (P.C.) ; *Hurdie* v. *Bhagwan,* 50 Ind.Cas. 812 (P.C.). So when a settlement is effected of a *bona fide* dispute between the widow and some members of her husband's family, whether the claim by the family members are legally valid or not, does not matter, provided it had been made in good faith, and such compromise is binding on the reversioners. *Veeramma* v. *Seetamma,* I.R. 1931 Mad. 125=128 Ind.Cas. 701=32 L.W. 188=A.I.R. 1931 Mad. 218=59 M.L.J. 139 ; *Raoji* v. *Kunja Lal,* A.I.R. 1930 P.C. 163=34 C.W.N. 627=51 C.L.J. 434=123 Ind.Cas. 709=32 Bom.L.R. 808=58 M.L.J. 720=32 M.L.W. 1=57 I.A. 177=54 Bom. 455 ; *Ram Sumran* v. *Shyam Kumari,* A.I.R. 1922 P.C. 356=1 Pat. 741=49 I.A. 432. A decree fairly obtained against a widow binds the reversioner. *Katama Nachir* v. *Rajah of Shivaganga,* 9 M.I.A. 539 (604)=24 W.R.P.C. 31 ; *Bhagabati Devi v. Bholanath,* 2 I.A. 256 (261)=1 Cal. 104 ; *Jugal Kishore* v. *Jotendra,* 11 I.A. 66 (73)=10 Cal. 985 ; *Hari Nath* v. *Mathura Mohan,* 20 I.A. 183=21 Cal. 8. In *Rama Santu* v. *Daji Naru,* 48 Ind.Cas. 125= 20 Bom.L.R. 947=43 Bom. 249, *Hayward J.* observed: "Now it is necessary to look at the award decree to determine whether it could properly be said to have been fairly obtained against the widow as representing the widow's estate including the rights of the reversioners.....That award was consent of the parties and in their actual presence made a

decree of the court. It seems to me that the defendant, who produced and relied upon this award decree, had not merely to produce it, but, in accordance with the principles already discussed, to prove further that it was fairly obtained against the widow, as representing not only her own interest but those of the reversioners as prescribed by the Privy Council. The defendant, however, failed to prove any such thing..... It would in my opinion, be right in such circumstances to accept this award decree as a decree fairly obtained against the widow as representing the whole estate and so binding on the reversioners.....It follows that the award decree bound the widow only and not the reversioners." In *Upendra Nath Mukherjee* v. *Gurupada Halder*, A.I.R. 1930 Cal. 508= 128 Ind.Cas. 241=34 C.W.N. 404, *Justice B. B. Ghose* said: "Of course if the reversioner could show fraud or any other ground upon which a decree should be shown to be not binding him that would be another matter." But now the position has completely changed with the passing of the Hindu Succession Act (XXX of 1956). By S. 14 of that Act Hindu family is given absolute estate to the property inherited by her.

201. Reference by pardanashin lady.—A Mahomedan *pardanashin* lady who was lonely, friendless and helpless executed an agreement to refer to dispute over her husband's property between her and her stepson to arbitration. At the time of executing the agreement she was kept in a big monastery in order to keep the whole transaction secret from her and there she was surrounded by her hostile male relatives and no person of independent views could approach and give her disinterested advice. In making the widow enter into the agreement the stepson and his brother-in-law conspired to defeat her legal claim to the property and the latter was the arbitrator appointed. The award gave the entire property to the stepson while the widow and her children were given small sums as maintenance. Even the wife and sister-in-law of the arbitrator were provided for in the award. *Held*, that the agreement was not genuine and *bona fide* and therefore the award based on it was void. *Sha Mohammad Jamil Ata* v. *Sha Mohammad Hafiz Ata*, A.I.R. 1928 Oudh 449=5 O.W.N. 847112 Ind.Cas 522. See also, *Tacoorden* v. *Ali Hossein*, 1 I.A. 192=21 W.R. 340 (P.C.); *Sudisht Lal* v. *Sheobarat*, 7 Cal. 245=8 I.A. 39; *Wajid Khan* v. *Ewaz Ali*, 18 Cal. 545=18 I.A. 144; *Sajjad Hosein* v. *Wazir Ali*, 34 All. 455=15 O.C. 271=39 I.A. 156= 16 Ind.Cas. 197; *Faridunnissa* v. *Mukhtar Ahmad*, A.I.R. 1925 P.C. 204=47 All. 703=28 O.C. 388=52 I.A. 342.

202. Reference by companies.—Section 152 of the Indian Companies Act=s. 389 of the Companies Act, 1956, since repealed enacts: "(1) A company may by written agreement refer to arbitration, in accordance with the Indian Arbitration Act, 1940, an existing or future difference between itself and any other company or person.

"(2) Companies parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

"(3) The provisions of the Indian Arbitration Act, 1940, shall apply to all arbitrations between companies and persons in pursuance of this Act." The figures "1940" in both the places have been substituted for the figures "1899" and in sub-section (3) after 1899 the words "other than those restricting the application of the Act in respect of subject-matter of the arbitration" have been omitted by this Act. *Vide* Fourth Schedule (*post*). In construing the Act before its amendment, it has

been held that section 152 is an enabling section and it merely confers powers on companies to refer disputes to arbitration under the Arbitration Act, 1899, by an agreement in writing, when this course is preferred. It is permissible for the company, although governed by the Arbitration Act, to make a reference outside the Arbitration Act, and although the award on such reference is filed in the court of Junior Subordinate Judge, the decree passed on the basis of it is perfectly legal. *Balmukund* v. *Punjab National Bank,* A.I.R. 1936 Lah. 721 (F.B.); but see *Jhirighat Native Tea* v. *Gupta,* A.I.R. 1940 Cal. 220; *Peoples Bank* v. *Northern India* Ltd., A.I.R. 1938 Pesh. 54. But after the passing of the arbitration Act, 1940, no procedure is available for any reference made outside the Act, and as such, all references are to be made by a company under the Act of 1940 [*vide* sections 46 and 47 (*post*)]. For cases of arbitration under the Act, *videAttock Oil Co.* v. *Abdul Majid,* A.I.R. 1929 Lah. 246=118 Ind.Cas. 533; *Punjab National* v. *Keval Krishina,* 148 Ind.Cas. 435=A.I.R. 1933 Pesh. 66; *Sunder Mal* v. *Paris Business Cor.,* 32 P.L.R. 444=132 Ind.Cas. 399; *Behari Lal* v. *Sirsa Trading,* 14 Lah. 249= A.I.R. 1933 Lah. 44=141 Ind.Cas. 64=32 P.L.R. 1048; *Ruplal* v. *Dhansar Coal,* A.I.R. 1933 Pat. 49=136 Ind.Cas. 445=13 P.L.T. 169. The point which arose for decision in these cases is whether a company can resort to arbitration under the Arbitration Act in areas outside the Presidency-towns, which had not been declared to be Presidency-towns under the 1899 Act. In *Sunder Mal* v. *Paris Business Cor.* (*supra*), it was held that a company could not do so unless the local area where the arbitration took place had been declared a Presidency-town under section 2 of the Arbitration Act, 1899. In *Behari Lal* v. *Sirsa Trading* (*supra*), *and Ruplal* v. *Dhansar Coal* (*supra*), a contrary view was taken, and it was held that even where the local area in question has not been declared a Presidency-town, the arbitration would be permissible in view of the provisions under section 152(3), Companies Act, read with proviso 2 to section 3 of the Arbitration Act of 1899. In *Balmukund* v. *Punjab National,* A.I.R. 1936 Lah. 721 (F.B.), the court observed: "Coming now to the case-law on the subject, no reported case directly in point was cited with the exception of *Attock Oil Co.,* v. *Abdul Majid,* A.I.R. 1929 Lah. 246. In that case, however, the point was conceded, and there is no discussion of the law on the point.....So far as I can see no question arose in these cases whether a company could or could not proceed to arbitration independently of the provisions of the Indian Arbitration Act, 1899. There are no doubt certain remarks in *Behari Lal* v. *Sirsa Trading,* 14 Lah. 249, as well as in *Ruplal Agarwala* v *Dhansar Coal Co.,* A.I.R. 1933 Pat. 49, which might be taken to favour the opinion expressed in *Attock Oil* v. *Abdul Majid* (*supra*). But these remarks can only be taken as *obiter dicta* and cannot be said to represent any considered opinion of the learned judges on the point now before us.....If a reference to arbitration, outside the Indian Arbitration Act was permissible, the decree passed by the learned Senior Subordinate Judge on the basis of the award was perfectly legal and consequently the other questions referred to the Full Bench do not arise." See also, *Chandra Lal* v *Graham Trading,* A.I.R. 1938 Lah. 827: *Anarkali* v *Jai Gopal,* A.I.R. 1940 Lah. 97: *contras Peoples Bank* v. *Padam Lal,* A.I.R 1938 Pesh. 54=177 Ind.Cas 659=11 R. Pesh. 30; *Jhirighat Native Tea* v. *B. Gupta,* A.I.R. 1940 Cal. 220=44 C.W.N. 285=71 C.L.J. 62= I.L.R. (1940) 1 Cal. 358=188 Ind.Cas. 143. See also, *Jhirighat* v. *Bipul,* (1940) 1 Cal. 258. This conflict has been set at rest by the amendment of this section by Act X of 1940, as well as by section 31 of the present

Arbitration Act, 1940. After the enactment of the Indian Companies Act (1913) and before the Indian Arbitration Act, 1940 came into force, a company could only enter into an arbitration under the provisions of the Arbitration Act (1899) and consequently companies were outside the scope of Schedule II of the Code of Civil Procedure Code. *Catholic Bank Ltd.* v. *Albuquerque,* I.L.R. (1944) Mad. 385=1944 Camp.C. 95=A.I.R. 1944 Mad. 303=(1944) 1 Meg. 290 (F.B.); but see *Karanatak Bank* v. *Singaraya,* A.I.R. 1944 Mad. 95=(1943) 2 M.L.J. 489=56 M.L.W. 637. But it has been held by the Calcutta High Court that the scope of S. 152 of the Companies Act is that the provisions of Sections 3 to 22 of the Indian Arbitration Act would apply, where one or both parties to arbitration are companies registered under the Companies Act, by force and effect of the Companies Act itself, irrespective of the provisions of Section 2 of the Arbitration Act; that is to say, the said Act would apply in a case falling within the scope of the Act even when the *locus* of the subject-matter was outside a Presidency-town, provided one of the parties or both of them were companies registered under the Companies Act. As the Indian Arbitration Act has no application to arbitration with the intervention of court, S. 152, of the Companies Act does not require the procedure laid down in the said Act to be followed in the case of such arbitration even if a company is a party to it. *East Bengal Ltd.* v. *Jogesh Chander,* I.L.R. (1940) 2 Cal. 237=44 C.W.N. 828=A.I.R. 1941 Cal. 127=193 Ind.Cas. 553.

Section 152 of the Companies Act only empowers a company to refer to arbitration an existing difference between itself and any other company or person. But a shareholder of a company has no right against the company. Apart from the Articles of Association of the company, a shareholder has no power to compel a submission to arbitration of a dispute arising out of the affairs of the company. *Madura Mills Co., Ltd.* v. *Krishna Ayyar,* (1937) M.W.N. 518=171 Ind.Cas. 690=45 L.W. 405=A.I.R. 1937 Mad. 405. A contract to refer to arbitration any dispute which might arisen between a company and an individual is not illegal because it is not under the seal of the company. *The Ganges Sugar Work* v. *Nuri Miah,* 28 Ind.Cas. 385=37 All. 273=13 A.L.J. 312. Powers of a living company to refer to arbitration are not co-extensive with the powers of official liquidators who cannot refer disputes to private arbitration. *Re Dehra Dun, etc.,* 50 All. 807=110 Ind.Cas. 695.

203. Reference under Religious Endowment Act.—Section 16 of the Religious Endowment Act (XX of 1863), enacts: "In any suit or proceeding instituted under this Act it shall be lawful for the Court before which such suit or proceeding is pending to order any matter in difference in such suit to be referred for decision to one or more arbitrators. Whenever any such order shall be made, the provisions of Chapter IV of the Arbitration Act, 1940, shall in all respect apply to such order and arbitration, in the same manner as if such order had been on the application of the parties under section 21 of the said Act". Section 17 of the same Act enacts: "Nothing in the last preceding section shall prevent the parties from applying to the Court or the Court from making the order of reference under the said section 21 of the Arbitration Act, 1940." Under section 16 of the Religious Endowment Act a court may refer any matter in difference in the suit for decision by an arbitrator but is not open to the court to refer the whole suit. 26 Mad. 361; 19 Mad. 498.

204. Reference by Corporation.—In *Sati Bhusan Mukherjee* v. *Corporation of Calcutta.* A.I.R. 1949 Cal. 20, Court observed: "There

is a fundamental distinction between the capacity of a natural person and of an artificial person which has been created by statue or charter, To a natural person whatever is not expressly forbidden by the law is permitted by the law. He has the capacity to do everything save and except those forbidden by law. In the case of an artificial person e.g., a Corporation which can be created either by charter or by statute the rule applicable to a natural person is reversed. Whatever is not permitted expressly or by necessary implication by the constituting instrument is prohibited not by any express or implied prohibition of the legislature but by the doctrine of *ultra vires*. This fundamental principle has been laid down in many cases. *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 652=44 L.J.Ex. 185; *Attorney-General* v. *Great Eastern Ry. Co.*, (1880) 5 A.C. 473 at p. 481=49 L.J.Ch. 545 and many other cases noticed in books on *ultra vires*." So if power be not given to a Corporation by the statute or charter creating it to refer matters in dispute to arbitration, it is not competent for the Corporation to do so.

As regards the capacity of Corporation, sole and aggregate, to refer matter to arbitration, *Russell* says: "Corporations are subject to restrictions, in many cases, with regard to contracts, and these restrictions will apply equally to submissions to contracts. Thus, if a Corporation can only validity contract under its common seal, a submission must be under seal in order to be binding. The restrictions and requirements in each case depend upon the nature of the Corporation, and the statutes or regulations by which it is governed, and the peculiar class of contract in question." *Russell* 15th Edn., p. 16. It is submitted with great deference that the distinction between natural and artificial person is to be kept in mind and even if there be no restriction in the particular statute creating the Corporation, even in that case an arbitration agreement would be *ultra vires*, if there be no specific provision empowering Corporation to make such agreement. So the statement of *Russell* that "Corporation is aggregate, subject to the restrictions mentioned above, may be parties to arbitration as well as individuals" does not seem to be correct. See *Kambakonam Municipal Council* v. *Abba Sahib*, 36 Mad. 113=21 M.L.J. 790 citing from *Halsbury's Laws of England* Vol. VIII p. 359, *Dundee Harbour* v. *Nicol*, (1915) A.C. 550=84 L.J.P.C. 74. In the last named case *Viscount Haldane L.C.* said: "It is well settled by the judgment of this House in the appeal in that case [1875] (44 L.J.Ex. 185=L.R. 7 H.L. 653), and by subsequent decisions which this House has given, that the answer to the question whether a Corporation created by a statute has a particular power depends exclusively on *whether that power has been expressly given to it by the statute regulating it or can be implied from the language used*. The question is simply one of construction, and not of presumption."

In the same case *Lord Dunedin* said: "The law as to statutory corporations, whether created by a general statute which allows persons acting in accordance with the rules there laid down to procure incorporation for a company, or by a special statute providing by its own provisions for the special incorporation was authoritatively settled by the case of *Ashbury Railway Carriage and Iron Co.* v. *Riche*, (44 L.J.Ex 185=L.R. 7 H.L. 653) in the House. The appellants do not dispute that. *They concede that a statutory Corporation must shew that its incorporating document authorises the acts which it purports to do*; but they appeal to the dictum of the *Lord Chancellor in Attorney-General* v. *Great Eastern Railway*

(1880) 49 L.J.Ch. 545=5 App.Cas. 473), 'that whatever may fairly be regarded as incidental to, or consequential upon,' the things authorised are not to be held prohibited by implication.....Incidental, in my view, means incidental to the main purposes of the main business."

Lord Parmoor said: "It is settled law that a body such as the appellants, constituted by statute, have no authority except such as Parliament has conferred upon them, and they must find a sanction for any powers, which they claim to have, in their incorporating statute or statutes. These powers may be expressly authorised, or implied as fairly incidental to what is expressly authorised."

205. Whether arbitrators named or not.—In *Sheonath* v. *Ramnath*, 10 M.I.A. 413=5 D.R. 14 (P.C.) their Lordships of the Judicial Committee of the Privy Council held that sections 312 and 314 of the Civil Procedure Code, 1889, clearly imported that the parties must either name the arbitrator or consent to the nomination of them by the court. So from the earliest time, it was the practice either to name the arbitrator or to accept the arbitrators suggested by the court. But under the Arbitration Act, of 1899, a reference can be made whether an arbitrator is named or not. [*Vide* section 4(b) of the Arbitration Act of 1899; *Bawa Chattagir* v. *Matonammal,* 4 Ind.Cas. 359=3 S.L.R. 149; *Ram Chand* v. *Gobinda Ram,* 56 Ind.Cas. 150=13 S.L.R. 193]. In the last named case the court observed: "A reference is made by a particular arbitrator being appointed under the agreement to refer. An agreement to refer and a reference are only distinguishable as separate transactions, where there is an agreement to refer in which no arbitrators are named, and subsequently a reference is made to an arbitrator in pursuance of the agreement." So an agreement does not become ambiguous on the ground that arbitrator is not specifically named. *Tarachand* v. *Paras Ram,* A.I.R. 1930 Sind 202=123 Ind.Cas. 696.

206. S. 2 (a), Sch. I, Para 3.—An award beyond four months of the arbitrators entering on the reference is, clearly met by para 3 of Sch. I. The plaintiff who was permitted to amend his claim after the expiry of four months was not estopped by his own conduct from challenging it; as there was no estoppel against the statute. The amended claim, was not in the nature of a fresh reference. Such amendment could not be termed, was not in the nature of a fresh reference. Such amendment could not be termed as fresh dispute and, therefore, a fresh reference. Fresh reference cannot be unilateral. *Lakshmi* v. *Union,* A.I.R. 1957 Pat. 633; A.I.R. 1951 All. 711 relied on.

CLAUSE (B)

207. Award.—Award according to clause (b) means an arbitration award. The decision of the arbitrator or arbitrators is called an award. *Banerjee* 3rd Edn., p. 2. It is an instrument embodying a decision of an arbitrators as regards matters referred to him. *Wharton Law Lexicon.* It is a paper containing the decision of the arbitrators. *Webster.* One of the essential ingredients of submission to arbitration is that parties should intend that the dispute intended to be referred should be determined in a *quasi-judicial* manner. If it is not so determined, the arrangement does not amount to a submission to arbitration and the person who decides the dispute is not an arbitrator. Therein lies the distinction between an agreement for submission to arbitration and an agreement to accept the decision of a valuer or appraiser or of a racing steward or of the

counsel of the parties. In all such cases there is no *animus arbitrandi*" *Firm Hormusji* v. *District Local Board*, A.I.R. 1934 Sind 200=285 S.L.R. 223=153 Ind.Cas. 911. In *Re Carus-Wilson & Grene*, (1886) 56 L.J.Q.B. 530=18 Q.B.D. 7, *Lord Esher, M.R.*, said: "If it appears from the terms of the agreement, by which a matter is submitted to any person, and that which he is to do, is to be in the nature of judicial inquiry, and that the object is that he should hear the parties and decide the matter upon evidence to be laid before him, there the person is an arbitrator." The decision of such a person or persons is called an award. It is a statement by which the arbitrator or arbitrators and umpire convey their findings and decisions regarding the subject-matter of submission or arbitration agreement. An award is not a contract inasmuch as the parties to it do not contract with the arbitrator; and it is also different from a consent decree where the order of contract with the arbitrator; and it is also different from a consent decree where the order of the court is imposed upon the agreement of the parties. *Tarachand* v. *Syed Abdul*, I.L.R. (1939) Kar. 422 & 182 Ind.Cas. 226= A.I.R. 1939 Sind 125=I.L.R. (1939) Kar. 422; but see *Narmadabai* v. *Natverlal*, 55 Bom.L.R 408=A.I.R. 1953 Bom. 386. A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnishes the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand. *Maung Po* v. *Ma Ba*, A.I.R. 1932 Rang. 459=A.I.R. 1937 Rang. 225=173 Ind. Cas. 690=10 Rang. 365. The award having become final had put an end to all the controversies and any one of the parties was not entitled to re-agitate a point which had been taken either in attack or defence on the ground that the arbitrators did not give any finding on it. *Ganpat Rai* v. *Boagwat Doyal*, (1937) A.L.J. 1141; see also *Damodar Das* v. *Basheshar Nath*, A.I.R. 1936 Lah. 865=167 Ind.Cas. 730. The object of an arbitration award is to decide a dispute which has arisen while the object of valuation is to avoid disputes. *Cursetji* v *Shivalu*, A.I.R. 1943 Bom. 32= 44 Bom.L.R. 859=204 Ind.Cas. 519. Where a court passes a decree in terms of an award, it is final. *Brijlal* v *Govindram*, A.I.R. 1943 Bom. 201 & 45 Bom.L.R. 358=I.L.R. (1943) Bom. 366=209 Ind.Cas. 50. But an award in order to be valid, must be final, certain, consistent and possible and must decide matters to be submitted and no more than the matters submitted. *Russell*, p. 448. When you have a decision which is the result of a discretion and an absolute discretion exercised by a person that decision cannot be in the very nature of things an award. *Vadilal* v. *Thakorelal*, 55 Bom.L.R. 609=A.I.R. 1954 Bom. 121.

An award is binding between the parties in all matters which it professes to decide, and the fact that parties to the award have not carried out its terms is not in law sufficient to deprive the award of its binding effect. A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand. *Luthfallah* v. *Khudur Baksh*, 223 Ind.Cas. 307= A.I.R. 1946 Sind 117. Where there are more than one arbitrator, all must join in making the award, *Russell*, p. 448.

Where at the time the award or report is made by the arbitrator,

the parties are not *ad idem,* and there was an honest difference of a fundamental nature about the subject-matter of the reference itself, the agreement itself would be void for uncertainty and the award of the arbitrator on such an uncertain reference would be void. *Laxman* v. *Ram Dulari*, A.I.R. 1952 V.P. 25. An award going beyond the subject-matter referred is invalid. *Union of India* v. *Premchand,* A.I.R. 1951 Pat. 201. *For further discussion of this topic, vide* notes under S. 14 under the heading *Award.*

Where disputes and differences arising out of a racing are submitted to the decision of stewards, the stewards though not judges or arbitrators, must observe the rules of natural justice. The person sought to be proceeded against must know what he is called upon to answer and must be heard. *Dayajinomal* v. *Karachi,* A.I.R. 1945 Sind 21.

208. Award by acceptance does not become an agreement.—An award continues to be an award notwithstanding the fact that the parties have accepted it. *Narbadabai* v. *Naiverlal,* A.I.R. 1953 Bom. 386=55 Bom.L.R. 408. In the above case *Chagla, C.J.* said: "There was no plea of any agreement subsequent to the award. The plea is that the award was accepted and agreed to. At the highest, this plea can only mean that the parties agreed not to challenge the award and to abide by the award. *But the acceptance of the award and the agreement to abide by the award cannot change the nature of the award.* If it was an award, it continued to be an award notwithstanding the fact that the parties have accepted it. It is difficult to accept the contention that merely on the parties abiding by the award and accepting the award the nature of the award is changed and it became an agreement and that the award was merged in the agreement.....In our opinion, parties appearing before the arbitrators may take an award by consent. They agree not to have the adjudiction by the arbitration. They may reduce the terms of agreement to writing and they may ask the arbitrator to promulgate that agreement as an award; but the mere fact that the parties have agreed to the terms of an award and that there has been no adjudication by the arbitrators does not in any way change the nature of the award. Once parties have referred their dispute to a domestic forum, it is that domestic forum alone that can decide upon those disputes. The forum may decide upon those disputes by adjudicating upon those disputes; it may decide those disputes if the parties consent to take a decision on an agreement. Whether in one case or the other, the decision of the domestic forum, whether by consent or *in invitum* is an award and has all the characteristics of an award."

209. Award must be certain.—The principle is well-settled that *certum est quod certum reddi potest,* that is sufficiently certain which can be made certain. *Cargey* v. *Aitcheson* (1823) 2 B. & C. 170 & 26 R.R. 290; *Ramji Ram* v. *Salig Ram,* 11 Ind.Cas. 481=14 C.L.J. 188. So also an award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning or as to the nature and extent of the duties imposed on it by the parties. If it is doubtful whether the award has decided the question referred, it will be set aside for uncertainty. *Russell,* p. 231.

210. Effect of award.—The effect of the award is such as the agreement of reference expressly or by implication prescribe. Where no contrary intention is expressed and where such a provision is applicable, all arbitration agreements are deemed to contain a provision that the award is

to be final and binding on the parties and any person claiming under that respectively. *Halsbury*, 3rd Ed., vol. 2, p. 44. Subject, therefore, to the power of the arbitrators to correct slips, and to the power of the court to remit the matters referred for re-consideration, the making of the award determines the arbitrator's authority, and he cannot alter the award after making it, even if he realises he has misapprehended the effect of the evidence or made a mistake as to the extent of his jurisdiction. *Ibid.* As between the parties to the arbitration agreement, the award gives rise to an estoppel *interpartes* and regard to the matters decided there is analogous to that created by judgment in an action in *personam*. *Ibid.* Where the court passes a decree in terms of an award it is final. The finality is not destroyed merely because the decree is not disturbed on account of difference of opinion between the appellate judges on question of competency of appeal. *Brijlal* v. *Govindram*, A.I.R. 1943 Bom. 201=45 Bom.L.R. 358=I.L.R. (1943) Bom. 366=209 Ind.Cas. 50. When an award is declared by the arbitrators in the presence of the parties on a certain date but it is signed by him on a later date, the award takes effect from the date when it was declared and not from the date when it was signed. *Sudhir Kumar* v. *Bilasbati*, 45 C.W.N. 223. A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and the award furnish the only basis by which the right of parties can be determined. *Damodar* v. *Basheshar Nath*, A.I.R. 1936 Lah. 865=167 Ind.Cas. 730. An award cannot be set aside on the ground of uncertainty upon a point upon which there is no controversy between the parties. *Vishindas* v. *Tejumal*, A.I.R. 1938 Sind 59=174 Ind.Cas. 334. If there is a rule or a bye-law of an association specifically providing for the hearing of the dispute by a fluctuating body of arbitrators then, the plea that the same arbitrators have not heard the dispute, would not invalidate the award. *Shiv Omkar* v *Banshidhar*, A.I.R. 1956 Bom. 459=58 Bom.L.R. 3=I.L.R. (1956) Bom. 100 (D.B.). Where in arbitration clause provides for an arbitration to be conducted according to particular Rules and Regulations, the system of exchange of letters provided by the Bengal Chamber of Commerce cannot be imported into such kind of arbitration. *Mury Exportation* v. *Khaitan*, A.I.R. 1956 Cal. 644.

211. International chamber of commerce.—Article 5 of Rules of conciliation and Arbitration provides for arbitration of business dispute and not of "international disputes". The business dispute must be an international character, and not a international dispute. *Mury Exportation* v. *Khaitan*, A.I.R. 1956 Cal. 644. Article 12 only relates to choice of arbitrators by parties. *Ibid.* As regards agreement to refer dispute to a foreign arbitrator, *vide Ibid.* As regards the meaning of the expression "validity", "construction", "execution", "dispute" and "litigation" in the arbitration clause, *vide Ibid.*

212. Parties to agreement—Bombay Oil-seeds Exchange.—A non-member would be bound by the arbitration rules of the agreement of the Bombay Oil-seeds Exchange, where for instance the non-member enters into a contract with a member in the prescribed form. Where the contract is under the prescribed form then the reference to arbitration is implied by the conduct of the parties, namely signing that particular form, but until that is done there could be no imposition of the rules as regards arbitration on a third party. *Vardan* v. *Narshi*, A.I.R. 1956 Bom. 720.

213. Arbitrator—Misconduct.—"Misconduct" in an arbitrator

which would invalidate his award need only be legal misconduct though something worse may be alleged. If it is a case of discretion only, the mere possibility of disagreement by the Court cannot make it misconduct If on the other hand, there are decisions so outrageous as to shock the conscience, it is certainly misconduct. *Laxman Prosad* v. *Ram Dulary*, A.I.R. 1952 V.P. 25.

214. Award—Judge of court appointed quasi arbitrator.—A judgment of a court pronounced *extra cursum curiae*, is in the nature of an arbitrator's award, and as a general rule at least, no appeal from it will lie. But the procedure *extra cursum curiae* is not applicable to proceedings not pending before the particular Court the Judge of which is consituted the *quasi* arbitrator. *Ariff* v. *Bengal Silk*, I.L.R. (1945) 2 Cal. 70=A.I.R. 1949 Cal. 350.

215. Awards dealing with matters involving status.—"I do not think it can be argued that an award is 'otherwise invalid' because it was not desirable, in view of the provisions of Section 4 of the Punjab Alienation of Land Act, that arbitrator should decide a question involving the agricultural caste of one of the parties." *Per Kayoni, J.* in *Baharuddin* v. *Muhamad*, P.L.D. 1951 Lah. 1. In the same case *Cornelius, J.* observed: "My own view is that the question referred to the arbitrator in the present case included one question which related to his legal status for the purposes of the Punjab Alienation of Land Act of 1900, and that such status is also a matter of great public interest, and that these two questions are of a nature which are not suitable for reference to an arbitrator."

216. Finality of award--condition.—For the making of an award it is not enough that the arbitrators act together and finally make up their minds and express their decision in writing. This writing must be authenticated by their signatures. The award thus made and signed and is complete and final so far as the arbitrators are concerned. *Asad-ul-lah* v. *Muhammad Nur*, 27 All. 459=2 A.L.J. 201: *Arumugam* v. *Arunachallam*, 22 Mad. 22: *Umersey Premji* v. *Shamji*, 13 Bom. 119 *Janardan Prosad* v. *Chandrasekhar*, I.L.R. (1950) Nag. 983=A.I.R. 1951 Nag. 198=1951 N.L.J. 241. "In *Akshoy Kumar* v. *S. C. Das*, A.I.R. 1935 Cal. 359=156, Ind.Cas. 165, it has been held that an award is final if it is made in time and that submission, delivery, or filing in time is not essential to maintain its validity." *Janardan Prosad* v. *Chandrasekhar, supra.* There is a fundamental difference between the making, signing and delivery of a judgment and making, signing and giving notice of an award. In the former case all these must be simultaneous acts and parts of the same transaction. In the latter case the first two may be simultaneous and notice of the award can be postponed. The award does not become invalid because notice of the making of it has not been given to the parties. *Ibid.* When an application is filed to set aside an arbitrator's award and is dismissed in default, the Court would appear to have no alternative, but to pronounce judgment in accordance with the terms of the award. The decree following cannot be considered *ex parte* and an order to set aside such a decree is, therefore, not applicable. *Ghulam Sarwar* v. *Abdul Sakoor*, P.L.D. 1949 Pat. 10.

217. Oral award.—Vide notes under Section 14 under the heading *Oral award is valid.*

218. An arbitrator is supreme judge of law and fact.—In *Adams* v. *G. N. S. Ry. Co.* (1891) A.C. 31, *Lord Halsbury* at p. 40 said: "The

Court.....nonetheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language he parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts. *Stimson* v. *Emerson,* 9 L.T. 199. In the Court of Queen's Bench thirty years ago, that decision was adopted as being the law which would guide the Courts in the decision of such questions." See also *Ghulam Khan* v. *Muhammad,* 29 Cal. 167 (183)=29 I.A. 51=66 W.N. 226=4 Bom.L.R. 161. In *Caledonian Ry.* v. *Tercans,* (1898) A.C. 256, of p. 268, *Lord Herscell* said: "I express no opinion upon them at present time because it appears to me that they do not arise before this House, in as much as the arbitrator, whether he has rightly decided or wrongly decided, is supreme." If an award is in respect of a breach of contract, it may be placed for further proceedings even though fresh damage has flowed from the breach. *Halsbury,* 3rd Edn., vol. 2, p. 45 citing. *Sheak* v. *Taylor,* 10 T.L.R. 224; bue see *Smith* v. *Wheatsheaf,* (1939) 2 K.B. 302=(1939) 2 All.E.R. 251. Once an award has determined the construction of a contract, the parties are bound by the construction so determined even though a new source of difference raising the question occurs. *Halsbury,* 3rd Edn., vol. II, p. 45. The publication of the award extinguishes any right of action in respect of the former matters in difference but gives rise to new cause of action based on the agreement between the parties to perform the award which is implied by every arbitration agreement. *Halsbury,* 3rd Edn., vol. II, p. 45. The learned author says: "Since it is the duty of parties to bring forward their whole case where the reference is of all matters in difference they will generally speaking lose their right of action in respect of any matter of difference not brought to the arbitrator's attention to the same extent as if it had been included in the matters actually determined." *Ibid.*

219. Award—characteristic of.—An award must be the result of a judicial decision and when a decision is the result of a discretion and an absolute discretion exercised by a person, that decision cannot in the very nature of things be an award. Where from the agreement between the parties it is clear that they intended the person appointed to act as a valuer and not as an arbitrator and that the decision was to be made, by him in the absolute discretion the mere fact that he was bound to observe the principle of natural justice and hear the parties before giving the decision does not make the decision and award. *Vadilal* v. *Thakorelal,* A.I.R. 1954 Bom. 121=55 Bom.L.R. 609. In the above case *Chagla, C.J.* said: "The first contention that has been raised before us by the Advocate-General is that the decision of *Sri Jamsedji Kanga* constituted an award and that award could only be given effect to in the manner provided under the Arbitration Act and that a decree could not be taken on that award by having a compromise recorded. In order to determine this point we have to consider what *Sri Jamsedji Kanga* had to do in order to fix the liability of each of the directors. If a dispute is referred to a person and if a person decides that dispute he holds a judicial enquiry and comes to a judicial decision, then undoubtedly that decision would constitute an award. On the other hand if a matter is referred to a person and he is not called upon either to hold a judicial inquiry or to give a judicial decision, but it is permissible to him to rely on his own skill, knowledge or experience in order to arrive at a particular decision, then that decision would not be an award. The authorities have made a distinction between what is known as a valuer and an

arbitrator, but there is a third category which may consist of persons who are neither arbitrators nor valuers, and the third category consists of persons who might be broadly as persons who are discharging functions other than those of arbitrators. In order to decide whether *Sir Jamsedji Kanga* was to act as an arbitrator or not, obviously we must first look at the document itself which referred to him the particular question with regard to the allocation of liability to the different direcors. It is a common place that the intention of the parties must be primarily gathered from the document which purports to express that intention, and when we turn to this document the first significant fact which strikes us is that the parties clearly intended that *Sir Jamsedji Kanga* should decide the particular matter as a valuer and not as an arbitrator..... But the fact that the parties had a clear conception that *Sir Jamsedji Kanga* should not give a judicial decision is apparent from the fact that they wanted him to act as a valuer and not as an arbitrator..... The most important characteristic of an award *is that it must emanate from a judicial determination.* An award must be the result of a judicial decision, and when you have a decision *which is the result of a discretion and an absolute discretion exercised by a person,* that decision cannot in the very nature of things be an award..... Now even assuming that *Sir Jamsedji Kanga* was bound to hear the case of each of the parties before he gave his decision, the mere fact that an enquiry had to be held is not sufficient to make the ultimate decision a judicial decision. We must have not only a judicial enquiry, but we must also have a judicial determination. Even assuming in favour of the Advocate-General that the compromise provide for a judicial inquiry, it definitely does not provide for a judicial decision. It is not sufficient for parties to say that the person whom they have appointed should observe the rules of natural justice and should hear the parties. They must further provide that he must decide as a Judge and not as a valuer or as a person other than an arbitrator." See also the observations *Lord Eshar, M.R. in Re Carrus Wilson and Greene,* (1886) 18 Q.B.D. 7=56 L.J. & B. 530, where he said: "If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decides upon evidence led before him that the case is one of an arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in judicial manner." See also *Kennedy Ltd.* v. *Barrow-in Furness Corporation* cited in *Hudson on Building Contracts,* 4th Edn., Vol. II at p. 41 ; *Monro* v. *Bognor Urban Council* (1915) 3 K.B. 167=L.J.K.B. 1091. In *Charles* v. *Cardiff Collieries Ltd.* (1928) 44 T.L.R. 448, *Scuton J.* has pointed that the decision of a chairman of the Conciliation Board was not an award within the meaning of the English Arbitration Act, and the mere fact that the parties had called the chairman's decision an award or himself an arbitrator, seemed to his Lordship, a matter of very small importance, and by no means introduced the whole machinery of the Arbitration Act, 1889, with the special powers to review the decision of a tribunal within the Act. *Firm Hormusji* v. *District Local Board,* A.I.R. 1934 Sind 200=28 S.L.R. 223= 153 Ind.Cas. 911 ; *Des Ram* v. *Secretary of State,* A.I.R. 1936 Sind 201= 165 Ind.Cas. 598 ; but see *Russell,* 15th Edn., p. 29 where it is said: "Although an appraisement or valuation is not necessarily an award, there is no reason why it should not be. Per *Lord Eshar, M.R.* in *Re Dawdy and Harcup,* 15 Q.B.D. 426 (431) ; see also *Finnegan* v. *Allen,*

(1943) K.B. 425 ;*Parry and Daw,* 85 S.J. 142. In *Finnegan* v. *Allen,* (1943) 1 K.B. 425 at p. 429 *Lord Green, M.R.* said: *"Heating J.* said in *Tharsis Sulphur* v. *Loftus* (1872) L.R. 8 G.P. 1: 'One of the most frequent grounds upon which actions of negligence are brought is not exhibiting due skill in the performance of a duty. Now, without deciding what is improper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, in as much as he was a person by whose decision two parties having a difference agreed to be bound. It appears to me that the safe rule when parties agree to be bound by the decision of a third party on any matter is that they take him in such a case for better or worse; and if he discharges his duty faithfully and honestly they must be satisfied.

In the above case *Finnegan* v. *Allen,* (1943) 1 K.B. 425 *Goddard, L.J.* said: "The distinction between a arbitrator and what the Court have called a *quasi*-arbitrator is not, I think, capable of precise definition. It depends on the nature of the matter submitted for decision and the reason for its submission."

In appreciating the effect of the words used in the award given by the arbitrators, the court must bear in mind that the arbitrators are laymen not familiar with the technical significance of legal expression and so the court must read the relevant clauses in the award as a whole with a view to determine what in effect and substance they intended to decide. *Nachiappa* v. *Subramaniam* A.I.R. 1960 S.C. 307=1960 S.C.J. 416=(1960) 1 S.C.A. 655=(1960) 2 S.C.R. 209.

220. Reference to document in recital.—Reference in the recital does not incorporate a document as to form part of the award. *Jupiter* v. *Corporation,* 60 C.W.N. 721=A.I.R. 1956 Cal. 470; see also A.I.R. 1923 P.C. 66=44 M.L.J. 406; A.I.R. 1927 P.C. 164=53 M.L.J. 18; A.I.R. 1949 P.C. 334=(1949) 2 M.L.J. 160.

221. Construction of submission.—"In construing a submission the cardinal principle to be borne in mind is that by a submission to arbitration a party deprives himself of the right accorded to him by common law to have the dispute to which the submission relates decided by a Court of law and that it must therefore, appear from the terms of the submission that with reference to any point arising the party has so deprived." *Per Chandravarkar, J. in Bombay Fire Ins.* v. *Ahmedbhoy,* 34 Bom. 1=1 Ind.Cas. 14.

CLAUSE (C).

222. Court—The Arbitration Act, 1940, is applicable throughout British India. The Arbitration Act of 1899, in the first instance, applied only to cases, where the subject-matter submitted to arbitration were the subject of a suit which could be instituted in the Presidency-towns. *Mathura* v. *Magan Lal,* 36 Bom.L.R. 47=A.I.R. 1934 Bom. 79; *Clements* v. *Rattan Singh,* 144 P.R. 1908. The definition of the word "Court" in section 4 of 1899 Act was given to suit the purposes of that Act. That definition is quite inapplicable to suit the purposes of the present Act of 1940. Hence a new definition has been given which would suit the purposes of this Act. This clause does not mean that a court has jurisdiction to receive an award only if the whole cause of action arose within the jurisdiction of the Court. Under Section 2(*c*) any Court which would have jurisdiction to decide the question arising from the

subject-matter of the reference, would be the proper Court in which the award may be filed. To give the Court jurisdiction it is not necessary that the whole cause of action should arise there. The Court has jurisdiction to determine the subject matter of the disputes between the parties also when the parties reside within its jurisdiction or the land was within its jurisdiction. *Cursetji* v. *Shivabai,* A.I.R. 1943 Bom. 32=204 Ind.Cas. 519=44 Bom.L.R. 859. The word "Court" in s. 21 cannot be interpreted to mean only the trial court. Similarly the word "suit" cannot be construed in the narrow sense of meaning only the suit and not an appeal. The word "court" in s. 21 includes the appellate court. S. 41 of the court is consistent with the view and no other section militates against it. *Nachiapa* v. *Subramaniam* A.I.R. 1960 S.C. 307=1960 S.C.J. 416=(1960) 1 S.C.A. 655=(1960) 2 S.C.R. 209 (over-ruling) I.L.R. (1946) 2 Cal. 492=A.I.R. 1947 Cal. 93=50 (W.N. 838). Because a party to an arbitration may choose to file a suit in a court which has no jurisdiction to go into the matter at all and merely because the defendant under S. 34 of the Act for stay of the suit it can not be said that the court which otherwise has no jurisdiction in the matter becomes a court within the meaning of S. 2 (c) of the Act. *Britania Building* v. *Gobinda* 64 C.W.N. 324.

223. Revenue Court.—The expression "Civil Court" as used in S. 2(c) does not include the Revenue Court. *Bithal Das* v. *Shri Nath,* 1947 A.L.J. 594=I.L.R. (1948) All. 10=A.I.R. 1949 All. 360. But the Act applies to Revenue Courts in the United Provinces. *Raghubir* v. *Haji,* 1952 A.L.J. (Rev.) 54=1952 R.D. 89. But see *Jai Singh* v. *Mangtoo* A.I.R. 1962 H.P. where it was held that revenue court is not a civil court within the meaning of s. 2(c) of the Act.

224. Insolvency Court—whether Civil Court.—The Insolvency Court is a Special Court and not a Civil Court within the meaning of S. 2 (*c*) and it has therefore no jurisdiction to make a reference of the disputes involved in an insolvency proceeding to arbitration. After the commencement of the insolvency proceedings the person proceeded against has no right to agree to a reference to arbitration. *Mangilal* v. *Devicharan,* I.L.R. (1948) Nab. 535=1948 N.L.J. 309=A.I.R. 1949 Nag. 110.

225. Small Causes Court.—As regards jurisdiction of Small Causes Court, *vide Dadhkhan* v. *Abdul,* 1959 M.P.L.J. 107 (notes).

226. Court whether includes appellate Court.—"Court" as defined in S. 2 (c) of the Act does not include an Appellate Court, and there is nothing in this Act which enable the Appellate Court to refer to arbitration the matter in dispute between the parties. *Abani Bhusan* v. *Hemchandra,* 227 Ind.Cas. 168=50 C.W.N. 838=I.L.R. (1946) 2 Cal. 492=A.I.R. 1947 Cal. 93, (Since over-ruled by the Supreme Court in *Nachippa* v. *Subramanim infra*), but see A.I.R 1948 All. 443 and A.I.R. 1953 All. 9: According to Patna High Court, "Court" in S. 2(*c*) includes Appellate Court. *Jamuar, J.* in delivering the judgment said: "I am of the opinion that the term 'Court' in S 2 (*c*), Arbitration Act, 1940 must be construed to include an Appellate Court, and that, therefore the Appellate Court may also pass an order for reference to arbitration under S. 21 of the Act." *Thakur Prosad* v. *Baleswar,* A.I.R. 1954 Pat. 106; see *Bundi Municipal Board* v. *Bundi Electric Supply Co.,* A.I.R. 1957 Raj. 278. But in a recent case of *Moradhwaj* v. *Bhudas,* A.I.R. 1955 All. 353=1955 A.L.J. 96 (F.B.) it has been held the word "suit" in S. 21 does not include appeals or execution proceedings and that

the word "Court" in S. 2 (*c*) refers to a Court of original jurisdiction. But see *Subramania* v. *Devadas,* A.I.R. 1955 Mad. 693=66 Mad.L.W. 765= 1955 Mad.W.N. 739 in which case, the A.I.R. 1954 Pat. 106 was followed and A.I.R. 1955 All. 353 (F.B.) explained and relied on and A.I.R. 1947 Cal. 93, not followed.

227. Arbitrators—if subject to territorial jurisdiction.—The arbitrators are not curcumscribed in their jurisdiction as a Court of law is. They have no territorial bounds and can divide property wherever situated all over the world. *Chouthmal* v. *Ram Chundra,* I.L.R. (1955) Nag. 180=A.I.R. 1955 Nag. 126.

228. Court—Forum.—The definition of "Court" in Section 2(c) makes it clear that all proceedings under the Arbitration Act will have to be taken to the Court which have jurisdiction to decide the question which formed the subject-matter of reference. *Narain Das* v. *Co-operative Society,* A.I.R. 1953 Punj. 49, where an application under s. 20 is made to a civil court having jurisdiction under s. 2(c), the operation of sub-s(4) of s. 31 excludes the jurisdiction of all courts other than that court over the arbitration proceedings and subsequent application arising out of the reference can only be made to the court and to no other court. *Britania Building* v. *Gobinda Chandra* 64 C.W.N. 324. In a case where there are three awards relating to three contracts of which two contracts relate to work done beyond jurisdiction the court having jurisdiction over one has no jurisdiction to deal with the other two awards. *K. C. Mehra* v. *Union of India* A.I.R. 1960 H.P. 20.

CLAUSE (D).

229. Legal representative.—This definition of "legal representative" is taken verbatim from the definition given in the Civil Procedure Code, *vide* section 2 (11). In English law the words "representatives" or "legal or personal representatives" *prima facie* mean executors or administrators. *In re Best's Settlement,* (1874) 18 Eq. 686 ; *Price* v. *Stranage,* 6 Mad. 159 ; *Stockdale* v. *Nicholson,* L.R. 4 Eq. 359 ; *Re Crawford's Trusts,* 2 Drew. 230 ; *Cosbyn* v. *French,* 4 Ves. 418 ; *Re Turner,* 2 Dr. & Sm. 501. But in the new Civil Procedure Code as well as in the Arbitration Act, 1940, a much wider meaning is given to the term. The word "legal representative" was construed in *Dinomoni Chaudhurani* v. *Elahadut Khan,* 8 C.W.N. 843. In that case *Brett, J.* observed: "The appellants centend that the term 'legal representative' in section 234 of the Code (of 1882) had its ordinary meaning of 'heir, executor or administrator.' The learned vakil for the respondents has urged us to put what he has described as an elastic interpretation on these terms though to what limit the freedom of interpretation is to extend or to what class of cases beyond those mentioned in the section is to be applied has not been stated.....

"Where there is an executor or administrator, they alone are the legal representatives of a deceased judgement debtor. But the section is also commonly applied both in the case of heirs as well as in that executors and administrators and the term 'legal representative' has been defined ordinarily to mean all these classes of persons. *Ishan Chandra Sircar* v. *Beni Madhab Sircar,* I.L.R. 24 Cal. 62 (71).

"When there is no executor or administrator but succession by heirship as in cases governed by the Bengal School of Hindu Law and in cases of separate and self-acquired property under the *Mitakshara* law the decree must be executed against the heir as the legal representative within the meaning of this section.

"This section, has however, been applied to cases where the succession is otherwise than by heirship to the last holder, of an estate as also to cases where the estate accrue to the present holder by survivorship. In these cases where a decree is passed against a judgment-debtor not in his or her personal capacity but in a representative capacity the decree may be executed against the person who though not an heir of the judgment debtor the last holder of the estate, is entitled thereto after her death whether as reversioner or surviving coparcener. So inasmuch as a decree properly obtained against a Hindu widow in her representative capacity is binding upon her husband's reversioner (*Tribhuwan Sunder Kuar* v. *Sri Narain Singh*, 20 All. 341), where a suit has been instituted or defended by a Hindu widow in her representative capacity the reversioners though they do not claim through her but as heirs of her husband have yet been held to be her legal representatives in respect of the estate held by her as such Hindu widow. *Ram Kishore* v. *Kally Kanto*, 6 Cal. 479; *Prem Moyi* v. *Preo Nath*, 23 Cal. 636; *Tribhuwan Sundar Kuar* v. *Sri Narain Singh* (*supra*); *Musala Reddi* v. *Ramayya*, 23 Mad. 125. The principle under consideration has been still further extended to the case of a person who without title as administrator, executor, heir, reversioner or surviving coparcener is the *de facto* possessor of the estate of the deceased Hindu it having been held that he must be treated for some purposes as his representative and that a judgment obtained against such a representative is not a mere nullity. *Prosanno* v. *Kristo*, 4 Cal. 342; *Janaki* v. *Dhanu*, 14 Mad. 454."

230. Administrator de son tort.—The definition of legal representative given in this section is wide; it is clearly not restricted to executors, administrators and heirs, for it includes even an *administrator de son tort*. *Jamnabai* v. *Jethamal*, A.I.R. 1937 Sind 318=172 Ind.Cas. 805. The word "intermeddle" is used to mean what is known as *executor de son tort*. *Ramprasad* v. *Jamnaprasad*, A.I.R. 1952 M.B. 153. See also *Chockalingam* v. *Kasuppan*, A.I.R. 1948 Mad. 386=(1948) 1 M.L.J. 422.

231. Benamidar.—A *benamidar* in some sense is a trustee for the real owner and his sons having some interest can succeed to the trusteeship and he can be considered to be his legal representative within the meaning of section 2 (11) of C. P. Code. *Chidambaran* v. *Swaminathan*, A.I.R. 1937 Mad. 101=(1936) M.W.N. 1008=(1937) 1 M.L.J. 33=168 Ind.Cas. 937. see also *Pynda* v. *Challa*, A.I.R. 1944 Mad. 27=56 L.W. 532=(1943) 2 M.L.J. 362=211 Ind.Cas. 298.

232. Donee's legal representative.—Donee's legal representative may be entitled to be substituted under Order XXII of C. P. Code—*Chandramani* v. *Bepin Behari*, A.I.R. 1932 Cal. 206=35 C.W.N. 1028=136 Ind.Cas. 543.

233. Heir or legatee.—The estate which devolves upon an heir or a legatee by right of inheritance or on the basis of a will is the estate which belonged to the deceased and it is this estate which came into the hands of the heir or legatee upon the death of the deceased. Therefore, the heir or legatee represents in law the estates of the deceased which has come to his hands and can be legal representative of the deceased within the meaning of section 2 (11) of the C. P. Code. *Ram Narain* v. *Phula*, A.I.R. 1943 Oudh 24=203 Ind.Cas. 125.

234. Heir of Parsi.—An heir of a Parsi is not his legal representative. *Khodadad* v. *Bai Jerbhai*, A.I.R. 1933 Bom. 6=39 Bom.L.R. 1156=172 Ind.Cas. 919

235. Joint Hindu family.—Where a member of a joint Hindu family dies, the surviving father, son and the widow are his legal representatives for the purpose of the execution of a decree obtained against him. *Prem Das* v. *Brij,* A.I.R. 1941 Lah. 447=43 P.L.R. 576=198 Ind.Cas. 569 ; *Autar Singh* v. *Jogindra,* A.I.R. 1939 Pesh. 45=184 Ind.Cas. 456 ; *Gyan Datt* v. *Sadanand Lal,* A.I.R. 1938 All. 163=(1938) A.L.J. 56=174 Ind.Cas. 307. A person on whom the estate of the deceased devolves would be his legal representative. If the deceased had left an estate then the surviving members of joint family would certainly be his legal representatives. *Sumeshar* v. *Baldeo,* A.I.R. 1935 All. 390=(1935) A.L.J. 293=157 Ind.Cas. 51 ; *Bishen* v. *Om Prokash,* A.I.R. 1952. Punj. 167=54 P.L.R. 73=B.L.R. 1952 Punj. 142 ; see also I.L.R. (1941) Bom. 177 (F.B.), A.I.R. 1938 All. 163 ; 20 P. 755 ; A.I.R. 1945 Oudh 60 ; (1949) 2 M.L.J. 821 ; A.I.R. (1941) Lah. 447.

236. Intermeddler.—A person who intermeddles with the property of a deceased person has been probably included in the definition of a "legal representative", in the C. P. Code merely to enable persons who wish to obtain relief against the property to proceed against it in the hands of such a person. This cannot affect the substantive rights of the lawful heirs. *Joi Kishen* v. *Karimuddin,* A.I.R. 1939 Lah. 321=41 P.L.R. 814 ; see also *Nagendra* v. *Hara Chandra,* A.I.R. 1933 Cal. 865=37 C.W.N. 758 ; *Satya Ranjan* v. *Sarat,* A.I.R. 1926 Cal. 825=96 Ind.Cas. 695 (A person who takes away a portion of property is not).

237. Scope of the definition.—The definition of "legal representative" in S. 2(11) C. P. Code is very wide. *Siromani* v. *Harcharan,* A.I.R. 1934 Lah. 1=154 Ind.Cas. 375. The expression "legal representatives" means and includes one person as well as several persons according as they represent the whole interest of the deceased person. *Firm Chunilal* v. *Amir Chand,* 31 P.L.R. 11=A.I.R. 1933 Lah. 356 (2)=142 Ind.Cas. 649. It is one of the essential tests with regard to the case of persons who intermeddle with the estate of another before they can be called as legal representatives of the deceased persons that they must retain possession of property belonging to the estate with the intention of representing the estate. *Nagendra* v. *Haran,* A.I.R. 1933 Cal 865=37 C.W.N. 758= 149 Ind.Cas. 927. A Hindu widow taking an interest in her husband's estate which devolves upon her under the Hindu Women's Rights to Property Act, would be his legal representative within the meaning of this definition. *Venkatasubba* v. *Jagannadha,* 225 Ind.Cas. 335=A.I.R. 1946 Mad. 283=(1946) 1 M.L.J. 159. The words "legal representatives" must be interpreted in the wide sense so as to include a person whose rights would be affected or might be affected if he survived the widow who had sued his deceased husband. *Gulzari Lal* v. *Sarju Bai,* 1949 A.L.J. 191=A.I.R. 1949 All. 604. So "legal representative" includes a Hindu reversioner (on the death of a Hindu widow) who does not claim under the limited owner but under the last male absolute owner. *Kailash* v. *Sheo Ranjan,* A.I.R. 1952 Pat. 380=B.L.R. 1952 Pat. 235. The person or class of persons indicated by the expression "legal representative" would depend on the context. Subject to that qualification it includes properly appointed executors and administrators ; it includes person who have taken on themselves duties and responsibilities, which belong to the office of executor or administrator even though only in respect of a part of the estate ; it includes heir-at-law, whether they take by succession or by survivorship ; it includes reversioners when the action has been brought

by or against the widow representing her husband's estate; it includes universal legatee; it may perhaps in some cases and for some purposes include trespassers; it does not include creditors who have received payments of the debts due for the estate of the deceased; it does not include persons dealing in the ordinary course of business with goods of the deceased received from another; it does not include persons who merely intervene for the purpose of preserving the goods of the deceased or providing for his funeral or for immediate necessities of his family; it does not include legatee of a part of the estate and it does not include those taking possession of the property of he deceased from the legatee of a part of the estate. *Netesa* v. *Alamlu*, 63 L.W. 388=1955 M.W.N. 311=A.I.R. 1950 Mad. 541=(1950) 1 M.L.J. 476.

238. Party in a representative character.—Where a person is a party in a representative character, the legal representative is the subject-matter of suit. *Mulla C. P. Code*, p. 12.

239. Endowed property—legal representative.—With regard to an endowed property, successor in management of the endowed property may be considered as a legal representative of the prior manager of the same endowed property. *Motibala* v. *Satyananda*, A.I.R. 1930 All. 348=(1930) A.I.J. 836=123 Ind.Cas. 376; see also *Keshab* v. *Jyoti Prosad*, A.I.R. 1932 Cal. 783=36 C.W.N. 816=139 Ind. Cas. 123; *Ratan Pillai* v. *Nataraja*, A.I.R. 1924 Mad. 615=84 Ind.Cas. 200. Where some of the trustees die or retire during the pendency of the suit and new persons are elected in their place: it is a case of devolution of interest during the pendency of a suit and the elected persons can be added as parties under Order 22, Rule 10 notwithstanding the question of limitation. *Trinmalai* v. *Arunachella*, A.I.R. 1926 Mad. 540; *Sunderasam* v. *Viswanath*, A.I.R. 1922 Mad. 402.

CLAUSE (E).

240. Reference.—"A reference is made by a particular arbitrator being appointed under the agreement to refer. An agreement to refer, and a reference are only distinguishable as separate transactions, where there is an agreement to refer in which no arbitrators are named, and subsequently a reference is made to an arbitrator in pursuance of the agreement." *Ramchand* v. *Gobind Ram*, 56 Ind.Cas. 150=13 S.L.R. 193. See also, *Bawa Chatagir* v. *Motonamal*, 4 Ind.Cas. 359=3 S.L.R. 149; *Dhanpatmal* v. *Kishen* Lal, 35 Ind.Cas. 536=10 S.L.R. 1 "Submission" in section 4 of the Arbitration Act, 1899 covers both what is ordinarily termed an arbitration clause and what is commonly called a reference. The former is a contract to refer, the latter is delegation of authority to a named arbitrator and an agreement to be bound by the award. *James Finlay* v. *Guardayal Pahlajrai*, 76 Ind.Cas. 600=17 S.L.R. 93. A reference does not necessarily involve a formal reference to arbitration on stamped paper and the word "reference" as used in sections 7, 8 and 9 of the Arbitration Act, 1899, is used as relating to the appointment of arbitrators by virtue of the submission which is the pivot of all references to arbitration. *Ibid.* Where there is a submission in terms of the Arbitration Act, and in pursuance of it either party appoints his arbitrator, the reference to arbitration is complete and it is not necessary to follow it up with a formal reference to arbitrators named. *Ibid.* See also, *Baksh Ilahi* v. *Abdul Rahman*, 71 Ind.Cas. 817; *McDonald* v. *Naraindas*, A.I.R. 1827 Sind 126=99 Ind.Cas. 554; *Dhanpat* v. *Kishenlal*, 35 Ind.Cas. 536. An agreement between the parties to refer

the matter to a person and abide by his decision amount to a reference to arbitration. *Swandnathen* v. *Moona,* A.I.R. 1933 Rang. 407=12 Rang. 1. A reference to arbitration should be read not in any pedantic spirit but so as to interpret broadly the intention of the parties. *Thimmalai* v. *Nanjayyar,* A.I.R. 1941 Mad. 266=(1940) M.W.N. 879. Reference to a village *panchayet* is the time-honoured method of deciding disputes and has these advantage, that it is generally comparatively easy for the *panchayatdars* to ascertain the true fact that, it avoids protracted litigation which might prove ruinous to the estate. *Vytla* v. *Marivada,* A.I.R. 1934 P.C. 105=38 C.W.N. 697 (P.C.).

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241. Agreement to refer as distinguished from submission.—"Parties cannot now and never" says *Russell* "could revoke an agreement to refer, which like any other contract, bound the parties." But an agreement to refer is not a submission under this section ; until a dispute has arisen and an arbitration has been agreed upon or validly appointed. *Russell* 13th Edn. p. 51. In this Act the conflict has been set at rest.

242. Reference—unilateral.—When it is desired to take advantage of an arbitration clause it is necessary that the party seeking the reference should first call upon the other party to join in the submission. An one-sided reference is illegal, until and unless the other party has refused to join the reference. *Punjab Province* v. *Lakshmi Das,* A.I.R. 1944 Lah. 149=46 P.L.R. 50.

243. When contract is denied.—Where the contract is denied and when there is no valid submission, the matter relating to the contract cannot go to arbitration and the award on that basis is without validity. *Chinoy* v. *Anjali,* A.I.R. 1958 Andh. Pra., 384.

244. Fresh reference.—An award beyond four months of the arbitrator's entering on the reference is clearly met by para 3 of Sch. I. The plaintiff who was permitted to amend his claim after the expiry of four months was not estopped by his own conduct from challenging it, as there is no estoppel against the statute. The amended claim, was not in the nature of a fresh reference. Such amendment could not be termed as fresh dispute and, therefore, a fresh reference. Fresh reference cannot be unilateral. *Lakshmi* v. *Union of India,* A.I.R. 1957 Pat. 633=1957 B.L.R. 608. There is no legal bar to matters in dispute arising after the date of submission being also referred to the same arbitrator. The only safeguard for the observance of the rules of natural justice is that both must be aware of the subsequent dispute and no party should be prejudiced by not being able to represent its care in respect of the new dispute before the Arbitrator. *Union of India* v. *Jagendra Singh* I.L.R. (1961) Cal. 544.

245. S. 19—Reference meaning of.—Section 19 clearly contemplates that "reference" and agreement are not indentical but are distinct things. The confusion that was sometimes created by the use of the word "submission" under the English Act of 1889 and to a certain extent under the Indian Act of 1899 as well, in the sense of both agreement to refer and an actual submission of a dispute has been avoided by defining "reference" and "arbitration" in the present Act clearly means the actual submission of particular dispute under the provision of an arbitration agreement to the arbitrator contemplated thereby. *Baranagore Jute* v. *Hulaschand,* 62 C.W.N. 734=A.I.R. 1958 Cal. 490. Where a contract is denied and when there is no valid submission, the matter relating to the contracts cannot go to arbitration and the award

on that basis is without any legal validity *Chinoy* v. *Anjali,* I.L.R. (1958) Andh. Pra. 243=A.I.R. 1958 Andh. Pra. 384=(1958) An. W.R. 69.

246. Reference—Limitation.—Where under an agreement between the parties reference to arbitration is to be made within three years of May 25, 1938 and the reference is not made until May 26, 1941, the date on which the time expires, namely, May 25, 1941, being Sunday, a reference is made within time. *Shivchandrai* v. *Panno Bibi,* A.I.R. 1943, Bom.197=5 Bom. L.R. 392=I.L.R. (1943) Bom. 280=208 Ind.Cas. 627.

247. Interpretation of reference.—The reference to arbitration should be read not in any pedantic spirit but also to interpret broadly the intention of the parties. *Thimmalai Chettiar* v. *Nanjayyar,* A.I.R. 1941 Mad. 266=(1940) M.W.N. 879. "He (the arbitrator) shall decide the terms and condition according to which the party No. 2 shall be admitted to the tenancy and what rent he shall pay". Held that the arbitrator can decide what rent should be paid by party No. 2 not only in future but also for the period before the reference. *Seth Shambhu Nath* v. *Surja Debi,* A.I.R. 1961 All. 180.

248. Consideration for arbitration agreement.—In an arbitration agreement either party is at liberty to take necessary steps to get the dispute decided by arbitration. *Burjor* v. *Ellernan,* 89 Ind.Cas. 866=27 Bom.L.R. 1098=49 Bom. 854. The parties must intend to refer the matter to arbitration. There must be *animus arbitandi. Hormusji* v. *District Local Board,* A.I.R. 1934 Sind 200. When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make proposal. [Contract Act, S. (2a)]. When a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted, becomes a promise: [Contract Act, S 2(b)]. When at the desire of the promisor, the promisor or any other person has done or abstained from doing, or does or abstain from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise [Contract Act, S. 2(d)]. Each arbitration agreement would show what are the considerations of the same.

CHAPTER II.

ARBITRATION WITHOUT INTERVENTION OF A COURT.

248A. Scope of the chapter.—The parties are competent to make a valid reference under Chapter II of the Arbitration Act of disputes in a pending suit, if they agree to arbitration without the supervision of the court and to withdraw the suit, even if the reference is made before the withdrawal of the suit. It would be enough in law that the award is made after the suit is withdrawn when the proceedings to obtain judgment in terms of the award can be obtained not in the suit, itself under Chapter IV but under Chapter II of the Act in an independent and new proceeding. *Financiers & Febra Dealers Ltd.* v. *Sankulal Sandar* A.I.R. 1961 Cal. 46. The fundamental basis of a non-statutory arbitration is an agreement between the parties thereto. Settlement of dispute between the parties by arbitration is strictly a proceeding by which the parties, by contract, submit the matter for determination to a tribunal of their own choice the substitution of tribunals provided under the law. An award is thus a fine judgment as it were of the arbitrator

or arbitrators in settlement of the controversy submitted to live on them, partaking the character of both a contrust as well as a judicial finding. *O. Mohamed Yusuf* v. *S. Hajee Mohammed* 76 Mad. L.W. 482=(1963) 2 Mad. L.J. 287 (F.B.).

Provisions implied in arbitration agreement.

3. An *arbitration agreement*, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

249. N.B.—This section reproduces verbatim Section 6 of the Indian Arbitration Act, 1899. Only the words "An arbitration agreement" have been substituted for the words "a submission". For reasons of the change *vide* notes under clause (*a*) of section 2 (*ante*). Section 6 of the Arbitration Act, 1899, was taken from section 2 of English of 1889.

250. Applicability.—If the arbitration agreement itself contains any provisions regarding the appointment of the umpire there will be no need to fall back on the implications contained in the first schedule, *Union of India* v. *Allied Trading*, A.I.R. 1956 Punj. 7.

251. Arbitration agreement.—An agreement procured under undue influence and coercion is voidable at the option of the party so coerced. *Ghulam Hussain* v. *Sakinabai*, 19 Ind.Cas. 374=6 S.L.R. 146. But where the party thus affected had voluntarily acted upon the reference and voluntarily appeared before the arbitrator he could be held to have acquiesced in the reference although it had been voidable at his option. *Ibid.*

252. Valid agreement.—It is essential that the terms of an agreement must be precise and definite. This applies as much to an arbitration agreement as to other agreement. *Firm Tata Varati* v. *Balabhadra*, A.I.R. 1954 Mad. 41. An arbitration agreement set up a private tribunal of the parties. The tribunal must consist of persons appointed as arbitrators: Outsiders who had never been appointed as arbitrator cannot give a decision which will be binding on the parties. *Luchman Singh* v. *Makar Singh*, A.I.R. 1954 Pat. 27.

253. Different intention expressed.—The object is to introduce into all arbitration agreement a recognised set of rules in place of the provisions usually inserted in submissions to arbitration before the Act. But the parties may exclude the provision of the schedule, if they so desire, by expressing a contrary intention. *Russell* 11th Edn. p. 74. In *Williams and Stepney, In re* (1891) 2 Q.B. 257, *Mathew J.* said: "that the Act added things which were not in the submission unless the intention that they should not be added was expressed." See also *James Mackintosh* v. *Scindia Steam*, A.I.R. 1922 Bom. 444=75 Ind.Cas. 221=47 Bom. L.R. 250; *Mayanamal* v. *Sanday Patrick*, 12 Ind.Cas. 662=5 S.L.R. 97. In matters of interpretation the court is to be guided by the intention of the parties; and by what law an arbitration contract is to be interpreted is also to be determined by the intention of the parties. *Hamlyn* v. *Taliker*, (1894) 71 L.T. at p. 2. See also *Sparier* v. *La Clocha*, (1902) A.C. 446; *Pena* v. *Rio* (1911) 846; *Fazalally* v. *Khinji*, A.I.R. 1934 Bom. 476=36 Bom.L.R. 1005. The failure of the arbitrator to make his award within four months does not automatically result in the cancellation of the arbitration agreement. *Shiv Ram* v. *Ram Rakha*, A.I.R.

1951 Pepsu 45=6 D.L.R. (Pepsu) 13. An award by the arbitrators has to be made within the period fixed under the agreement unless the same is extended by the court under S. 28, this is a statutory provision. Where a party seeks to set aside an award on the ground that it was delivered after the time fixed, it is not open to the other party to plead that the first party is estopped by conduct from challenging the award on that ground, as there can be no estoppel against statute. *Kamta Prosad* v. *Ram Doyal,* A.I.R. 1951 All. 711.

254. Arbitrators appointing umpire beyond time.—Under this section, unless there is an express provision in the arbitration agreement itself to the contrary, the reference must be to a single arbitrator. Where the parties who did not realise the legal implications of this arbitration agreement which did not contain any provision as to how many arbitrators should be appointed, appointed two arbitrators, one nominated by each, and the two arbitrators appointed an umpire beyond the time mentioned in clause (2) of the First Schedule, the appointment of the umpire is invalid, even assuming that the appointment of two arbitrators was valid. It is a fundamental rule that a judgment of a court or of an arbitrator or of an umpire without jurisdiction is a nullity. Here this is an inherent incompetency in the umpire to deal with the matter as an umpire and no consent of parties would confer upon him any jurisdiction to make an award. By reason of the limitation imposed by statute the co-called umpire has no jurisdiction to determine the disputes between the parties and neither acquiescence nor express consent of the parties can confer jurisdiction upon him. Moreover, estoppel cannot be invoked against the mandatory provisions prescribed by a statute. *Mamack Chand* v. *Ram Sarup,* 85 C.L.J. 232.

255. Implied provisions.—Under the English Act also all the clauses mentioned in the First Schedule are implied terms of the arbitration agreement. (*Vide Halsbury* 2nd Edn. Vol. 1, p. 631). In this connection *Russell* says: "Certain terms are implied in any arbitration agreement, unless the contrary intention is expressed in.....In addition to these statutory terms, the court will normally imply a term that the arbitrator is to decide the case in accordance with the ordinary law". *Russell* 15th Edn., p. 33 citing *Chandris* v. *Isbrandtsen Moller Co. Inc.* (1951) 1 K.B. 240 (C.A.)=(1950) 2 All. E.R. 617; *Ram Kissendas* v. *Sassoon & Co.* (1929) W.N. 27=98 L.J.P.C. 58; see *Mohammadali Charat Singh,* A.I.R. 1925 Sind 51. However well-established the usage or practice may be, if it is contrary to natural justice, it cannot be upheld in a court of law. Hence mercantile usages in the conduct of references cannot be supported if contrary to the principles of natural justice. *Fazalally* v. *Khimji,* A.I.R. 1934 Bom. 476=36 Bom.L.R. 1005. *In re Brooks and Delcomyn,* (1864) 16 C.B. (N.S.) 408 at p. 414, *Erle C. J.* observed: "I have always a great desire to give effect to mercantile customs, and to the awards of mercantile arbitrators, unless they infringe upon principles of wider importance."

256. Time for making award.—Prior to the Arbitrator Act of 1940, the policy of the law was that the award should be given as expeditiously as possible and now under the present Act the period of four months is made an implied condition of every reference and time cannot be extended till the Court has agreed thereto. Under the old law, in an arbitration without the intervention of Court, the award was made by the arbitrators nearly 4 years after the reference. The award was governed by the old law and not by the Act, of 1940. It was held that

a party who had continued to take parts in the arbitration till a day or two before the award could not be allowed to challenge the award mainly because the award was made after such a long time. *Choutumal* v. *Ram Chandra,* I.L.R. (1955) Nag. 100=A.I.R. 1955 Nag. 126.

257. S. 3 and Sch. 1, Rule 3—Applicability.—Vide *Barangore Jute Factory* v. *Hulaschand,* 62, C.W.N. 734=A.I.R. 1958 Cal. 190. Where upon the refusal of the first arbitrator to act as such, after having entered upon the reference, another arbitrator was appointed in the terms of agreement and this arbitrator makes his award within four months of his entering the reference, the award cannot be thrown out on the ground that it was given beyond limitation. *Nawab Syed* v. *Nawab Askari* A.I.R. 1959 All. 777=I.L.R. (1959) 2 All. 328. The combined effect of section 3 and condition 3 of the First Schedule is that every arbitration agreement contains a condition as to which is of the essence of the agreement. If this condition is broken either party to the agreement can treat the arbitration as at an end. But a condition in an agreement has not the same effect as a statutory condition which goes to the root of the jurisdiction of a court or any other authority. It can be waived by the parties. The general principle of the law of contract is given statutory recognition by s. 28(2). *Shambhu Nath* v. *Surja Devi* A.I.R. 1961 All. 180.

258. Scope of the sections 6 and 10 to 15 of the old Act of 1889.—It has been held in connection with sections 10 to 15 of the old Act, 1899, that these sections are general sections applying to all, awards under the Act, whether the provisions of the First Schedule are applicable to the particular arbitration or whether they are excluded by the expressed intention of the parties. *Heeralal Agarwalla & Co.* v. *Joakim Nahapiet & Co.,* A.I.R. 1927 Cal. 391=31 C.W.N. 446=102 Ind.Cas. 395. In the new Act section 13 corresponds to section 10, section 14 to section 11, section 28 to section 12, and section 30 to section 14 of the old Act.

4. The parties to *an arbitration agreement* may agree that any reference *thereunder* shall be to an arbitrator or arbitrators to be appointed by a person designated *in the agreement* either by name or as the holder for the time being of any office or appointment.

Agreement that arbitrators be appointed by third party.

259. N.B.—This section reproduces section 7 of the Arbitration Act of 1899, with slight alteration. There is no corresponding section in the English Act of 1889. The following illustration was appended to section 7 of the old Act of 1899:—*Illustration*—"The parties to a submission shall be referred to an arbitrator to be appointed by the Bengal Chamber of Commerce, or, as the case may be, to an arbitrator to be appointed by the President for the time being of the Bengal Chamber of Commerce".

260. "Arbitration agreement."—An "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. *Vide* section 2(*a*). In order that there may be a valid agreement to refer to dispute to arbitration under the Arbitration Act, it is necessary that the aggrcement should be in writing and that such writing should embody all the terms of the agreement either directly or by implication. It is not necessary that such written document should be executed by both the parties. All that is requi-

red is that both the parties should accept a written document as containing the agreed terms; it might be in the form of a document signed by both of the parties containing the terms, or a document signed by one party containing the terms and a plain acceptance either signed or orally by the other party; or an unsigned document containing the terms agreed to orally by both the parties. *Keshoram Cotton* v. *Kanhyalal Bag*, 44 C.W.N. 607; *Jubilee Chamber of Commerce* v. *Lala Amrit Sha*, A.I.R. 1940 Lah. 180=42 P.L.R. 48; *Radha Kanto* v. *Baertien Bros.* 56 Cal. 118=32 C.W.N. 1101; *Shanker Lal* v. *Jainy Bros.*, 53 All. 384; *Ramlal* v. *Haribux*, A.I.R. 1934 Cal. 796=61 Cal. 702=38 C.W.N.737. But arbitration clause in original contract between the importer and first dealer of goods cannot be said to be an incident of a contract for the subsequent sale and purchase of goods. Therefore unless the language of the particular sale-deed clearly shows that the parties thereof definitely mean to find themselves with that arbitration clause, that sale-deed in its usual form cannot incorporate the arbitration clause in the contract which constitutes a collateral bargain between the original parties, and there is no valid arbitration contract. *Ramlal* v. *Haribux*, A.I.R. 1934 Cal. 796=61 Cal. 702=38 C.W.N. 737; see also, *Chatturbhuj* v. *Baseodas*, A.I.R. 1921 Cal. 767=60 Ind.Cas. 909=47 Cal. 799; *Vali* v. *Shamdeo*, A.I.R. 1930 Cal. 774; *Weir & Co.* v. *Pirie*, (1898) 3 Com.Cas. 263; *T. W. Thomas* v. *Portsea Steam Ship*, (1912) A.C. 1=81 L.J.P. 17; *Hamilton* v. *Mackie*, 5 T.L.R. 677. It is essential that the terms of an agreement must be precise and definite. This applies as much to an arbitration agreement as to other areements. Before holding that the parties have agreed in writing to refer their dispute to arbitrators and in the absence of such a clause in the agreement actually signed by the parties there must be at least a specific contract or document containing such a clause in respect of which it might be said that it had been incorporated in the agreement of the parties by reference. *Firm of Tatavarti* v. *Balabhadra*, A.I.R. 1954 Mad. 71. An arbitration sets up a private tribunal of the parties. Thet tribunal must consist of persons appointed as arbitrators. Outsiders who had never been appointed as arbitrators cannot give a decision which will be binding on the parties. *Lachman* v. *Markar*, A.I.R. 1954 Pat. 27.

261. Stamp.—An arbitration agreement is an "instrument" not otherwise provided for in the Stamp Act and as it should be stamped under article 5 (*b*) of Schedule I of the Indian Stamp Act as amended by local Acts. *Bajabai* v. *Shivaram*, (1883) Bombay, Printed Judgments 151. Letters written by parties to arbitrators authorising them to arbitrate do not require to be stamped. *Gangaram Kshaba* v. *Narayan Balaji*, 19 Bom. 32. A deed appointing an arbitrator in place of one appointed under an agreemen to refer to arbitration, does not require to be stamped under Article 5 of the Stamp Act. *Kali Charan Banik* v. *Mani Mohon Saha Banik*, 28 C.W.N. 871=82 Ind.Cas. 416=A.I.R. 1924 Cal. 794. In the last-named case *Suhrawardy J.* observed: "It is conceded that the stamp required on a document embodving a reference to arbitration is eight annas under Art. 5, clause (*c*), of Schedule I of the Indian Stamp Act (II of 1899). That article says that an agreement or a memorandum of an agreement should be stamped with a particular stamp, and in clause (*c*) it says that where there is no provision otherwise made, it must be stamped with a stamp of eight annas. It has also been held that a document authorising an arbitration should be stamped as such, that is, with a stamp of eight annas. It is, therefore, clear that a docu-

ment which purports to be an agreement to refer a dispute between parties to arbitration should be stamped. That document, in my opinion, is the original document under which the parties agree that the matters in difference between them should be referred to the arbitration of certain persons. Any subsequent variation in the names of the arbitrators will not be a reference to arbitration but would, in my opinion, be only a substitution of the name of an arbitrator in place of another or, if I may say so, the document asking for the substitution may be called a letter of nomination or appointment for which the Stamp Act does not provide for any stamp. See *Gangaram Kushaba* v. *Narayan Balaji,* 19 Bom. 32". No stamp is required when umpire is appointed by arbitrators. *Routledge* v. *Thornton,* 4 Taunt. 704=13 R.R. 734.

Only one stamp is required, although the submission may comprise a number of separate causes of action by or against a number of different persons. *Goodson* v. *Forbes,* 6 Taunt 171=1 Marsh 525. Any alteration or amendment of a submission, whether endorsed on the original submission or written on a separate document, must be stamped. *Stephens* v. Lowe, 9 Bing. 32. By memorandum A and B agreed to refer a dispute to an impartial surveyor ; by a further memorandum written on the same paper on a subsequent day it was agreed that the question should be settled by one C. It was held that the two memoranda required only one samp. *Taylor* v. *Party,* 1 M & G 604=9 L.J.C.P. 298. An arbitration agreement, unless duly stamped is not valid and an award based on such agreement is also not valid. *Hurdwary Mull* v. *Ahmed Musaji Selaji,* 13 C.W.N. 63=1 Ind.Cas. 371. But where the submission has been admitted in evidence by the arbitrators, it is not open to either of the parties to call in question such admission in the arbitration proceedings on the ground that the submission had not been duly stamped. *Runglal* v. *Kedarnath,* 27 C.W.N. 513=77 Ind.Cas. 845.

Where a defendant wrote a letter of request to the Bengal Chamber of Commerce for the appointment of two arbitrators in accordance with a provision in the contract for reference to arbitration of Bengal Chamber of Commerce, and the issue of an award, on setting forth the details of the buyer's complaints and giving the numbers of the bales—the subject of dispute, *held* that such a letter does not require to be stamped. *Finley Muir & Co.* v. *Radha Kissen Gopi Kissen,* 36 Cal. 736 (743).

A contract of sale of goods was comprised in bought and sold notes. each signed by the brokers and stamped under Article 43 of Schedule I to the Stamp Act with a stamp of two annas. This contract contained a clause for the submission of disputes to arbitration. *Held,* dissenting from *Hurdway Mull* v. *Ahmed Musaji Selaji,* 1 Ind.Cas. 371=13 C.W.N. 63, that the agreement to refer any dispute whatever arising out of the contract to arbitration was a part of the contract itself and not a "distinct matter" within the meaning of section 5 of the Stamp Act, and the whole contract fell under the exemption clause *(a)* of Article 5 as being an agreement or memorandum of agreement for or relating to the sale of goods of merchandise exclusively, and that, therefore, the documents together making the contracts, were not chargeable with duty otherwise than on broker's note under Article 43. *Bombay Company* v. *National Jute Mills,* 16 Ind.Cas. 153=39 Cal. 669 ; see also, *Baijnath* v. *Ahmed Musaji,* 17 C.W.N. 395.

An agreement for the sale of goods does not require a stamp under the Indian Stamp Act, although it contains provisions as to the ware-

housing, insurance of goods and also reference to arbitration. *Kyd* v. *Mahomed*. 15 Mad. 150. In the above case the court observed : "We are of opinion that the agreements A and B fall within the exception. It is urged that the stipulations relating to the payment of godown rent and fire insurance as also those relating to reference to arbitration are extraneous to the contract of sale, but we are of opinion that they are only collateral and subsidiary incidents relating to the sale of goods, which is the transaction evidenced by the documents". An agreement containing a submission to arbitration is not invalid in default of bearing an eight anna stamp. *Firm of Tara Chand* v. *Louis Dreyfus & Co.*, 35 Ind.Cas. 449=10 S.L.R. 14.

262. Arbitration agreement on unstamped or insufficiently stamped document—effect on award.—Contract notes which contain a provision for the submission of disputes to arbitration ought each to bear eight-anna stamp under Art. 5 of Schedule I to the Indian Stamp Act, 1899, as an agreement not otherwise provided for in the Schedule. *Hurdway Mull* v. *Ahmed Musaji Selaji*, 13 C.W.N. 63=1 Ind.Cas. 371. In delivering the judgment in the above case, *Fletcher J.* observed : "The first object that appears to me from the record to have any substance in it is that submission to arbitration are insufficiently stamped. Now, each of the contract notes containing the submission bears a one-anna stamp only, being stamped under Art. 43 of Schedule I to the Indian Stamp Act, 1899.

"It will be noticed that Art. 43 refers only to a note or memorandum by a broker or agent to his principlal intimating the purchase or salc on account of such principal of any goods exceeding in value Rs. 20.

"Section 5 of the Indian Stamp Act. 1899, enacts as follows:—"Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act'. And section 6 of the same Act enacts:—

"Subject to the provisions of the last preceding section, an instrument so framed as to come within two or more of the descriptions in Schedule I, shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties."

"Do then, the contract notes comprise or relate to several distinct matters, or are they so framed as to come within two or more of the descriptions in Schedule I to the Stamp Act?

"The contract notes, in addition to the intimation by the broker of the purchase or sale of goods, contain a submission in writing by the buyer and seller to refer dispute to arbitration signed by the broker, as the authorised agent of the parties. To hold otherwise would mean that, in this case, there is no submission in writing signed by either of the parties, in which case, the award could not, in any event, by filed in court, as not being within the provisions of the Indian Arbitration Act.

"If, then, the contract notes contain a submission to arbitration, they fall within the provisions of section 6 of the Indian Stamp Act. A submission to arbitration is chargeable with eight-anna stamp under Schedule I, Art. 5, of the Indian Stamp Act, as an agreement not otherwise provided for. (See *Bajabai* v. *Shivaram*, (1883) Bom.P.J. 151, referred to in *K. Seshadri Ayangar's Stamp Law in British India*, Part I, Schedule I, p. 46). I may also refer to *Russell on Arbitration*, 9th Edn.,

p. 56, where the learned author states that submission to arbitration requires an agreement stamp under the provisions of the English Stamp Act, 1891. There is no distinction on this point between the English and the Indian Stamp Act.

"I am of opinion, therefore, that each of the contract notes should have borne a stamp of eight annas. This being so, it becomes natural to consider section 35 of the Indian Stamp Act, 1899, which is in the following terms:—'No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped.'

"The arbitrators, even though the parties do not take the objection, are bound by the Indian Stamp Act to take notice of any omission or insufficiency in the stamping of any document produced before them. They are also to require under proviso (a) to section 35 of the Indian Stamp Act, before they receive in evidence or act under the submission, the payment of the necessary duties and penalties (see *Russell on Arbitration*, 9th Edn., p. 157). In the present case, the arbitrators being persons having, by the consent of the parties, authority to receive evidence, acted upon the two submissions to arbitration without the same being duly stamped to the provisions of section 35 of the Indian Stamp Act.

"Under the old practice, an award had to be enforced in a suit, and in such a suit, the plaintiff had to prove the submission under which the arbitrators acted (*Ferrer* v. *Oven*, 7 B. & C. 427), and though, under the provisions of the Indian Arbitration Act, an award may be enforced in the same manner as a decree, yet it is still necessary to prove that the arbitrators acted upon a valid submission.

"The Arbitration Act has only in this respect made the procedure for enforcing an award simpler than that under the former practice. Section 35 of the Indian Stamp Act is, however, clear in its provisions and forbids any person having by law or consent of the parties authority to receive evidence (as the arbitrators have in the present case) from acting upon it until it is duly stamped. How then can I say on the evidence before me that the arbitrators acted on a valid submission when the statute expressly says they shall not act upon it until sufficiently stamped? I must confess that I have been unable to see any way out of this difficulty. It may, however, be that if this were the only objection, the court could remit the matter to arbitrator."

But in *Runglal* v. *Kedaranath*, 27 C.W.N. 513=77 Ind.Cas. 845, a Divisional Bench of the Calcutta High Court consisting of *Sanderson C.J.* and *Richardson J.* took the opposite view. In the above case *Sanderson C.J.* observed: "The instrument in this case is not stamped and therefore under the provisions of the first part of section 35 it should not have been admitted in evidence by a person having authority to receive evidence and acted upon by such person. That section seems to me to imply that the instrument which is referred to in the section is one which in the first instance is to be received in evidence before it can be acted upon. Whether that be so or not, in my judgment, in this case the submission to arbitration must have been put in evidence before the arbitrators, before they could act upon it. The submission—the agreement in writing—must be produced to the arbitrators and if they are satisfied as to the execution of the document, it is necessary that the

execution of the document should be proved before the arbitrators. In any event it seems to me clear that the submission in this case was a document which had to be put in evidence before the arbitrators. It was their duty to see that it was properly stamped. If an objection had been taken at the time then the proviso to section 35 would have come into force, and upon payment of the stamp duty and the penalty the instrument would have been admitted in evidence in accordance with the proviso. That was not done. It is necessary therefore to refer to another section. Section 36—which provides, 'Where an instrument has been admitted in evidence, such admission shall not except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground, that the instrument has been duly stamped.' The provisions of section 61 are not material to the question which arises in this case. The submission was, in my judgment, admitted in evidence by the arbitrators, and having been admitted in evidence by the arbitrators, it was not open to either of the parties to call in question such admission in the arbitration proceedings on the ground that the submission had not been duly stamped. The award therefore which was made upon the submission, was in my judgment a valid award." *Richardson J.* said: "In my opinion, once an instrument is admitted in evidence in any proceeding, either under section 35 or under section 36, it is available in that proceeding for all purposes as if it had been properly stamped from the outset. The proceeding will go through to a valid termination and cannot afterwards be challenged for want of jurisdiction merely by reason of non-compliance with the Stamp Act."

The same question again arose in the case of *Kali Charan* v. *Mani Mohan,* 82 Ind.Cas. 416=28 C.W.N. 871=A.I.R. 1924 Cal. 794, where *Walmsley J.* observed· "It appears to me that the proceedings before the arbitrators and the proceedings in court must be kept distinct. So far as the arbitraors are concerned they might have proceeded under section 35(*a*) had the defect been brought to their notice; they did not do so, and when once they had taken up the enquiry on the basis of the reference, the admission of the reference by them could no longer be called in question before them (section 36), and Mani Mohan could not have urged before them that they had no authority to make award. Then came the suit on the award, and then, I think, it was open to Mani Mohan to challenge the juristiction of the arbitrators on the ground that there was no valid reference; and it became the duty of the court to investigate the assertion, and the court was entitled on ascertaining the true facts to proceed under section 35(*a*).

"The question has been discussed recently in the case of *Runglal Kalooram* v. *Kedarnath Kesriwal,* 77 Ind.Cas. 845=27 C.W.N. 513, and the view taken by the learned judges was very much in accordance with what I have said above. The earlier decisions that were cited before us hardly afford any help."

263. Registration.—Ordinarily an arbitration agreement does not require registration because such an agreement, neither creates nor declares, assigns, limits or extinguishes either in present or in future, any right, title or interest in immovable property and is, therefore, not liable to be registered compulsorily. *Vide* Section 17(1) (*b*) of the Registration Act. But where an agreement to refer to arbitration recited *inter alia* "the executants have agreed and consented to divide the estate in dispute and accordingly they appoint.....arbitrators and an umpire and agree

that the arbitrators shall partition the estate and thereupon each executant shall obtain proprietary possession of his respective share as declared by the arbitrators" and it was found in evidence that this agreement was the only record of matters which had been settled before it was executed and there was no evidence of any agreement, independent of the instrument to partition the estate: *Held* that the agreement was inadmissible in evidence for want of registration. *Raghubir* v. *Umrao,* 13 Ind.Cas. 500.

264. All parties interested must join.—The principle that in a pending suit all parties must join in the reference also applies to arbitrations out of court. Disputes relating to accounts of partnership cannot be settled unless all the interested persons are joined, because the dispute involved the interests of all the partners which cannot be settled piecemeal by some of the partners without the consent of the others. Where, therefore, such a dispute between the partners is referred to arbitration out of court on the assumption that all the partners have joined in the reference, but it subsequently transpires that there was no valid reference on behalf of one of the partners, then the award that is afterwards passed on such reference is not binding on the other partners also. *Abdul Ghani* v. *Sirajuddin,* 41 P.L.R. 580=A.I.R. 1939 Lah. 154.

In the course of judgment in the above case court observed: "It is contended that although it is necessary for all the parties to join in the case of a reference to arbitration in a pending suit, this is not necessary when the reference is made out of court. If any person interested does not join, the award may not be binding on him, but it was argued there is no valid reason why it should not be binding on the other parties to the reference.....The learned Counsel for the appellants cited *Jnanendra Nath* v. *Jitendra Nath,* A.I.R. 1928 Cal.275=107 Ind.Cas. 70=32 C.W.N. 108, *Diala Ram* v. *Nihali Bai,* A.I.R. 1936 Pesh. 96; *Jadunath* v. *Kailash Chandra,* 2 Ind.Cas. 414=10 C.L.J. 41 and *Muhammad Sayed* v. *Abdul Gafar,* 115 Ind.Cas. 680=10 P.L.T. 53 in support of his contentions. The rulings however seem to be distinguishable. In A.I.R. 1928 Cal. 275, all that was held was that an award in so far as it interfered with rights of strangers would not be binding on them.

"In A.I.R. 1936 Pesh. 34, it was held that an award partitioning joint family property made on reference by only some members of the family is valid and is binding on the members joining the reference". See also 2 Ind.Cas. 414; but in *Dharanidhar* v. *Sukharam,* A.I.R. 1921 Nag. 176=71 Ind.Cas. 860. In *Balkishan* v. *Sohan,* A.I.R. 1929 Lah. 476=116 Ind.Cas. 559=10 Lah. 871, it is conceded that in a pending suit all interested party must join in the suit. In the original case the court continued: "It is difficult to say why a different principle should govern arbitrations out of court." A.I.R. 1939 Lah. 154. Where brokers are not liable under the contract they should not be made parties to the submission. *Miller, Gibb & Co.* v. *Smith,* (1916), 1 K.B. 419=85 L.J.K.B. 627.

265. Appointed arbitrators.—"It is a common practice to insert a clause in commercial contracts providing that disputes, if they arise, shall be referred to an arbitrator to be appointed by some persons holding an official position, but it is not usual in such clauses to provide for the case of the arbitrator refusing to Act. *Russell,* 11th Edn., p. 126.

Now the question is what is the meaning of the word "appoint". If it means "nominate" then the third party's duty comes to an end after nominating an arbitrator. But the word "appoint" may mean something more than "nominate". It *may mean to appoint an arbitrator who is willing to act,* and in that case, if the third person appoints an arbitrator who is unwilling to act, his powers are not exhausted, but he can appoint another". *Russell* p. 127 ; see also *In re Wilson & Sons etc.,* (1892) 1 Q.B. 86 ; *Reynolds* v. *Gray,* (1698) 1 Salh. 70: Where the person appointed does not accept there is no appointment. *Ringland* v. *Lowndes* (1863) 33 L.J.C.P. 25. Where a contract contains an arbitration clause that any dispute arising out of the contract "shall be referred to the arbitration of the Bengal Chamber of Commerce under the Rules of its Tribunal of Arbitration for the time being in force", the "appointed arbitrator" is the Bengal Chamber of Commerce, though under the rules the Bengal Chamber of Commerce is authorised to delegate its powers to a smaller body. *Bhuwalka Bros.* v. *Fatechand,* 87 C.L.J. 71 & A.I.R. 1952 Cal. 294.

266. Reference to an arbitrator.—Arbitration agreement in section 2 covers both what is ordinarily termed an arbitration clause and what is commonly called a reference. The former is a contract to refer, and the latter is delegation of authority to a named arbitrator and an agreement to be bound by the award. *James Finlay* v. *Gurdayal,* 76 Ind.Cas. 660=17 S.I.R. 93 ; *Dhanpalang* v. *Kishan Lal,* 35 Ind.Cas. 536=10 S.L.R. 1. A reference does not necessarily involve a formal reference to arbitration on stamped paper and the word "reference" as used in this section is used as relating to the appointment of arbitrators by virtue of the arbitration agreement which is the pivot of all reference to arbitration. Where there is a submission in terms of the Arbitration Act, and in pursuance of it either party appoints his arbitrator, the reference to arbitration is complete and it is not necessary to follow it up with a formal reference to arbitrators named. The acceptance of the office by an arbitrator need not be in writing and may be indicated either verbally or in writing or by conduct of the arbitrator, e.g., entering on the reference, and it is not essential for an arbitrator to formally notify his acceptance to the party nominating him as an arbitrator on his behalf so long he consents to act as such in pursuance of his appointment. *James Finlay* v. *Gurdyal,* 76 Ind.Cas. 660=17 S.L.R. 93 ; *Shamdas* v. *Khiman Mal,* 29 Ind.Cas. 602=8 S.L.R. 302.

267. Acceptance.—In *Ringland* v. *Lowndes* (1863) 33 L.J.P. 25, the quarter sessions appointed a person to act as umpire subject to his acceptance of appointment, and it was held that there being no acceptance, that was no acceptance.—*Russell* 11th Edn., p. 127. Acceptance of the office by the arbitrator appears to be necessary to perfect his appointment. *Russell* p. 379 ; 15th Edn., p. 184. In *James Finlay* v. *Guradayal,* 76 Ind.Cas. 660=17 S.L.R. 52, the court observed: "It was, however, argued that, the reference to arbitration cannot be deemed unless there is an acceptance by the arbitrator of the mandate conveyed to them by the parties, and reliance has been placed on the case of *Shamdas* v. *Khimanmal,* 29 Ind.Cas. 602=8 S.L.R. 302, where it was said that 'the appointment of a certain person as arbitrator is not complete until such person has accepted the reference and consented to it.' The Indian Arbitration Act contains no reference to an acceptance by the arbitrator of his appointment. He is certainly at liberty to accept or refuse but

if he accepts, I know of no law that requires the acceptance to be in writing.....In *Russell* on *Arbitration* at p. 92, it is said: 'Acceptance of the office by the arbitrator seems necessary to perfect his appointment' but it is not said that his acceptance should be in writing or should be communicated to the party appointing, and it appears to me that the acceptance may be indicated either verbally or in writing only the consent of the arbitrator."

268. Nomination without prejudice.—Nomination without prejudice is not a valid nomination. In presence of willing nominated arbitrators, appointment of a new arbitrator is a nullity. *Rambhai & Co.* v. *Yusuf Ali,* A.I.R. 1925 Sind. 12.

269. Person.—Person shall include any company or association or body of individuals whether incorporated or not. *General Clauses Act,* 1897, *Section* 3 (42).

"By 62 & 63 Vict. 63, S. 89, a person includes any body corporate or unincorporated, 'unless the contrary intention appears'. See also *R.* v. *Vardner,* Comp. 79; *R.* v. *York,* 6, A. & E. 419, *Pharmaceutical Sons* v. *London Supply Association* 5 App.Cas. 837; *Hisst.* v. *West Riding* (1901) 2 K.B. 560 (C.A.); A.I.R. (1923) Lah. 31. A firm is a person, 48 Mad. 792. A company is a person. 41 Mad. 624=45 Ind.Cas. 164. The expression 'person' includes a Municipality. 39 Bom.L.R. 835=A.I.R. 1937 Bom. 417=I.L.R. (1937) Bom. 782=171 Ind.Cas. 660. The definition of 'person' in this sub-section, is sufficiently wide to include a sanitation *panchayat.* A.I.R. 1935 Nag. 242=31 N.L.R. 108 Sup.=160 Ind.Cas. 301. The members of a joint Hindu family are a body of individuals who come under definition of 'person' as given in this sub-section. A joint Hindu family is therefore a single person and cannot form partnership by itself. A.I.R. 1936 All. 855=(1936) A.L.J. 1151=166 Ind.Cas. 276. An association may be appointed arbitrator. But where the intention is that the association as such would act as arbitrator, the Secretary of the Association cannot abrogate all the powers and functions of the whole body and make award. *Narsingadas* v. *Siva Ram,* A.I.R. 1929 Lah. 826.

270. Choice of arbitrators.—As a matter of vital importance at the outset of a reference is the choice of an arbitrator. Though, as we shall hereafter see, almost any one may be chosen as an arbitrator in ordinary cases. So if parties agree to trust their decision of their disputes to the experience of a child or the vagaries of an idiot, such decision when given, will be binding upon them. *Stiff* v. *Andrews,* 2 Mad. 6. Too great caution cannot be observed in selecting competent and disinterested persons; for if an incompetent and interested person be chosen, it will seldom happen that he will not through some misconduct, error of judgment, or open display of basis, render his award impeachable. *Redman* pp. 45. As lunatic and infants are not in a position to accept the office, they are not competent to be appointed arbitrator.

271. Appointed.—There appears to be some difference between appointment and nomination. Nomination without prejudice is not a valid nomination. In the presence of a willing nominated arbitrators, appointment of a new arbitrator is a nullity. It appears that a power of nomination is exhausted after the first exercise, while the powers of appointment can again be exercised where the appointed arbitrator is not willing to act. *Vide Rambhai* v. *Yusuf Ali,* A.I.R. 1925 Sind 12=76 Ind.Cas. 261.

272. Arbitrators to be appointed in accordance with the terms of agreement.—It was held nder the old Civil Procedure Code of 1882, that unless arbitrators were therein named (either personally or *ex-officio*) effect could not be given to such an agreement to refer *Fuzulbhoy Meharali* v. *The Bombay and Persian Steam Navigation*, 20 Bom. 232 ; *Nandlal* v. *Alexander Atkinson*, 95 P.L.R. 1905. But under the present Act as well as by Civil Procedure Code of 1908, arbitrator need not be named. *Vide* section 2(*a*) ; Para 17 of the Second Schedule to the Civil Procedure Code ; *Charles Louis Dreyfus* v. *Gurditta Mal*, 9 Ind.Cas. 655=35 P.R. 1911. So where one of the terms of the agreement was that "in case of any dispute whatsoever arising under this contract the same is to be referred to two European merchants residing in Karachi, each party having the right to nominate one arbitrator", the agreement was held not to be ambiguous. "It is true that no persons are specifically 'named' in the agreement as the persons to be appointed arbitrators, but it is absurd to say that of this reason the agreement is 'ambiguous'. *Id certum est quod certum reddi potest*, and it is quite possible for the parties to nominate certain European merchants residing at Karachi as their respective arbitrators". *Charles Louis Dreyfus* v. *Gurditta Mal (supra)*. Where the policy of insurance provided by a clause for reference to arbitration, but there was no reference to such clause of the policy in the reference, *held* the fact that the arbitration proceedings under the reference, before a tribunal other than that contemplated by the clause of the policy but in itself legal, was no ground for holding that the award was in anyway bad. *Himalayan Assurance* v. *Assudamal*, A.I.R. 1926 Sind 8=88 Ind.Cas. 878.

273. Condition of reference.—An agreement which purports to oust the jurisdiction of the court is on grounds of public policy illegal and void. *Horton* v. *Saver*, 4 H. & N. 643: *Lee* v. *Page*, 30 L.J.Ch. 857 ; *Doleman* v. *Assett*, (1912) 3 K.B. 257 (267)=81 L.J.K.B. 1092 : *C. Zarnikow* v. *Roth*, (1922) 2 K.B. 478. An agreement to refer a dispute to arbitration does not oust the jurisdiction of the court. *Bhownidas* v. *Panna Chand*, A.I.R. 1925 Cal. 901=52 Cal. 453=88 Ind.Cas. 929.

274. Who may be appointed arbitrator.—The parties may appoint whomsoever they please to arbitrate on their dispute. They may choose an arbitrator by lot or any other way. If they choose an incompetent or unfit person, that is their own affair. *Halsbury*, 2nd Edn., Vol. I, p. 644, citing *Re Shaw and Sind*, (1851) 17 L.T.O.S. 160.

275. Reference to a fluctuating body—Rules of Association binding.—A reference may apparently be made to a society consisting of a fluctuating body of members (*Ruthven* v. *Elgin*, L.R. 2 H.L.S.C. 535) or to a committee of a trades association [*Keighley, Maxstead & Co., In re*, (1893) 1 O.B. 405=62 L.J.Q.B. 105]. See also, *Ram Narain* v. *Liladhar*, 10 C.W.N. 814=33 Cal. 1273. When a reference is made to an association consisting of a large and fluctuating body of persons, who cannot sit as a tribunal, the association has power to appoint individuals to act as arbitrators, and *the rules of the association are binding on the parties*. *Ganges Manufacturing Co., Ltd.* v. *Indra Chand*, 33 Cal. 1169. In the above case *Harrigton J.* observed: "I agree with the argument of the defendants that, where a dispute is referred to the award or a body of persons, who can sit as a tribunal, then the arbitrators are not entitled to delegate their power to individuals. But in my opinion where a dispute is referred to an association consisting of a large and fluctuating

body of persons, who cannot sit as a tribunal, it must be taken that the parties intend that that body will carry out the arbitration in the only way in which it is possible to do so, *viz.*, by individuals selected for that purpose".* In *Chatram* v. *Bridhichand,* 30 Ind.Cas. 681=19 C.W.N. 820=21 C.L.J. 584, *Sri Lawrence Jenkins C.J.* said: "The petitioners' complaint is that the arbitrators refused to allow them to adduce evidence to establish their contentions and proceeded with the arbitration according to the Rules of the Tribunal of Arbitration established by the Bengal Chamber of Commerce, and not under the Indian Arbitration Act. The petitioners' contention is that the arbitration clause in the contract is merely an agreement to abide by the decision of the Chamber without accepting to be governed by the wide powers of that body as expressed in the rules.....The first question, therefore, which we have to consider is whether these rules were imported into the contract. Even without the assistance of any authority it appears to me that these were imported into the contract, and that without such importation the contract would be insensible so far as is related to arbitration. For it would involve the ridiculous position that every member of the Chamber of Commerce would have to sit on the arbitration. So that on the contract itself I should have felt no doubt. But apart from that there is a very careful judgement of *Mr. Justice Harrington* in *Ganges Manufacturing Co., Ltd.* v. *Indra Chand,* 33 Cal. 1139, delivered so far back as the 5th June, 1960, where the contract was in the same terms as that with which we are now concerned."

In *In re Keighley Maxtead & Co.,* (1893) 1 Q.B. 405, *Lord Esher, M.R.* said: "In the contract the parties had agreed, in case dispute should arise, to refer it to the arbitration of certain persons (who were, I suppose members of the corn trade) as arbitrators and under certain conditions; if no objection was taken by either party of the award, it was of course to be final; but if either party wished to take the matter to an umpire, as way of appeal, as the parties call it, then the umpire was to be the Appeal Committee of the London Corn Trade Association. The case accordingly went to arbitration, and one of the parties, being dissatisfied with the award, wished the case to go before the umpire. Now, the parties had not only agreed that the committee should be

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* In the case the well-known maxim *Delegata portestas non potest delegari* (2 Inst. 597, Arg. *Factor* v. *Beacon,* 5 Bing. N.C. 310); or, as it is otherwise expressed, *vicarius non vicadium*—one agent cannot lawfuly appoint another to perform the duties of his agency are not applicable. This rule applies wherever the authority involves a trust for discretion in the agent for the exercise of which he is selected. The person to whom any office or duty is delegated—for example an arbitrator—cannot lawfully delegate the duty on another, unless he is expressly authorised to do so *Brooms' Legal Maxim* p. 639 citing *Whetmore* v. *Smith,* 7 H. & N. 509; *Thornburn* v. *Barnes,* L.R. 2 C.P. 384 (404): *Little* v. *Newton* 2 Scott. N.R. 509: *Reg* v. *Jones,* 10 A. & E. 579; *Hughes* v. *Jones,* 113 & Ad. 388; *Wilson* v. *Thorpe,* 6 M. & W. 721. *White* v. *Sharpe* 12 M. & W. 712; *Ruther* v. *Chapman,* 6 M. & W. 1; see also *Russell* 15th Edn., p. 116. In *Neale v. Richardson,* (1938) 1 All. E.R. 753, such delegation was considered as represent to act. See also *Re Eastern Counties Rly. etc.* (1863) 3 Deg. I. & Son. 610. But ministerial work can be delegated. *Thorp* v. *Cop.* 2 C.M. & R. 367. But it is very difficult to distinguish ministerial works. *Stevenson* v. *Watson,* (1879) 4 C.P.D. 148. So in case of reference to a body of persons, the above-mentioned rule is not violated in view of the fact by such reference the rules of that association is imported in the reference as the parties agreed to be bound by these rules. 87 C.L.J. 71=A.I.R. 1952 Cal. 294.

umpire, but they had agreed that it should be according to the rules of the London Corn Trade Association, which were well-known." See also *Fazalally Jivaji Raja* v. *Khimji Poonji*, A.I.R. 1934 Bom. 476 ; *Rathven Parish* v. *Elgin Parish*, 2 H.L. 535 ; *Bombay Co. Ltd.* v. *National Jute*, 16 Ind.Cas. 153=39 Cal. 669 ; *Radha Kissen* v. *Lukhmi Chand*, 56 Ind. Cas. 541=31 C.L.J. 283=24 C.W.N. 454 ; *Chandanmull* v. *Donaid Campbell*, 23 C.W.N. 707 (footnote) ; *Heeralal Agarwalla* v. *Joakim Nahapiet*, A.I.R. 1927 Cal 647=31 C.W.N. 730=103 Ind.Cas. 648=55 Cal. 180 ; *Sasoon & Co.* v. *Ram Datt*, A.I.R. 1922 P.C. 374=50 Cal. 1= 49 I.A. 366 (P.C.) ; *Surajmull Askaran* v. *Chandmull*, A.I.R. 1927 Cal. 601=31 C.W.N. 686=103 Ind.Cas. 634 ; *Jubillee Chamber of Commerce Ltd.* v. *Lala Amrit Shah*, A.I.R. 1940 Lah. 180=42 P.L.R. 48 ; *Patel Bros.* v. *Shree Minakshi*, A.I.R. 1942 Bom 239=44 Bom.L.A. 485 ; *Abdul* v. *Mohamad*, 32 Ind.Cas. 426=43 A. 56 ; *Ramanath* v. *Nanju*, A.I.R. 1953 Cal. 787. Where a contract contains an arbitration clause that any dispute arising out of the contract "shall be referred to the arbitration of Bengal Chamber of Commerce under the Rules of its Tribunal of Arbitration for the time being in force" the "appointed arbitrator" is the Bengal Chamber of Commerce, though under the rules the Bengal Chamber of Commerce is authorised to delegate its powers to a smaller body. *Bhuwalker Brothers Ltd.* v. *Fatechand*, 87 C.L.J. 71=A.I.R. 1952 Cal. 294. In the above case the court observed: "Counsel refers to the well-known case of *Chailram Rambilas* v. *Bridhichand*, 42 Cal. 1140=A.I.R. 1916 Cal. 689, in which it has been held that where a contract contains an arbitration clause by which it is agreed that any dispute arising out of the contract shall be referred to the arbitration of the Bengal Chamber of Commerce, *the rules of the Association are imported into the contract and are binding on the parties.* For this proposition there was no necessity of citing a case. Because in this case the rules are not binding.

"The question is whether by the arbitration clause an arbitrator has or has not been named. Counsel for the respondent also refers me to Rule 9 and other rules of the Tribunal and draws my attention to the words 'appointed arbitrator' in the rules and asks me to hold that the appointed arbitrator is the court which the Registrar shall appoint.

'I am unable to take the view that the arbitration clause, does not name an arbitrator. In my view the 'appointed arbitrator' is the Bengal Chamber of Commerce, though under the rules the Bengal Chamber of Commerce is authorised to delegate its powers to a smaller body.

"It is well-known principle that an arbitrator cannot delegate his authority to somebody else without the consent of the parties concerned. If the rules were not expressly or by implication incorporated into the contract, the Bengal Chamber of Commerce would have no power to appoint a court by its Registrar to decide the dispute. But by incorporation of the rules into contract, the Bengal Chamber of Commerce has been authorised to appoint by its Registrar the court who actually will hear and decide the dispute.....

'A fluctuating body like the Bengal Chamber of Commerce with such a large number of members cannot be called upon to arbitrate a dispute. Things should be taken in a sensible way. The arbitrator appointed is the Bengal Chamber of Commerce. The reference is to that chamber ; the proceedings are to be held under the rules of the

Tribunal of Arbitration of that body. It has been admitted that the Bengal Chamber of Commerce is a registered body incorporated under the Indian Companies Act. It is, therefore, a definite *persona,* a legal entity to which reference can be made to decide disputes between parties. But the dispute is actually adjudicated upon by a court appointed under the rules of that tribunal." See also *Mohanlal* v. *Bisseswarlal,* 48 Bom. L.R. 686; *Bhuwalka Bros.* v. *Fatehchand,* 87 C.L.J. 71=A.I.R. 1952 Cal. 294.

276. Customs inconsistent with normal procedure in a case where the fluctuatory body is an arbitrator.—Where the appointed arbitrator is the London Corn. Trade Association and where according to the rules of that Association the normal rules of arbitration is not followed, that award is not bad for settlement of disputes by stages if it is not unreasonable or unlawful. *Brain Smith Ltd.* v. *Wheat Sheaf Mills* (1939) 2 K.B. 302=(1939) 2 All. E.R. 251. In the above case the facts were as follows. By a contract under the rules of the London Corn Trade Association the respondent agreed to purchase from the appellants a parcel of Chinese White peas. The contract contained a clause providing that "all disputes from time to time arising out of this contract shall be referred to arbitration." Upon tender the buyers complained that the peas were not according to contract, and the question whether they were entitled to reject the shipment was referred to arbitration. The award was in the buyers' favour. The buyers then put forward a claim for £187 10s. damages, the difference between the contract price of the peas and the price which they had to pay in the market to replace them. The seller took the point before the arbitrators that the first award was final and binding between the parties, as to all disputes arising under the contract and that the buyers were barred from putting forward any further claim. The arbitrators, being unable to agree, appointed an umpire, who decided against the seller's contention. On appeal by the sellers to the Appeal Committee of the London Corn Trade Association the award of the umpire was upheld, on the ground that there was a custom of the trade in respect of such contract that a buyer who claimed to reject goods when tendered was entitled in the first instance to arbitrate the question of his right to reject, and then, in another arbitration, to put, forward a claim for damages for breach of contract. The Committee stated their award in the form of a special case:—

Held that the award must be upheld because, even if there was only one cause of action, the parties to a contract under the rules of London Corn Trade Association must be taken to have agreed to carry out the arbitration of disputes according to the custom of the trade, which provided for the settlement of disputes in stages, and included the application of the rule of law that all relief to which a party might be entitled under one cause of action should be claimed in one proceeding; and that the custom which was not illegal and was obviously a very convenient one, was binding on the parties.

Held, further, that the first award was not equivalent to a judgment in an action for damages, but was merely a decision that the tender of the peas was not a fulfilment of the contract: that at the time of the first award the sellers were not in breach of this contract, because they might put themselves right by making another tender which was a proper one: and until there was a breach the buyers had no cause of action for damage. On these grounds, also, the award must be upheld.

277. Jurisdiction of arbitration to decide as to trade custom.—Where a contract for sale of goods provides that all disputes arising out of the contract shall be referred to arbitration, the arbitrators have jurisdiction to decide as to existence of a custom in the particular trade, the existence or non-existence of which is relevant to the trade meaning and effect of the contract. *Produce Brokers* v. *Ilympia Oil,* 85 L.J.K.B. 160=(1916) A.C. 314. In the above case *Lord Loreburn,* said. "In my opinion the appeal arbitral committee had jurisdiction finally to find as they did in regard to the custom of trade. I confess that I am no better able than was *Lord Justice Buckley* to understand the contrary principle laid down in *Hutcheson* v. *Eaton,* 13 Q.B.D. 861, and in *North Western Rubber Co. & Huttonbeach & Co., In re,* (1908) 2 K.B. 907=78 L.J.K.B. 51. When an arbitrator has power, as here, to decide all disputes arising out of a contract, including questions of law, surely he must decide what the contract is, and he cannot decide that without introducing the custom. These decisions seem to mean that he can decide on the existence of a custom only if he decides rightly. There is no magic in a custom that an issue as to its existence should be treated differently from any other issue of fact before an arbitral tribunal." *Lord Atkinson* said: "It would, I think, be quite impossible for any court of law, not to treat such a determination as one made with full authority, and final in itself. Now, is there any essential difference between such a case and a case where it is sought to construe the language of a contract in relation to, and through the medium of, a trade usage or custom ? In my opinion there is not. The language expressing a trade custom is taken to be imported into the language used by the contracting parties, whether written or oral, because it is presumed that they had the usage in their minds when they made their contract, made it in reference to that custom, and intended that the custom should form part of it. If they have used language in their contract inconsistent with the custom, that is one of the most effectual ways of negativing this presumption, excluding the custom, and declaring that their contract is unaffected by it." See also, *Meyer* v. *Dresser,* 16 C.B.N.S. 646 (660)= 33 L.J.C.P. 289 (294). *per Erle C.J. ; Metzner* v. *Bolton,* 23 L.J.Ex. 130= 9 Ex. 518 ; *Tucker* v. *Lingir,* 8 App.Cas. 508.

278. Appointment of foreign court as arbitrator.—A contract which provides that a dispute arising in relation thereto should be tried by a foreign court is considered a submission of any dispute arising between the parties to the arbitration of such foreign court. *Fazlally* v. *Khimji,* A.I.R. 1934 Bom. 476 (480)=36 Bom.L.R. 1005=155 Ind.Cas. 801 ; *Haji Abdulla* v. *Stamp,* A.I.R. 1924 Bom. 381=80 Ind.Cas. 523 ; *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance,* (1903) 1 K.B. 249=72 L.J.K.B. 211 ; *Law* v. *Garret,* 8 Ch. D. 26 (C.A.) ; *Kirchner & Co.* v. *Gruban,* (1909) 1 Ch. 413=78 L.J.Ch. 117. So an agreement to refer dispute to a foreign tribunal entitles a defendant in this country to stay proceedings in an action brought against him to enforce the agreement unless the plaintiff can make out a case for injunction. *Kirchner* v. *Gruban, supra.*

278. Judge in the cause as arbitrator.—The subject-matter of an action may be referred to a judge as arbitrator. The judge in such a case will, if such is the intention of the parties, be merely an arbitrator and have no special powers by virtue of the fact that he is a judge, and his award will not be subject to appeal. *Russell* 15th Edn., p. 99 ; see also *White* v. *Bucclench (Duke)* (1866) L.R. 1 H.L.S.C. 70 ; *Re Durham*

Country etc. (1871) L.R. 7 Ch. 45 : *Harrison* v. *Wright,* (1845) 13 M. &. W. 816 ; *Burgers* v. *Morton,* (1896) A.L. 136=65 L.J.Q.B. 321 ; *Baikunta* v. *Sitanath,* 38 Cal. 421 ; *In re Nimmogadda Peda,* 26 I.C. 355 ; *Parbati Kuer* v. *Vaikunta,* 44 Ind.Cas. 622 ; *Ladgard* v. *Butt.* 9 All. 191.

280. Number of arbitrators.—Parties may appoint a single arbitrator or two arbitrators and an umpire, or two or more arbitrators without any umpire. *Halsbury's Laws of England,* 2nd Edn., Vol. 11, p. 644 ; *Abdul Shakur* v. *Muhammad Yusuf,* 43 All. 456=19 A.L.J. 348=32 Ind.Cas. 426.

281. Agreement authorising one party to nominate arbitrator for other party.—Where an agreement has provided that if any party refuses or neglects to appoint an arbitrator within certain days after one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then upon such failure the party making the request may appoint another arbitrator to act on behalf of the party so failing to appoint and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment. The appointment of such arbitrator cannot be deemed to be inoperative or incomplete until other party received notice of it. *Louis Dreyfus & Co.* v. *Hemandas,* A.I.R. 1940 Sind 37. The period of days after which one party in accordance with the terms of the agreement may nominate an arbitrator on behalf of the other must be so many clear days commencing from the midnight after the receipt of the letter or notice requiring the other party to nominate his arbitrator. *Ibid.*

282. Arbitration—term of business providing that dispute should be referred to arbitration of certain number of directors.=Where one of the terms of business of a company was the clause for submission of disputes to the arbitration of certain number of directors, it was held that the fact that the arbitrators had to be chosen from the directors was perfectly legal. *Jubilee Chamber of Commerce Ltd.* v. *Lala Amrit Sha,* A.I.R. 1940 Lah. 180=42 P.L.R. 48.

283. Arbitrator or reference.—Where the counsel's statement makes it clear that a person is being appointed as a referee and that he is to make a statement in court, the fact that he was allowed to make the statement after taking the statments of the parties, could not have the legal effect of altering the character of the referee, for it cannot be said that a referee can never be authorized by the parties to examine the parties before making his statement in court. Such a person is not an arbitrator. *Rameswar Nath* v. *Ghulam Rasool Khan,* I.L.R. 1939. All. 50=180 Ind.Cas. 316=(1938) A.L.J. 1132=A.I.R. 1939 All. 92. But an agreement to be bound by the finding of a third person is an agreement to refer. *Mahomed Mia* v. *Osman,* 60 C.L.J. 173.

284. Whether technical experts are arbitrators.—A mere agreement between two persons to be concluded by the decision of a third does not by itself constitute such third person an arrbitrator. To give him that character it should be intended that such person should determine dispute in a *quasi*-judicial manner. So where technical expert is authorised to settle dispute merely by use of his skill and judgment, he is not an arbitrator. *Des Ram* v. *Secretary of State,* 165 Ind.Cas. 598=A.I.R. 1936 Sind. 201.

285. Clause in contract—officer referring to arbitration.—Where an agreement between the military and a contractor for the supply of

fodder provided that, any dispute or difference arising out of this contract shall be referred to the arbitration of the officer sanctioning the contract, a reference made by the Assistant Director of Grass Farms is competent, an officer of the department is competent, in the absence of any indication in the contract that the reference should be made by a particular officer. Further the rules framed by the Government regarding the conduct of Government litigation have no bearing on the question of reference to arbitration. The reference has to be made not to the person who sanctioned the contract but to the officer who may be holding the appointment of the sanctioning authority at the time of the dispute. So reference to the officer who became the successor to a different officer as the sanctioning authority on a re-organisation of the department is valid. *Kedar Nath* v. *Secretary of State,* 171 Ind.Cas. 361. The clause in military contract providing that difference between parties should be referred to sole arbitration of officer to be nominated by Chief Engineer, Central Command Construction gives the power to the Chief Engineer, Central Command to nominate himself inasmuch as the words in the clause "any officer nominated" was sufficiently comprehensive to include the Chief Engineer himself. *Chajjumal & Sons.* v. *Dominion of India* 1959 M.P.L.J. (Notes) 209.

286. Who can be appointed an arbitrator.—An arbitrator is a tribunal chosen by the consent of parties. *Mahomed Ibrahim* v. *Ahmed Said Khan,* 6 Ind.Cas. 219 (223). An arbitrator is a person selected by mutual consent of the parties to determine the matters in controversy between them, whether they be matters of law or fact, *Russell,* p. 92. Neither natural nor legal disabilities hinder a person from being an arbitrator. (*Vin Ab.,* A 2), for every person is at liberty to choose whom he likes best for his judge, and he cannot afterwards object to the manifest deficiencies of those whom he has himself selected. *Bac. Ab.Arb. O.*, *Hunting* v. *Ralling,* 8 Dowl. 879 ; *Russell,* p. 92. "It is the most fundamental principle of justice that a judge or a tribunal should not decide a dispute if there is a probability that he would be biased in the case" *Bhuwalka Bros.* v. *Fatechand,* A.I.R. 1952 Cal. 294 (305) ; see also *Eckersley* in *Mersey Docks,* (1894) 2 *Q.B.* 667 (670).

287. Personal misconduct or interest.—If an arbitrator becomes unfit for his office, by reason of personal misconduct, or has a personal misconduct, or has a personal interest in the subject-matter of the award, unknown to one of the parties, so that it is not probable that he will faithfully and honestly discharge his duty, he is not a proper person to act as arbitrator. *Russell,* p. 93, citing *Beddow* v. *Beddow,* 9 Ch. 89=47 L.J.Ch. 588 ; *Parker* v. *Burroughs Colle's* Part. Cas. 257 ; *Earl* v. *Stocker,* 2 Vern. 251 ; *Seller* v. *Highland Ry.,* 56 Sc.L.R. 216 (H.L.) ; but see *Rangers* v. *Great Western Railway,* 5 H.L.Cas. 72. An award made by a man convicted of perjury was held void. *Parker* v. *Burroughs* (*supra*) ; *Earl* v. *Stocker* (*supra*) *. A dispute having arisen as to the result of a horse race, the stewards (who by the rules were to be the arbitrators of all disputes) decided against a horse against which one of them had made a bet: *Held* that the decision of the stewards was not invalid on the ground of one of them being interested arbitrator. *Ellis* v. *Hooper,* 3 H. & N. 766. A surveyor to and shareholder in a railway company, closely connected in interest with and holding many shares in another railway company, upon an arbitration between the latter company and a landowner, under the Land Clauses Consolidating Act, 1845, was appointed

umpire by the arbitrators, and as umpire made his award. The landowner first discovered that the umpire was such surveyor and shareholder after the date of the award, and obtained an order *nisi* to set aside the award on that ground. In declining to set aside the award, *Vice-Chancellor Knight Bruce* observed: "With regard to Mr. Marmat, I am not clear that he ought to have been appointed an umpire, in point of delicacy, considering that he was not only surveyor to the Great Western Company, which is intimately connected with the South Devan Company, but that he held shares in the former company. I should, however, be going too far to set aside the award on this ground. There are somethings in this case, which it would have been better had they been otherwise; but I think that there are no judicial grounds on which to set aside the awards." *Elliot and South Devon Ry., In re,* 2 De G. & Sm. 17=12 Jur. 445. See also, *Hawley and North Staffordshire Ry., In re,* 2, De G. & Sm. 33=12 Jur. 389.

288. Disqualification by probable bias.—If there is an engagement entered into between the arbitrator and one of the parties, unknown to the other party, which gives the arbitrator a direct pecuniary interest in deciding against the party who was ignorant of the engagement, the court will not enforce a submission to arbitration. *Kimbersley* v. *Dick,* L.R. 13 Eq. 1; *Kemp* v. *Rose,* 1 Giff. 258; *Russell,* p. 93. But the mere fact of an arbitrator being indebted to one of the parties, is not of itself sufficient to set aside an award, though the other party was ignorant of the circumstances, and, as soon as he knew of it, objected to the arbitrator's proceeding. *Morgan* v. *Morgan,* 1 Dowl. 611=2 L.J.N.S.Ex. 56; but see *Malmesbury Ry. Co.* v. *Budd,* 2 Ch.D. 113; *Beddow* v. *Beddow,* 9 Ch.D. 89; *Mahomed* v. *Hakiman,* 29 Cal. 278=6 C.W.N. 235; *Jagrup* v. *Kushi,* A.I.R. 1934 All. 658.

The existence of any circumstance calculated to bias the mind of an arbitrator, unknown to either of the parties who have submitted to his decision, is a sufficient ground for interference of a court of equity. *Kemp* v. *Rose,* 1 Giff. 258. Therefore where a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a specified amount, although he refused to guarantee that amount, the court did not consider the decision of the architect made under such a bias as binding, but gave directions so as to ascertain, under the authority of the court, how much remained justly due to the builder. *Kemp* v. *Rose,* 1 *Giff.* 258. But an arbitrator does not necessarily misconduct himself by expressing an opinion on the subject-matter of a reference before formally entering upon it, even though such expression is made in writing, and is identical in terms with the award finally made. *Hutchison* v. *Hayword,* 15 L.T. 291.

289. Counsel habitually employed or retained pleader.—In cases of arbitration, where a person is appointed by two parties to exercise judicial duties, there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appoinment, and every disclosure, which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. When the arbitrator is the retained pleader of the plaintiff,

and where there is no disclosure of that fact before the appointment of the arbitrator, to the defendant who goes to arbitration consequently in ignorance of the fact, the award is not valid and binding on the defendant. *Kali Prosanno* v. *Rajani Kant,* 25 Cal. 141 ; but see *Bright* v. *River Plate Construction Co.,* (1900) 2 Ch. 835, where a contract provided that all disputes arising thereout should be decided by a certain barrister. Dispute arose in which one party alleged misconduct, affecting fulfilment of their contract, on the part of the representative of a firm of solicitors. An action was brought to stay arbitration before the barrister on the ground that he had intimate professional relations with the solicitors. The question arose in the case whether an arbitrator named in a reference is not disqualified merely because circumstances may exist or arise such as to cause a suspicion or bias. In answering the question in the negative *Cozens-Hardy J.* said : "Now as a matter of strict law, I do not think I could accede to this application. I must adopt the principle laid down by the Court of Appeal in the two cases *Jackson* v. *Barry Ry. Co.,* (1893) 1 Ch. 238, and *Eckersley* v. *Mersey Docks and Harbour Board,* (1894) 2 O.B. 667, which of course, are binding on me. Those cases clearly distinguish between an arbitrator appointed by name and another person fulfilling a judicial function. In *Eckersley* v. *Mersey Docks and Harbour Board (supra),* the engineer of the harbour board had been nominated in a contract between the board and a contract as the arbitrator in case of dispute as to the work contracted for. A dispute arose as to work superintended by the engineer's son, and the contractor alleged incompetency on the part of the engineer's son. It was held by the Court of Appeal unanimously that engineer was not an improper person to act as arbitrator. No one in that case would have contemplated when the contract was made that there would be any difference between the contractor and the engineer's son. At the same time, no one would have thought the possibility of such a dispute a reason for not naming the engineer in accordance with the custom. It was laid down that in case of a named arbitrator all those considerations which affect the qualification of a person who may be suspected, though unreasonably, of bias in a judicial position must be laid aside, unless it can be shown that the arbitrator has prejudged the case or has actual bias."

290. Known interest whether disqualifies.—"The objection as to interest only applies to the case of a concealed interest. For if the arbitrator have an interest in the subject of reference well-known to the parties before they sign the submission, as if they refer to an owner of lands a question respecting the mode and expense of making a drain which will benefit the arbitrator's own estate, the award is good notwithstanding his own interest". *Russell,* p. 93, citing *Johnston* v. *Cheape,* 5 Dow. 247 ; *Drew* v. *Drew,* 2 Macq. 1. See also, *Jackson* v. *Barry Raailway,* (1893) 1 Ch. 238 (246) ; *Ives & Barker* v. *Williams,* (1894) 2 Ch. 478 : *Clout and Metropolitan Ry., In re,* 46 L.T., 141 ; *Ranger* v. *G. W. Railway Co.,* 5 H.L.C. 72 : *In re Haig & London,* (1896) 1 Q.B. 649. An arbitration clause referring disputes to the engineer of one party cannot be disregarded on the ground that the engineer is in substance a judge in his case unless there is sufficient reason to suspect that he will act unfairly. *Ives & Barker* v. *Williams,* (1894) 2 Ch. 478. In the above case *Lindley L.J.* in delivering his judgment said: "It is obvious that the sub-contractors must prove great deal more than that the engineers have formed an opinion already upon the subject of the dispute. They must attack the character of the engineers to such an extent, and in such a manner, as to show that the engineers will probably be guilty of some misconduct in

the matter of arbitration, that they will not act fairly. That is really what the evidence must establish. Having chosen to put themselves in that position, the sub-contractors cannot complain of the legitimate consequence of their bargain; *but they could complain of the illegitimate consequence, and if it were true that these engineers were in collusion with the contractor so as to act unfairly* or so as to lead the court to suppose that they would act unfairly, there would be some ground for saying that this arbitration clause ought not to be enforced." *Lopes L.J.* said. "It must be borne in mind that they are not arbitrators in the ordinary sense of the word. They are arbitrators chosen and selected by the parties, selected with the knowledge that to some extent they must have an interest in the direction of their employers. It is well-known they must have it, and I think the words of *Lord Justice Brown* in the case of *Jackson* v. *Railway Co.*, (1893) 1 Ch. 238 (246), at the commencement of his judgment, are highly instructive as to what the position of engineers or arbitrators is in a case like the present. He says: "It is an essential feature in the contract between the plaintiff and the railway company that a dispute such as that which has arisen between the plaintiff and the company's engineer should be finally decided not by a stranger or a wholly unbiased person but by the company's engineer himself. Technically, the controversy is one between the plaintiff and the railway company; but virtually the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel. Employers find it necessary in their own interests, it seems, to impose such terms on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however erroneous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference, the engineer cannot be expected nor was it intended, that he should come with a mind free from human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew will that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence.'" See also, *Crowford* v. *Northern Light House,* (1925) S.C. (H.L.) 22.

But this rule is not applicable where the arbitrator has been improperly influenced by the party under whom he is employed. *Hickman & Co.* v. *Roberts,* 82 L.J.K.B. 678=(1913) A.C. 229. In the above case. under a building contract the decision of the architect of the building owners relating to any matter or thing: or the goodness or sufficiency of any work, or the extent or value of any extra or omitted work, was to be final, conclusive, and binding on all parties; and payments as the work proceeded were to be made on the certificate of the architect. The architect having taken a wrong view of his position and being improperly influenced by the building owners, delayed issuing certificate for the outstanding balance due to the contrtctor. After the work had been completed and after the period of maintenance had expired, the contractor

brought an action against the building owners to recover the balance due to him. After the commencement of the action the architect issued his final certificate. In holding that the building owners cannot, as a defence to the action, rely on the issue of a certificate as a condition precedent to that right of the contractor to commence proceedings for the recovery of the balance. *Lord Loreburn* L.C. said : "I think the appellants cannot rely upon this certificate, either as a condition precedent or as an adjudication binding on the other party. The architect, Hobden, did, I think, place himself in a position which deprived his certificate of the value which otherwise it would have had *Lord Justice Fletchex Moulton* after referring to what he had done, says : "He is no longer fit to be a judge, because he had been acting in the interest of one of the parties and by their direction. That taints the whole of his acts and makes them invalid, whatever subsequent matter his decision is directed to. I agree with that, but it is not, in my opinion, a case to which the terms 'turpitude' or 'fraud' are apt I think the real error of the architect was that he mistook his position ; that he meant to act as a mediator ; that he had not the firmness to recognise that his true position was that of an arbitrator, and repel unworthy communications made to him by the appellants." *Lord Asbourne* said "I am of opinion that architect here did not preserve that attitude of judicial independence which was needed and required of him in the discharge of his responsible and possibly difficult duties ; . . . . .I think that he had not present to his mind, and did not act upon that need for judicial independence that is requisite for any one in his position and I entirely agree with the conclusion upon this subject expressed in the judgment in the Court of Appeal."

291. Subsequent acquisition of interest in the subject-matter of arbitratoin.—Subsequent acquisition of interest in the subject-matter of the reference disqualifies an arbitrator from continuing with his work. *Blanchard* v. *Sun Fire Office* ; 6 T.L.R. 365 ; *Parker* v. *Burroughs*, Colles 257 ; *Nuttal* v. *Manchester* Cor. (1892) 8 T.L.R. 513 ; *Edinburg Magistrate* v. *Lownie*, (1903) 5 F. 71.

292. General rule as regards appointment of arbitrator.—In *Madho Mal Kishore* v. *Firm Gurdial Radha Kishen*, 63 Ind.Cas. 1007. *Sir Sadilal C.J.* observed : "It is a well-established rule of law that there should be the greatest good faith on the part of all the parties concerned in relation to the selection and appointment of the arbitrator, and every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to the particular individual should or should not be made. *Kali Prosanno Ghose* v. *Rajani Kanta Chatterjee*, 25 Cal. 141." See also, *per Rupchand Bilaram A.J.C.* in *Firm of Motharam Dowlatram* v. *Firm of Mayadas Dowlatram*, A.I.R. 1925 Sind 150. In *Kemp* v. *Rose*, 1 Giff. 258=4 Jur. N.S. 919=32 L.T.O.S. 51=114 R.R. 429 at page 435, *Stuart V.C.* observed: "A perfectly even and unbiased mind is essential to the validity of every judicial proceeding. Therefore, where it turns out that, unknown to one or both of the persons who submit to be bound by the decision of another, there was some circumstance in the situation of him to whom the decision was entrusted which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of this court. Whether in fact the circumstance had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence, and may remain unknown to every human being, perhaps even

unknown to himself. It is enough that such a circumstance did exist. The House of Lords had occasion to consider this doctrine in the case of *Dimes* v. *The Grand Junction Canal,* 3 H.L.C. 759=88 R.R. 330."

In the last-named case a public company, which was incorporated, filed a bill in equity against a landowner, in a matter largely involving the interest of the company. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, a fact which was unknown to the defendant in the suit. The cause was heard before the Vice-Chancellor, who granted the relief sought by the company. The *Lord Chancellor Lord Cottenham* on appeal affirmed the order of the Vice-Chancellor. Now the question is raised whether the fact that the Lord Chancellor was the holder of shares in the plaintiff company rendered him incompetent to hear and decide the suit and his incompetency affected the Vice-Chancellor, who was his deputy. *Baron Parke* in delivering the unanimous opinion of the judges observed: "We think that the order of the Chancellor is not void; but we are of opinion, that as he had such an interest which would have disqualified a witness under the old law, he was disqualified as a Judge; that it was a voidable order, and might be questioned and set aside by appeal or some application to the Court of Chancery, if a prohibition would not lie." *Lord Chancellor Lord St. Leonards* observed: "In reference to the question upon which Her Majesty's Judges, a few days since, gave their opinion, at the desire of this House, the effect of that opinion, in which I for one entirely concur, is that having regard to the interest which the late Lord Chancellor had in the Grand Junction Canal Company, his decision must be deemed to be voidable, and that an appeal to this House must be considered, as proceeding in a court of equity, the proper step to be taken to aviod such a decree.....Upon the other question, upon which I never entertained any doubt, namely, whether the decree and orders of the Vice-Chancellor could be affected by the circumstance that the Lord Chancellor who affirmed them had an interest in the subject-matter of the suit, the learned Judges have given the House a very clear opinion, and in that opinion I entirely concur; it is that which I always entertained. It is impossible to represent, upon the suitable authority given to the Vice-Chancellor, that he is in the situation of a mere deputy, so as to fall within the cases referred to, or to say that therefore any order or decree made by him would be void or voidable, in case the Lord Chancellor himself had an interest in the matter of the suit. There is no warrant for such an opinion in the words of the statute....."

In *Co-operative Hindustan Bank* v. *Bholanath,* 31 Ind.Cas. 597=19 C.W.N. 165, *Mr. Justice Chitty* observed: "Now it is clear that if an arbitrator, unknown to one of the parties, has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator, as the fact of his having such an interest might influence his decision. But in this case, as his interest was so small and was apparently unknown even to himself, it is impossible to say that it could have influenced his award in any way."

293. Relationship.—The known relationship of the arbitrator to one of the parties does not make the award invalid. *Bykunt* v. *Preonath,* 22 W.R. In delivering the judgment of the court *Jackson J.* said: "No misconduct or corruption is imputed to the arbitrators. The utmost that the Moonsiff says is that the award smacks of partiality, and the partiality is surmised from the fact that one of the arbitrators was a relation of the defendant. That was not a circumstance unknown at the

time when the reference was made. Both parties knew whom they selected as arbitrators, and took them with their relationships and probable bias. If the courts referring matters to arbitration were at liberty to take up the award and consider the grounds on which it is based, there would be an end to the finality of arbitration award which the law intended." But undisclosed relationship of an arbitrator to one of the parties will affect the validity of an award. *Trustees of the Firm of Motharam Dowlatram* v. *Firm of Mayadas Dowlatram,* 78 Ind.Cas. 521=A.I.R. 1925 Sind 150. In the above case *Rupchand Bilaram* A.J.C. said: "I am of opinion that it was incumbent on respondent No. 1 and the arbitrator to disclose the existence of such close relationship between them to respondent No. 2.....In *Kali Prosanno Ghose* v. *Rajani Kanto Chatterjee,* (1899) 25 Cal. 141 (144), failure to disclose the fact that the arbitrator was the retained pleader of the plaintiffs was held to invalidate the award. In *Mahomed Wahiduddin* v. *Hakiman,* 29 Cal. 278=6 C.W.N. 235, failure to disclose the indebtedness of the arbitrator to the party in whose favour the award was passed was held to invalidate the award. In *Turnbull* v. *Piperton,* (1915) 8 W.R. 82 (Canada) (referred to in Vol. II of the British Empire Digest, page 549), the court held that the fact that the arbitrator was a brother of one of the parties to the proceeding affords a real likelihood of an operative prejudice on the part of the arbitrator.

"Whatever may be the effect of such relationship among other people, so far as the Hindus in Sindh are concerned, the fact that the arbitrator is related to one of the parties as his first paternal cousin does afford a real likelihood of an operative prejudice on his part and the existence of such relationship with one of the parties unknown to the other disqualifies him from acting as an arbitrator. It is not necessory for respondent No. 2 to prove actual bias or partiality on the part of the arbitrator or to prove that the existence of this relationship had any operation on his mind, which is for the most part incapable of evidence and may remain unknown to every human being, perhaps even unknown to himself; *per Stuart, V.C.,* in *Kemp* v. *Rose,* 114 R.R. 429 (435)=1 Giff, 258=4 JurN.S. 919=32 L.T.O.S. 31. The rulings in *Bykunt Nath Mookerjee* v. *Prionath Ghose,* 22 W.R. 447, where the party objecting to the award knew of the arbitrators' relationship, or the rullings referring to the contracts for works or for supply of goods where the engineer of the employer is named as an arbitrator in the submission clause contained in the contract and agreed to as a person not indifferent to the subject-matter of the dispute as in the case of the *Secretary of State for India* v. *Arathoon,* 5 Mad. 173, or *Jackson* v. *Barry Railway Co.,* (1893) 1 Ch. 238=68 L.T. 472, have no bearing on the present case. *A party who agrees with open eyes to abide by the decision of a person who, he knows, is not an indifferent person, cannot subsequently object to the award, unless he proves as a fact a good deal more than the existence of this relationship such as actual partiality.*" See also, *Ghulam Mahomed* v. *Gopal Das,* A.I.R. 1933 Sind 68=143 Ind.Cas. 635.

294. Necessary witness as arbitrator.—A necessary witness in a case is disqualified from acting as an arbitrator. *Hogg* v. *Belfast Cor,* 53 I.L.T. 62=(1919) 2 I.R. 305 (Div. Ct. Ireland). But an award given by arbitrators some of whom gave evidence in the arbitration proceedings can be upheld, if the parties agreed, while entering into the contract to refer to arbitration, that the arbitrators should also be witness. *Brojendra Kumar* v. *Purna Chandra,* A.I.R. 1931 Cal. 53=34 C.W.N.

689=129 Ind.Cas. 428=58 Cal. 569. In the above case *Mitter J.* observed: "It appears from the affidavit in answer of the opposite party that two of the arbitrators who had personal knowledge about the matter in dispute stated what they knew to the other arbitrators in the presence of both the parties. In these circumstances it is difficult to say that the parties did not contemplate that the arbitrators would be examined as witness." In *Machan* v. *The Workers' Union,* (1929) 1 Ch. 602 (624), the court observed: "Moreover, it is well-settled by the decisions of the Court of Appeal, that if the parties to a contract agree that a person who may well be suspected of a bias or who may be deciding in his own cause will not interfere: *Jackson* v. *Barry Ry. Co.,* (1893) 1 Ch. 238=68 L.T. 472: *Eckersley* v. *Mersey Docks and Harbour Board,* (1894) 2 Q.B. 677. The position is one as *Davey L.J.* remarked in the latter case at page 673, which *prima facie* raises some surprise in a judicial mind; but he adds 'that is contract of parties."

Authority of apointed arbitrator or umpire irrevocable except by leave of Court.

5. *The authority of an appointed arbitrator* or *umpire shall not be revocable* except *with* the leave of the Court, unless a *contrary* intention is expressed *in the arbitration agreement.*

295. N.B.—This section corresponds to section 5 of the Indian Arbitration Act of 1899. Section I of the English Arbitration Act of 1889 (Stat. 52 & 53 Vict., c. 49) and Section I of the English Arbitration Act, 1950 given in the Appendix.

296. At common law submission revocable until award was made.—The authority of an arbitrator is, common law, in its nature, revocable, and no act of the party submitting can render it irrecoverable; but if the party is bound under a penalty to abide by the arbitration, the bond is forfeited by his countermanding the authority. *Vynior's case,* (1610) 8 Co. Rep. 80(*a*). Generally speaking, the submission may be revoked at any time before an award is made. *Per Dallas C.J.* in *Clapham* v. *Higham,* 1 Bing. 89. The Stat. 9 & 10 Will. III, c. 15, made no difference in this respect. *Milne* v. *Gratrix,* 7 East 611. Submission may be equally revoked, whether it be by deed, or other writing, or by a Judge's order or order of *nisi prius. Clapham* v. *Higham,* 1 Bing. 89; *Milne v. Gratix,* 7 East 608; *Newgate* v. *Degelder,* 2 Keb. 10; *Warburton* v. *Storr,* 4 B. & C. 103=3 L.J. (O.S.) K.B. 156; *Aston* v. *George,* 2 B. & A. 395; *Grem* v. *Pole,* 6 Bing. 443=8 L.J. (O.S.) C.P. 149. It seems that where the submission is by deed, the revocation ought to be by deed also according to the rule.—*unumquodque eo dissolve ligamine quo ligatum est vid. Rex.* v. *Wait,* 1 Bing. 121; contra: *Parker* v. *Lus,* 2 Keb. 64. It is revocable even when it is "made irrevocable by the express words of the submission, for nothing under a legislative power could make irrevocable which was in its nature revocable, for the arbitrator being constituted and put in the place of the parties by their consent to act for them, could no longer act than he had such consent, and an award made subsequent to revocation is a nullity. *Bac. Ab. Arb. B.*" *Russell,* p. 122. The power to revoke at common law remained even where the submission had been made a rule of court (*Rouse & Co. and Meter, in re,* L.R. 6 C.P. 212=40 L.J.C.P. 145) because an arbitrator was in contemplation of law merely an agent appointed by the parties to decide the matter in dispute between them, and his authority is therefore revocable by either

of his principals. *Vynior's case,* 8 C.Rep. 80 (a) ; *Hide* v. *Petil,* 1 Cas. In Ch. 185 ; *Mills* v. *Bayley,* (1863) 2 H. & C. 36 ; *Thompson* v. *Anderson* (1870) L.R. 9 Eq. 523 ; *Re Rouse & Co., and Mier & Co.,* (1871) L.R. 6 CP. 212 (217) ; *Re Mitchell and Izord and Governor of Ceylon,* (1882) 21 Q.B.D. 408 ; *Doleman & Sons* v. *Ossett Corporation,* (1912) 3 K.B. 257 *Clapham* v. *Higham,* (1822) 1 Bing. 89 ; *Halsbury,* 2nd Edn., Vol. 1 p. 634.

But a party cannot revoke his bond or deed of submission (*Milne* v. *Gratix,* 7 East 611) but will be liable to be sued upon it. And if after the submission (whether such submission is by a Judge's order, order of *nisi prius* or agreement within State 9 & 10 Will. III, C. 15) is made a rule of court, either party revokes the submission, such party so revoking will be guilty of and liable to an attachment for a contempt, *Milne* v. *Gratix, 7 East* 611 ; *Clapham* v. *Higham,* 1 Bing. 89 ; *Haggett* v. *Welsh,* 1 Sim. 134 ; *Green* v. *Pole,* 6 Bing. 443.

297. Changes made by Statute 3 & 4 Will. IV, c. 43.—By section 39, State. 3 & 4 Will. IV, c. 43, passed in 1833, it was enacted that the power of the arbitrator appointed in pursuance of a rule of court made in an action, or in pursuance of a submission containing an agreement that the submission should be made a rule of court is not revocable by any party, without the leave of the court. By the same section power was also conferred on the court to enlarge the time for making an award. *Vide Mitchell* v. *Governor of Ceylon,* 21 Q.B.D. 408=57 L.J.Q.B. 524 Section 17 of the C.L.P. Act, 1854, (Stat. 17 & 18 Vict., c. 125), enacts, that every submission might be made a rule of court, unless the agreement expressed a contrary intention. But notwithstanding these enactments, it remained the law that where there was no agreement that the submission should be made a rule of court, and where no action was pending, the authority (although the submission has been made a rule of court) is revocable. *In re Rouse & Meir,* L.R. 6 C.P. 212=40 L.J.C.P. 145 ; *Randell* v. *Thomson,* 1 Q.B.D. 748=45 L.J.Q.B. 713. But where, however, by a contract containing an arbitration clause it was agreed that the provisions of the C.L.P. Act of 1854, with regard to arbitration should apply to the arbitration thereby agreed to, it was held that the contract by incorporating section 17 of the C.L.P. Act, 1854, impliedly provided for the submission being made a rule of court ; and that consequently the authority of an arbitrator who had been appointed under the submission could not be revoked. *In re Mitchell & Izord,* (C.A. 1888) 21 Q.B.D. 408=57 L.J.Q.B. 524 ; *Campbell's Ruling Cases,* Vol. III, p. 363. By section 1 of the Arbitration Act of 1889 (52 & 53 Vict., c. 49), effort was made to remove their defects.

298. Section 1 of the English Arbitration Act of 1889—criticism of.—The Arbitration Act, 1889 (52 & 53 Vict., c. 49), repealed the clauses of the former Acts mentioned above. Section 1 of that Act enacts : "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of the Court." This section has been much criticised by *Bowen L.J.* in *Re Smith & Nelson.* 25 Q.B.D. 544=59 L.J.Q.B. 533 (536). There His Lordship observed : "We have to construe section 1 of the Arbitration Act of 1889. The word 'submission' is a word used with some inexactitude, both in cases and in the text-books. An agreement to refer to arbitration was always irrevocable by one of the parties, but there may be an agreement to clothe a particular arbitrator with authority, which authority could be revoked, and then the agreement in that sense became useless. The distinction between the two

cases, which must be borne in mind, is pointed out by *Lord Justice Mellish* in *Randell* v. *Thompson,* 1 Q.B.D. 748=45 L.J.Q.B. 713. The difficulty here is that the definition of 'submission given in section 27 of the Act of 1889, includes cases in which the arbitrator is not named. The Statute 3 & 4 Will. IV, c. 42, section 39, recognised the distinction, and enacted that the power and authority of an arbitrator was not to be revocable by any party to the reference when it had been made a rule of court ; but the mandate given to the arbitrator was revocable. The difficulty here arises with regard to the words of section 1 of the Act of 1889, that the submission is to have the same effect as if it had been an order of the court. It was said that the agreement here is a general agreement to refer, and is to have the same effect in all respects as if it had been made an order of the court ; but the mere fact of making a submission a rule of court did not give the court power to compel a party to appoint an arbitrator when the arbitrator was not named in the submission.

"The Act of Will IV, therefore, would not have applied to such an agreement as this. The power of the court to attach a party for not appointing an arbitrator is explained in the judgment of *Mr. Justice Willes in. In re Rouse & Meir,* L.R. 6 C.P. 212=40 L.J.C.P. 145, from which it does seem that a party might be attached if he revoked the authority of the arbitrator after he had been appointed, and after the submission had been made a rule of court. I find no authority, however, where a party has been attached for not appointing an arbitrator in accordance with the agreement to refer ; ond if the practice was not to make the submission a rule of court until after the arbitrator has been appointed, then no such authority would be found. I am not sure whether the submission in the case of *In re Rouse & Meier* was made a rule of court before the arbitrator was appointed, but the object of making it a rule of court was to give the court power to enforce the award. There is certainly no case in which specific performance of an agreement like this has been granted, nor have I ever heard of an attachment at common law against a party for not appointing an arbitrator in accordance with an agreement to refer."

The result appears to be that, when once an arbitrator is duly appointed, his authority is irrevocable ; but there is not power to compel an unwilling party to proceed with a reference except in cases specially provided for formerly by C.I.P. Act, 1854, and now by the 5th and 6th sections of the Arbitration Act, 1889. The submission or agreement to refer is itself, as it always has been, irrevocable, but where an arbitrator has not been appointed, and in a case to which 5th and 6th sections of the Act of 1889, do not apply, there are no means by which one of the parties can compel the other, if unwilling, to proceed with reference. *Campbell's Ruling Cases,* Vol. III, p. 367.

299. Indian law before the passing of Act IX of 1899.—An award made by private submission may be valid and binding, though no proceedings under section 327 of Act VII of 1859, have been taken to enforce it. *Surubjut Narain* v. *Gouree Prosad,* 7 W.R. 269. In that case *Normal J.* observed : "If it is found that the plaintiff revoked the submission before award was made, it will be necessary to see whether there is anything in the submission to take the case out of the almost universal rule that such a submission to arbitration is revokable." So from this case it is clear that the Indian courts even before the passing of the Arbitration Act of 1899, held, that an award made by private submission was valid and binding apart from section 327 of Act VIII of 1859, and that it was a universal rule that a submission to arbitration was revocable

before award. *Norman J.* laid down the above rules following the English Common Law rule as stated in *Goscoyne* v. *Edwards,* 1 Y. & J. 19, and *Tomlinson* v. *Arriskin,* 1 Comy's Rep. 328. In *Aka Aiyappa* v. *Nandula Peraiya,* 3 M.H.C.R. 82, *Holloway J.* olso observed : "In this case the Principal Sader Amin found that there had been a withdrawal by the plaintiff from arbitration previously to the award. It is clear, therefore, on the English cases that no valid award could have been made, because there was no longer that concurrence of will which would set up a tribunal not constituted by law. As to the Code of Civil Procedure (1859), it is provided by section 326 that any submission to arbitration may be made a rule of court, and then the submission is not countermandable. But the necessity of this provision is strong evidence of what the law was before, and therefore still is where the provision has not been acted upon." See also, *Jeokaran Lal* v. *Muthura Pershad,* 1 N.W.P.H.C.R. 252 ; *C. Koegler* v. *The Coringa Oil Co. Ltd.,* 1 Cal. 42 ;*Chhaya Mal* v. *Kashiram,* 57 P.R. 1876. But in subsequent cases this rule has not been followed.

In *Napaswamy Naik* v. *Rungasamy Naik,* 8 M.H.C.R. 46, again the question arose whether such a submission is revokable. In answering the question the court consisting of *Sir W. Morgan C.J.* and *Holloway J.* observed : "But we cannot admit that by the law which governs this case, a person is allowed to revoke, at his pleasure, or without sufficient cause, the authority of arbitrators once appointed, and to whom a difference has been submitted.

"In England, no doubt, a rule of law had been long prevailed which enabled parties, in breach of binding engagements and without show of excuse, to revoke the arbitrators' authority at any time before the making of an award, and, in some instances here, it had apparently been assumed that a like rule existed.

"In the case of a reference through the intervention of a court, or where the order of reference or award is filed in court, it is now clear that these provisions of the Code of Civil Procedure do not permit such a revocation of authority [*Pestonjee Musserwanjee* v. *D. Maneckjee & Co.,* 3 M.H.C.R. 183, confirmed on appeal by the Privy Council in 12 M.I.A. 112=10 W.R. 51 P.C. See also, *Santiya* v. *Ramaraya,* 7 M.H.C.R. 257].

"In the present case, the reference having been made without the intervention of a Court of Justice, can it be said that the authority was revocable, even if the fact that it was withdrawn before the award was assumed ?

"The 'horror',* which formerly prevailed in the English courts, of a domestic forum, never found place in British India, where it has always been the policy of the Legislature to promote the reference of disputes

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* In *Livingstone* v. *Ralli,* 5 E. & B. 132=24 L.J.Q.B. 269, which was an action on a contract containing an agreement that, should any difference arise, the same should be left to arbitration in the usual manner ; averment, that a difference arose ; and breach, that the defendant refused to refer it to arbitration, it was held on demurrer that an action lay. *Lord Campbell C.J.* observed in the course of his judgment (p. 136) ; "There seems at one time to have prevailed in our courts a horror of a domestic forum which I can neither, sympathise with, nor account for ; but the Legislature has recently, in the Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125), section 11, made a provision in such cases, not that the agreement to refer shall be pleaded in bar, but that the court may stop the action. This shows the opinion of the Legislature that such agreements are not contrary to public policy."

to arbitration ; *and the framers of the Code, in this Chapter on Arbitration, embodied most of the existing law of the Company's courts.

"Having regard, not only to the former law in force in this country, but also to the provisions of the Indian Contract Act of 1872 †section 28, we are inclined to say that an agreement to refer an existing dispute to arbitration, is binding and capable of enforcement at any other lawful contract, and that a submission of such dispute to arbitration once made is not, without just and sufficient cause, revocable."

The above view is reiterated by the various High Courts in subsequent cases. In *Perumal Satya Narain* v. *Perumal Venkata Rangayya*, 27 Mad. 112, the court observed at page 115: "But in this country, as pointed out in the case of *Nagaswamy Niak* v. *Rungaswamy Niak*, 8 M.H.C.R. 46, the policy of the Legislature has always been different and the English Common Law rule has not been followed. According to the law here the submission of an existing dispute once made is not, without just and sufficient cause, revocable even in the case of a submission which has not been made a rule of court, while, with reference to a submission which has been a rule of court and consequently where the matter has become the subject of a suit, the submission can be revoked only with the leave of the court for good cause shown. *Pestonjee* v. *Maneckjee*, 12 M.I.A. 112." Similarly, in *J. G. Smith* v. *Ludha Ghella Damodar*, 17 Bom. 129 (145), *Farran J.* observed: "I wish for myself to say that I do not agree that it is law in India that one of the parties to a written reference can recede from it without cause before award made". So the rule laid down in the case of *Pestonjee Nusserwanjee* v. *Maneckjee*, 12 M.I.A. 112=10 W.R. 51 (P.C.), to the effect that "where parties had agree to submit the matter in difference between them to the arbitration of one or more specified persons, no party to such agreement can revoke

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* Bengal Regulation XVI of 1793 (1st May, 1793)—"A Regulation for referring suits to arbitration, and submitting certain cases to the decision of the Nazirs"—was extended with the exception of section 10, to Benares by Regulation XXI of 1802 (1st January, 1802), and literally, except as to the Preamble and section 10 which were omitted, by Regulation XXI of 1803 (24th March, 1803), for the Ceded Provinces. See also, Regulation XIII of 1810, superseded by Regulation X of 1928, section 13. Suits referred under these Regulations were those "concerning disputed accounts, partnerships, debts, doubtful or contested bargains, or non-performance of contracts, in which the cause of action shall exceed two hundred (*sicca*) rupees, and "in suits for money or personal property, the amount or value of which shall not exceed the sum of two hundred (*sicca*) rupees'. Bengal Regulations VI of 1813, extended the provisions of Regulation XVI of 1793, and Regulation XXI of 1803, so as to include disputes about title to land. See also, Madras Act V of 1816, section 14 of which was repealed by Act XXVIII of 1855, and section 19 by Regulation IX of 1828, while section 7 was modified by Act VIII of 1840. See also, Madras Regulation XII of 1816, relating to the Collectors powers to refer disputes as to lands, bounndaries, etc., to village panchayats.

Bombaay Regulation VII of 1827, pas passed on the 1st January, 1827, "to facilitate the amicacble adjustment of disputes of a civil nature by means of arbitrators (a panchayat)."

† The Indian Contract Act, 1872 (IX of 1872), section 28, after declaring "every agreement, by which any party thereto is restricted absolutely from enforcing his rights under, or in respect of, any contract by time within which he may thus enforce his rights, is void to that extent", provides that "contracts to refer any dispute which may aise (*Exception* 1), or question which have already arisen (*Exception* 2), to arbitration are not rendered illegal by this section."

the submission unless for good cause, and that a mere arbitrary revocation of authority would not be permitted", was applicable both in cases where the arbitration was made a rule of the court as well as in cases of private reference. *Vide Sultan Muhammad* v. *Sheo Prosad,* 20 All. 145 ; *Coley* v. *Da Costa,* 17 Cal. 200 ; *Abalakhee* v. *Ooden Singh,* 15 W.R. 331 ; *Sheo Narain* v. *Bala Rao,* 7 All. 273=5 A.W.N. 12 ; *Nilmonee* v. *Mohima,* 17 W.R. 516 ; *Bansidhar* v. *Sital,* 29 All. 13=3 A.L.J. 613=(1906) A.W.N. 253 ; *Hashan Ali* v. *Hosdar Ali,* 113 P.R. 1890.

300. Umpire, meaning of.—An umpire is a third person, who is to decide a controversy or question submitted to arbitrators, in case of their disagreement. *Blackstone* ; *Louis Dreyfus & Co.* v. *Hemandas,* A.I.R. 1940 Sind 37 ; *Yeshovant Rao* v. *Dattaraya Rao* N.R. (1947) Nag. 631. When an agreement for arbitration by an even number of arbitrators provides for any difference between them to be decided by a named person, even if the word "umpire" is not used in connection with that person, he can only act in that capacity If such an agreement provides that the matters of difference or which were not determined by the arbitrators should be decided by a named judge of the High Court, the latter does not act *extra cursum curiae* as a judge when he disposes of the matters referred to arbitration but acts as an umpire in the arbitration. *Bengal Silk* v. *Aisha* 231 Ind.Cas. 187=A.I.R. 1947 Cal. 106. If there is disagreement between the arbitrators there is no award and the jurisdiction of the umpire is attracted. In the absence of a contrary provision in the arbitration agreement the umpire must adjudicate upon the whole case, even if the arbitrators disagree in one point. It is really for the umpire to decide if there is a compromise or withdrawal of the reference which cannot be retracted. Even if there is a compromise the umpire may make an award in accordance with the compromise. In fact the umpire ought to embody the admitted clause or compromise in the award unless the parties invite him not to do so. *Probodh Kumar* v. *Union of India,* 56 C.W.N. 436.

301. Authority of an appointed arbitrator or umpire is irrevocable.—An "arbitration agreement" means a written agreement to submit present or future difference to arbitration, whether an arbitrator is named therein or not. [*Vide section* 2(*a*).] Section 5 of the old Arbitration Act of 1899 enacts that "a submission, unless a different intention is expressed therein, shall be irrevocable, except by the leave of the Court'. Commenting on the corresponding section of the English Act (*vide* section 5 of the English Arbitration Act of 1889), *Bowen L.J.* in *Re Smith & Nelson* (1890) 25 Q.B.D. 545 at p. 547, points out that the language "a submission shall be irrevocable" is ambiguous ; the word "irrevocable" being applicable not to the agreement to refer, but to the authority of the arbitrator. The definition of "arbitration agreement" includes both kinds of agreement, namely, an agreement of arbitration where arbitrators have been named or where such persons have not been named [*vide Manchester Ship* v. *Pearson,* (1900) 2 Q.B. 606.] This change has been made by the Legislature to meet the criticism of *Bowen L.J.* in the above case where he said: "The word 'submission' is a word used with some inexactitude, both in cases and in the text-books. An agreement to refer to arbitration was always irrevocable by one of the parties, but there may be an agreement to clothe a particular arbitrator with authority, which authority could be revoked, and the agreement in that sense became useless."

302. "Shall not be revocable."—Where there has been a valid reference to named arbitrators, the submission is not revocable except by the leave of the court. *Sawyer* v. *Louis,* 20 Ind.Cas. 504=7 S.L.R.; *Ismail* v. *Hansraj,* A.I.R. 1955 Raj. 153. Once a valid submission has been made to an arbirator, it is irrevocable without leave of the court, under this section, and if the arbitrator refuses or neglects to act, the procedure laid down by section 8 of the Act should be adopted. So long as the arbitrator holds his mandate unrevoked, the parties cannot appoint a fresh arbitrator. *Dwarka Prosad* v. *Firm of Dipchand,* 44 Ind.Cas. 360=11 S.L.R. 101. See also, *Firm of Dhanpatmal* v. *Firm of Kishenlal,* 35 Ind.Cas. 536=10 S.L.R. 1; *Bansidhar* v. *Sital Prosad,* 29 All. 13; *Chiddu* v. *Kunwar Sen,* 29 All. 49=3 A.L.J. 654; *Lekhraj Singh* v. *Dulhma Kuar,* 4 All. 302; *Ram Narain* v. *Balu Singh,* 18 All. 46 (49); *Kesho Ram* v. *Pearee Lal,* 21 A.I.J. 209=71 Ind.Cas. 761=A.I.R. 1923 All. 223. This section provides that the authority of an appointed arbitrator shall not be revocable except by the leave of the court, implying thereby that with such leave it may be revoked. *Prafulla* v. *Panchanan,* A.I.R. 1946 Cal. 427=50 C.W.N. 287=222 Ind.Cas. 597=87 C.L.J. 1. In the above case *Chakravarti J.* said: "At first sight it might seem that this provision applies only to the authority of a particular arbitrator or arbitrators and has no application to the reference itself. But the real scope of the section will appear if the meaning of the word "authority" is closely examined. In the corresponding provision in the English Arbitration Act of 1889, s. 1., the word used is 'submission' and in criticising that section *Bowen L.J.* pointed out in (1890) 25 Q.B.D. 545=59 L.J.Q.B. 533 (*In Re Smith and Nelson*) that the word 'submission' had been used with some inexactitude, because the agreement to refer, which the term 'submission' might seem to denote, was always irrevocable and it was only necessary to provide for the irrevocability of 'the authority of the arbitrator'. The Indian Legislature seems to have met the criticism of *Bowen L.J.* by accepting the exact language suggested by him and when the section speaks of the authority of the arbitrator, it means reference". The Arbitration Act gives no power to the Court to revoke the authority of an arbitrator, but only gives it power to give leave to a party to revoke. Thus where after the award was set aside by the Court, the reference was not superseded, the result was that the arbitrator remained in seisin of the reference and the arbitration agreement continued to subsist. If at that stage, the party who had originally made the reference addressed a further communication to the arbitrator asking for arbitration and an award, and although the communication was in the form of a statement of claim, it refers to the previous proceedings and a copy of the award that had been set aside was endorsed with it. *Held* that the communication was not a fresh reference but for the further arbitration on the reference. Since the original reference had not been superseded, there could not be a second reference of the same dispute and there was no need of any. In resuming the reference, the arbitrator did nothing illegal and his authority could not be revoked on that ground. *Morgan* v. *Khardah Co.,* A.I.R. 1959 Cal. 169; *Jute Factory* v. *Hulaschand,* A.I.R. 1958 Cal. 490.

There are two limits which the descretion of the Court under this section in revoking the submission is to be exercised; one, the Court should not lightly release the parties from their bargains that follows from the sanctity the Court attaches to contracts; the other, that the Court should be satisfied that subsantial miscarriage of justice will take place in the

event of its refusal to grant leave. *Reliance Investment* v. *Union of India*, A.I.R. 1957 Cal. 151 ; A.I.R. 1952 Cal. 294. The revocation of reference to arbitration would only have the effect of nullifying any adjudication made by the arbitrator and relegating the parties to the position occupied by them as if there was no adjudication. *Panchapagesa* v. *Kalyanasundaram*, A.I.R. 1957 Mad. 472.

303. Inherent power of court to revoke arbitration.—In *Shiam Sundar Lal* v. *Bhairon Singh*, 3 A.L.J. 185 it was held that only under the Act the court can appoint a new arbitrator in place of a selected arbitrator, see also *Thorugan* v. *Chinna*, A.I.R. 1927 Mad. 910 ; *Sadiq* v. *Nazir*, 33 All. 745=12 Ind.Cas. 15=38 I.A. 181 (P.C.). But the court has inherent jurisdiction and it can in the exercise of its inherent powers revoke a reference when it would be futile to proceed with the reference which is grossly irregular and defective. *Parrathamma* v. *Subbamma*, A.I.R. 1935 Mad. 349 ; *Lathman* v. *Moghal Mian*, A.I.R. 1925 Pat. 720=86 Ind.Cas. 540 ; *Anand Das* v. *Rambhusan*, A.I.R. 1933 Pat. 566=146 Ind.Cas. 1081 ; *Bholanath* v. *Raghunath*, A.I.R. 1929 All. 743=122 Ind.Cas. 685=51 All. 1010 ; *Naraini* v. *Thirpal* A.I.R. 1935 All. 281 ; *Ahmed* v. *Cassum*, A.I.R. 1934 Bom. 338. The court, though having jurisdiction to grant leave to revoke and a case of revocation being proved, might not go so far as to revoke the submission if it is satisfied that the arbitrator would act upon the court's direction. *Hart* v. *Duke*, 32 L.J.Q.B. 55 ; *Robinson* v. *Davies*, (1879) 5 Q.B.D. 26—*Russell* 11th Edn., p. 55.

304. Reference is irrevocable when it is made through court.—A party cannot resile from a reference to arbitration at his sweet will and pleasure, and it cannot avail him to show that having once agreed to reference he afterwards repented of his action. *Chet Kunwar* v. *Pattu Singh*, 27 Ind.Cas. 424=17 O.C. 386=2 O.L.J. 129. See also *Nilmonee* v. *Mohima*, 17 W.R. 516 ; *Nainsukh* v. *Umadi*, 7 All. 273. Where parties submit their difference to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good reason. *Kunj Lal* v. *Banwari Lal*, 4 P.L.J. 394=48 Ind.Cas. 711. So according to the Indian law, the submission of an existing dispute once validly made is not revocable without just and sufficient cause, even in the case of a submission which has been made a rule of court. *Ramji* v. *Saligram*, 14 C.L.J. 188. Where parties have agreed to submit the matter in difference between them to arbitration of one or more specific persons, no party to such an agreement can revoke the submission to arbitration unless for good cause and a mere arbitrary revocation of the authority is not permitted. *Gopal Ram* v. *Bankey Lal*, 96 Ind.Cas. 325. In *Sheo Narain* v. *Bala Rao*, A.I.R. 1932 All. 348=(1932) A.L.J. 331=137 Ind.Cas. 198, *Sen J.* observed : "It is a settled rule of law that it is not open to a party to an agreement of reference to revoke the submission to arbitration except for good cause and 'that a mere arbitrary revocation of the authority is not permitted : *Pestonjee Nusserwanjee* v. *Manekjee & Co.*, 12 M.I.A. 112=2 Sar. 390 (P.C.)=10 W.R. 51. *Bansidhar* v. *Sital Pershad*, 29 All. 13=3 A.L.J. 613=(1906) A.W.N. 253, and *Ram Chandra Pal* v. *Krishan Lal Pal*, 17 Ind.Cas. 600=17 C.W.N. 351. The ground on which the agreements were sought to be revoked was that one of the arbitrators, namely, Gayadin had figured as a witness for the prosecution in the case under section 107 of the Criminal Procedure Code. This was no ground at for resiling from the agreements. Where the parties have once agreed to a submission to arbitration, the agreement is binding and enforceable and cannot be annulled except for some such reason as that agreement had been obtained by fraud, coercion

or undue influence. It is opposed to all legal principles to allow a party to the agreement to revoke it at his sweet will and pleasure." See also *Naisukh* v. *Umadai* 7 All. 273=(1885) A.W.N. 12; *Chat Kunwar* v. *Pattu Singh*, 27 Ind.Cas. 424=17 Oudh Cas. 386=2 O.L.J. 129; *Ghulam Mahomed* v. *Gopal Das*, A.I.R. 1933 Sind 98=143 Ind.Cas. 635.

305. Frustration of contract containing arbitration clause—power of arbitrator to act after that.—If the objects of a contract which contains an arbitration clause are completely frustrated by causes entirely beyond the control of the contracting parties to the arbitration, the clause comes to an end, and an arbitrator has no jurisdiction to deal with any question which may be raised, although neither party exercised a power of cancelling any contract under the clause contained in it. *Hirji Mulji* v. *Cheong Yue Steamship Co.*, 95 L.J.P.C. 121=(1926) A.C. 495=134 Com.Cas. 199.* In the above case Lord *Summer* in delivering the judgment of the Privy Council said: "The case made by the appellant

*The essential idea upon which the doctrine of frustration is based is that of impossibility of performance of the contract, in fact impossibility and frustration are often used as inter-changeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of section 56 of the Contract Act. To the extent that the contract deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *dehors* these statutory provisions. The decisions of the English courts possess *only a persuasive value* and may be helpful in showing how the courts in England have decided cases under circumstancces similar to those which have come before Indian courts. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56, taking the word 'impossible' in its practical and not literal sense. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.....*If and when there is frustration the dissolution of the contract occurs automatically.* It does not depend as does rescission of a contract on the ground of repudiation or breach or not the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract. What happens generally in such cases is that one party claims that the contract has been frustrated while the other denies it. The issue has got to be decided by the court *ex-post facto*, on the actual circumstances of the case. (1944) A.C. 265=113 L.J.P.C. 121; *Satyabrata* v. *Mugneeram*, A.I.R. 1954 S.C. 44 per *B. K. Mukherjia J.*

In para 12 of that judgment the learned Judge said: "The English law passed through various stages of development since then and the principles enunciated in the various decided authorities cannot be said to be in any way uniform. In many of the pronouncements of the highest courts in England the doctrine of frustration was held 'to be a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands'. *Vide Hirji Mulji* v. *Cheong Yue Steamship Co.*, (1926) A.C. 497 at p. 501.....These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India, that only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word 'impossible' in its practical and not literal sense." It must be borne in mind, however, that section 56 lays down a rule of positive law and does not bear the matter to be determined according to the

charterers was throughout that the arbitrator had no jurisdiction. The claim made against them, with which he had purported to deal, could not be said to be a dispute 'arising under the charter' in the words of the clause, seeing that, before it was made or any question arose, the whole charter had come to an end by frustration of its objects in consequence of the requisition of the ship.....Upon the question of frustration the case is a typical one, and is governed both in its facts and its law by the *Bank Line* v. *Capel & Co.*, (1918) 88 L.J.K.B. 211 = (1919) A.C. 435. A great many charter-parties have been dealt with during the last few years on indistinguishbly similar facts and have been held to have been frustrated by reason of the requisition.....As the arbitrator was the judge, if at all, both of law and of fact, the sole question is whether he had any jurisdiction to decide, as he purported to do, between the parties. The depends on the question whether or not there was any submission, and that again on the question whether, at the time when it purported to be submitted to him, there was a dispute, subsisting between the parties, 'under this contract', that is, a contract then subsisting.

"That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject-matter of the complaint. For this purpose a contract which has been determined is in same position as one which has never been concluded at all. It founds no jurisdiction. *Lord Parker of Waddington* sums up this subject in the *Produce Brokers' case* [85 L.J.K.B at p.

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intention of the parties. The Supreme Court in India is not bound either by Federal Court decision or Privy Council decision. *State of Bihar* v. *Abdul Majid*, A.I.R. 1954 S.C. 245. In *State of Bombay* v. *Adamji & Co.*, A.I.R. 1951 Cal. 145 [148] *Banerjee J.* said : "Whether the arbitration agreement falls with the contract depends upon a particular test and that test is laid down in *De la Grade* v. *Worshop Co.*, (1928) Ch. 17. "The test is said to be whether the contract is determined by something outside itself, in which case their arbitration clause to be determined with it, or by something arising out of the contract, in which case the arbitration clause remain effective and can be enforced. (*Russell on Arbitration*, Edn.,14 at p. 75). The arbitration agreement does not come into operation until a dispute arises under or out of the contract. If there is no dispute there is no operation of the arbitration clause". See also *Satyabrata* v. *Munisheram*, A.I.R. 1954 S.C. 44. But in an Allahabad case it has been held that under S. 56 of the Contract Act, a contract to do an act which after the contract was made, becomes impossible, becomes voidable. It is, therefore, only that contract which is for doing an act that becomes frustrated. An agreement to refer a dispute to arbitration arising out of a contract cannot be said to be a contract to do an act. In a contract containing an arbitration clause there is (1) a promise by one party to do an act for a consideration furnished by the other party and (2) an agreement to refer dispute arising out of that contract to arbitration. Section 46 of the Contract Act applies to the former and not to the latter agreement. Referring a dispute to arbitration is not a duty to be performed under the contract and there is hardly any question of performance of the duty being rendered impossible. Moreover whether a contract frustrated or not is itself a dispute that arises under the contract and if the contract continues an arbitration clause that dispute must be referred to arbitration also continues. Hence even if a contract is said to be frustrated the arbitration clause remains operative. *Municipal Board* v. *Eastern Electric*, A.I.R. 1958 All. 506 ; *Heyman v. Darwins Ltd.*, (1942) I All. E.R. 335 = (1942) A.C. 356 ; *Kruse* v. *Questier Co. Ltd.*, (1953) 1 All. E. R. 950.

166=(1916) 1 A.C. at p. 327] in the following words: 'The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission... Where, however, the submission is contained in the contract it may be a question of construction whether such expression as 'all disputes arising under the contract' include question as to the ambit of the submission itself. *Prima facie* I do not think they would. 'A court', says *Lord Loreburn* in the same case [85 L.J.K.B. at p. 163=(1916) A.C. at p. 322], 'will decide for itself whether an inferior court has clothed itself with jurisdiction by an erroneous finding on something vital to the jurisdiction'—See, too, *Attorney-General for Manitoba* v. *Kelly,* (1922) A.C. 268=91 L.J.P.C. 101. Accordingly, if it be the law that when a contract is frustrated it is brought forthwith to an end as regards matters thereafter arising, and if it was the fact that the contract had come to an end before 1919, when for the first time an offer of the ship for service was effectively made, then the arbitrator could not clothe himself with jurisdiction by finding that there has been no frustration." But see *Heyman* v. *Drawin Ltd.,* (1942), A.C. 356=(1942) 1 All. E.R. 337=111 L.J.K.B. 241, where this case has been criticised. The contract may come to an end by frustration; but the arbitration agreement may yet remain operative. The arbitration agreement may be declared void without the contract being declared invalid. They are two separate things. The test to find out whether the arbitration agreement falls with the contract is whether the contract is determined by something outside itself, in which case the arbitration clause is determined with it, or by something arising out of the contract, in which case the arbitration clause remains effective and can be enforced. *State of Bombay* v. *Adamji,* A.I.R. 1951 Cal. 147= 6 D.L.R. (Cal.) 102; *Bhuwalka Brothers* v. *Rajputana,* 6 D.L.R. (Cal.) 108. In *State of Bombay* v. *Adamji Co., supra, Banerjee J.* observed: "In *Heyman* v. *Darwins Ltd.,* (1942), 1 All. E.R. 337 (347)=1942 P.C. 356. *Lord Macmillan* observes as follows: 'I venture to think that not enough attention has been directed to the nature and function of the arbitration clause in a contract. It is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde;* but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in any ordinary contract the obligation of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specially enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement. Moreover, there is the further significant difference that the courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts.'

"To the same effect are the observations in the speeches of *Viscount Simon, Lord Wright* and *Lord Porter.* It is clear from the observations in this case that a contract may come to an end *e.g.,* by frustration; but the 'arbitration agreement' may yet remain operative. The arbitration agreement may be declared void without the contract being declared invalid. They are two separate things." It is regretable that the case of

Hirji Mulji v. *Cheong*, (1926) A.C. 497=95 L.J.P.C. 121 was not brought to the notice of their Lordships which according to the Full Bench decision of Lahore High Court is binding on Indian High Courts in A.I.R. 1946 Lah. 116 at page 123, *Harries C.J.* said: "If, however, (1926) A.C. 497 governs the present case, it must be followed inspite of the criticisms levelled at the decision in the speeches of their Lordships in (1942) A.C. 356". For other cases on *Frustration* vide *Joseph* v. *Imperial* (1942) S.C. 154; (1923) S.C. (H.L.) 137. In the case of *State of Bombay* v. *Adamji, supra* the court followed the case of *Heyman* v. *Darwin Ltd.*, (1942) 1 All. E.R. 337 (347) was followed.

306. Effect of failure in the endeavour to solve differences by arbitration.—The fact that the parties endeavoured to solve their differences by recourse to arbitration and failed does not in the slightest degree affect the validity of the arbitration clause and it is no answer to say that the parties went through what all of them actually believed at the time was an arbitration in due form, if when examined by the court, the arbitration was found to have been of no legal effect. *Rikhab Kumar* v. *Trivedi & Co.*, 27 A.L.J. 877=116 Ind.Cas. 444=A.I.R. 1929 All. 455.

307. When agreement is determined.—Where an agreement containing an arbitration clause is determined by something arising outside the contract, the arbitration clause is determined with it; and any dispute as to the cause of such determination cannot be brought to arbitration by virtue of the arbitration clause. But where such determination is due to something arising directly out of the contrtct itself, the arbitration clause is not made ineffective, and the dispute can be referred to arbitration. *De la Grade* v. *Worsnap*, 96 L.J.Ch. 446.

308. Arbitration clause—effect on, by outbreak of war.—If on the outbreak of war a contract containing an arbitration clause would in the ordinary course of performance or the settlement of disputes require any intercourse with the enemy, the contract including the arbitration clause is dissolved. *Ertel Biber & Co. v. Rio Tinto Co.*, (1918) A.C. 260 (291)=87 I.J.K.B. 531 (538). In the above case *Lord Dunedin* said: "Section 18 is an arbitration clause. Now, although I agree with the learned Judge who says that arbitration cannot be conducted without intercourse, it seems to me that arbitration is not necessary, nor indeed, an usual part of the performance at a time when *ex hypothesi* all deliveries under the contract are suspended. There is nothing for the time being to arbitrate about." In *Naylor, Bunzon & Co.* v. *Krainische & Geselleschaff*, 87 L.J.K.B. 1066=(1918) 2 K.B. 486, *Mcardie J.* in the court of first instance observed: "It is now also settled that, as a matter of rigid law, all intercourse, whether commercial or otherwise, is prohibited.—See *The Panariellos*, (1915) 84 L.J.P. 140, affirmed in P.C. (1916) 85 L.J.P. 112, *Robson* v. *Premier Oil and Pipe Line Co.*, (1915) 84 L.J.Ch. 629 (632=(1915) 2 Ch. 124 (133), and *Tingley* v. *Muller*, (1917) 86 L.J.Ch. 625 (635)=(1917) 2 Ch. 144 (166, *per Lord Justice Warrington*). It is clear, I think, that arbitration cannot take place without communication and the transmission of notices between the parties. Hence an arbitration clause, if contemplated by the parties as one which will be in operation after the outbreak of war, involves intercourse with the enemy state.—See *per Lord Justice Swinfern Eady* in *Zinc Corporation* v. *Hirsch*, (1915) 84 L.J.K.B. 565 (573)=(1916) 1 K.B. 541 (556), and *per Lord Justice Pickford* and *Lord Justice Scrutton* in *Rio Tinto Co.* v. *Ertal Biber & Co.*, 116 L.T. 810=33 T.L.R. 537.

Hence it follows that the present contract is avoided, even if it contemplated a possible war between Austria and this country and a suspension of deliveries by reason thereof, for it also contemplated intercourse between the parties after the outbreak of hostilities. I deem it to be a true rule of law that if the contract in the ordinary course of performance or the settlement of disputes would require any intercourse at all after the outbreak of war, the contract is dissolved, not only as to one or more future acts of performance, but absolutely and *in toto* as to all future duties, rights and obligation." But where outbreak of war is expressly provided for by the contract, and the contract is not illegal for absence of intercourse with enemy subjects, the parties are bound by the arbitration clause. *Smith, Coney & Barret* v. *Bicker, Gray,* (1916) 2 Ch. 86=84 L.J.Ch. 865=112 L.T. 914=31 T.L.R. 151. In the above case *Lord Cozens-Hardey M.R.* said : "If they were illegal, then any question of arbitration under the contract would fall with it.....When once we have got to the point that there is a contract, and a contract which confers rights upon both parties, it seems to me that the case is really at an end. The parties have in terms agreed that their mutual rights and obligations shall be settled by arbitration, and in no other way. It may or may not be a very foolish thing to have such a term.....The parties have selected the tribunal, and in the absence of very special circumstances the court of first instance ought to hesitate greatly before allowing the arbitral tribunal to be in any way interfered with ; and certainly when the Judge in the court below has exercised judicially his discretion, the Court of Appeal ought to think not once but think twice before it intereferes with discretion."

308. Incomplete reference.—Where there is no completed arbitration agreement, the parties are at liberty to withdraw from such agreement. *Ashutosh* v. *Apurba,* 10 C.L.J. 449=4 Ind.Cas. 370. An arbitrator acts without jurisdiction if the partner have not agreed that the matters in dispute should be decided by arbitrator. *Commander* v. *Armugam,* A.I.R. 1954 Mys. 46 (D.B.). The existence of disputes or differences contemplated by an arbitration clause is an essential condition of and prerequisite to the exercise of the jurisdiction by the arbitrator. A dispute implies an assertion of a right by one party and a repudiation thereof by another. *Nandram* v. *Raghunath,* 95 C.L.J. 92=58 C.W.N. 510= A.I.R. 1954 Cal. 245.

309. Evidence to vary or alter terms of arbitration agreement.—An arbitration agreement is a contract within the meaning of S. 91 of the Indian Evidence Act, and where the parties to an agreement of reference refer a dispute which arises between them, they cannot lead evidence to vary or add to the terms of the agreement by saying that they made the reference in any other capacity save that appearing from the agreement itself. *Radha Kishan* v. *Sahattar,* A.I.R. 1957 All. 406 overruling A.I.R. 1929 All. 415.

310. Agreement of reference—when revocable—No contrary intention.—Where there is no contrary intention expressed in the agreement relying on which it was open to the party to resile from or revoke the reference, the agreement is irrevocable unless the leave of the court is taken. It for some reason a party to the agreement thought that the agreement had obtained either by fraud or the person who had been appointed would not be very fair to him, or some matter had been suppressed from his knowledge at the term of the execution of the agreement, or there are any other reasons on which he can contend that

he could revoke the agreement, it is open to him to go to the court with an application under S. 5 and ask for a revocation. Where this has not been done the court is bound by the mandatory nature of this section to hold that the reference would be irrevocable. *Dulari Devi* v. *Rajendra Prakash,* A.I.R. 1959 All. 711.

311. Oral agreement and revocation.—As oral agreement for reference to arbitration is outside the scope of this Act, as such it seems a party cannot apply for revocation of arbitration appointed by oral agreement under this section. In England the Common Law applies and by applying that law the court in a fit case revokes the authority of the arbitrator, before the award is made. In India according to Mr. Sarkar the court can give relief if it is in accordance with justice, equity and good conscience. *Sarkar's Law of Arbitration,* p. 99, s. 47 *infra.* "It will be observed" says *Russell* "that for this provision to apply there must be an 'arbitration agreement' within the Act, that is, either a written submission or a written agreement to refer. It would seem however that where there is a written agreement to refer to an arbitrator appointed by parole may be 'appointed by virtue of an arbitration agreement' so as to make his authority irrevocable leave." *Russell* 15th Edn., p. 46.

312. Leave of the Court.—This section relates merely to the right to revoke an arbitration contract. *Doleman* v. *Osset Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1092=107 L.T. 531. One a valid submission has been made to an arbitrator, it is irrevocable without leave of the court, under this section, and if the arbitrator refuses or neglects to act, the procedure laid down by section 8 of the Act should be adopted But so long as the arbitrator holds his mandate unrevoked, the parties cannot appoint a fresh arbitrator. *Dwarka Prosad* v. *Firm of Dipchand* 44 Ind.Cas. 360=11 S.L.R. 93. *In re Arbitration Act, Re Atlas Insurance Co.,* 10 Bom.L.R. 351=34 Bom. 1. *Dewar J.* observed : I think the proper procedure to be followed in moving for leave to revoke a submission to arbitration under section 5 of the Arbitration Act (IX of 1899), should be by motion in court" ; see also *Heyman* v. *Darwins,* (1942) A.C. 356 at p. 376 per *Lord Wright.*

313. Material consideration for granting leave.—A material consideration for the court as to the order it will make on an application for leave to revoke the authority of an appointed arbitrator is the time when the application is made. If it is made at an early stage of the arbitration proceeding, the court will more readily grant leave to revoke, assuming always that a good case for revocation is shown. Where, however, the application is not made at an early stage, and the applicant knowing about the defect in the arbitrator's qualification or in the proceeding before him submits his case to him, the court will not be disposed to grant leave to revoke the authority to the arbitrator. *Kanowar* v. *Hindusthan,* 85 C.L.J. 140 ; see also per *Hennedy, J.* in *Re. Gerard (Lord)* and *London & North-Western Ry. Co.,* (1894) 2 Q.B. 915 ; (1895) 1 Q.B. 459. There are two limits within which the discretion of the court under this section in revoking the submission is to be exercised : one, the court should not lightly release the parties from the bargain that follows from the sanctity the court attaches to contracts ; the other, that the court should be satisfied that substantial miscarriage of justice will take place in the event of its refusal, to grant leave. *Reliance Investment* v. *Union of India,* A.I.R. 1957 Cal. 151 : A.I.R. 1952, Cal. 294. No leave is to be granted, if by such grant, speedy end of strife will be hampered. *Scott* v. *Van Sun Den,* (1841), Q.B. 102 (110) : *Dean*

of Steamship Airlie Co. Ltd. v. *Mitsui & Co., Ltd.,* (1912) 106 L.T. 451. Before the court exercises its discretion 'to give leave to revoke an arbitrator's authority' it should be satisfied that a substantial miscarriage of justice will take place if the leave is refused. *Jones* v. *James,* (1889) 22 Q.B.D. 669 at page 674. To obtain leave of Court, a very strong case should be made out. *James* v. *Attwood,* (1839) 7 Scott, 843 cited in *Bhuwalka Bros.* v. *Fatechand,* A.I.R. 1952 Cal. 294. So an application for leave to revoke should be granted with great caution. *Per Mathew L.J.* in *Belchar Roedean School Site etc.,* (1901) 85 L.T. 468 (471).

314. Convenience and expense.—The Court generally considers the balance of convenience and inconvenience and expense in granting or refusing leave for revocation under this section. *Scott* v. *Van Sadan,* (1841) 1 Q.B. 102 ; see also *The Ithaka,* (1939) 3 All.E.R. 630 ; *Dean of Steamship Airlie* (1812) 106 L.T. 451.

315. Unless a contrary intention is expressed in the arbitration agreement.—In the arbitration agreement express provision may be made under what circumstances the arbitration agreement would be revokable. In such cases the court is to consider whether those circumstances have arisen.

316. Arbitration under S. 19, Defence of India Act.—Arbitration Act applies to arbitration under S. 19, Defence of India Act, in the matter of revocation of arbitrator's authority, as such it must be held that the provisions of section 5 of the Act is applicable in cases of revocation of authority of an appointed arbitrator under S. 19 of the Defence of India Act. Consequently an order of the Provincial Government revoking the authority of the arbitrator and appointing a new one without leave of the court is without jurisdiction. *East India Film* v. *P.R. Mookerjee,* 92 C.L.J. 246 = A.I.R. 1954 Cal. 41.

317. Granting of leave is discretionary.—In *James v. James and Bendall,* (1889) 23 Q.B.D. 12, *Lord Justice Lindley* says: "I have no doubt that we have powers to grant leave to revoke the submission but I also have no doubt that it is a matter of discretion whether we would do so, and therefore the real question seems to me to be whether the facts of the present case are such as to render it right for us in the exercise of that discretion to grant such leave." *Lord Justice Lopes,* who followed *Lord Justice Lindley,* takes the same view and in explaining the *East and West India Docks* v. *Kirk and Rendall,* (1887) 12 App.Cas. 738 = 57 L.J.Q.B 295 = 58 L.T. 158 ; says: "It seems to me clear that the decision was that the power is a discretionary power, to be exercised according to the circumstances of each particular case." In the earlier case of *East and West India Docks Co.* v. *Kirk and Rendall* (*supra*), the House of Lords held that the court had power to give leave to revoke a submission where it appeared that the arbitrator was going wrong in point of law even in a matter within his jurisdiction, and in this case the House of Lords, reversing the decision of the Divisional Court and the Court of Appeal, was prepared to exercise the power unless the parties agreed to the arbitrator raising the questions in a special case for the opinion of the court. *In re Indian Arbitration Act, Re Atlas Insurance Co.,* 34 Bom. 1 = 10 Bom.L.R. 351 = 1 Ind.Cas. 14.

In the last-named case *Davar J.* observed: *"Lord Denman Co. J.* in delivering the judgment of the Court in *Scott* v. *Van Sandan,* (1841) 1 Q.B. 102, makes some very weighty observations which ought, I think, to be

present to the mind of a Judge deciding a question like the one before me. After observing that the submission to arbitration were 'highly advantages to the end of justice' and that when 'resorted to on proper occasions the jurisdiction was of inestimable value,' he says : 'We will only observe that the discretion of the Court to which the appeal is made, ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of the strife, should only open the flood-gates for multiplied expenses and interminable delays.'

"The result of the authorities on this subject is summed up in *Halsbury's Laws of England,* Vol. I, p. 449, where it is stated :

"The power to grant leave to revoke a submission is exercised by the court in a sparing and cautious manner and unless the applicant can establish that there will be failure of justice if the reference is allowed to proceed, he will not be allowed to revoke.'

"These authorities are valuable guides for the decision of the question arising under the present petition. The conclusions to be drawn from them are,—that when a party to a submission to arbitration feels aggrieved by the arbitrators deciding improperly or erroneously to admit evidence which they should have rejected, his proper course is to apply to the court for leave to revoke the submission, that on such application the court will accord or refuse such leave according to the circumstances of each particular case that comes before it, that the power of the court is discretionary and ought to be cautiously and sparingly exercieed, but that such power should be exercised by the court in favour of the applicant if it appears to the court that main object of all submission to arbitration, which is to obtain 'speedy end of the strife', is not likely to be attained and the applicant is likely to be subjected to multiplied expenses' and 'interminable delays' by the conduct of the arbitrators, and lastly, that leave to revoke should be accorded to the applicant in all cases where he can establish that there will be the failure of justice if the reference is allowed to proceed.' " (Reversed on appeal on merit in 11 Bom.L.R. 1=34.Bom. 1=1 Ind.Cas. 14). In *Kewalram Totaldas* v. *Diwanchand,* A.I.R. 1928 Sind 195=111 Ind.Cas. 700, *Rupchand Bilaram A.J.C.* observed : "Now it is well-settled law that the discretionary powers vested in the court of revoking a submission to named arbitrators ought to be exercised in a most sparing and cautious manner [cf. *Scott* v. *Van Sandan* (1841) 1 Q.B. 102 (110), *Belcher* v. *Roedean School Site and Buildings, Ltd.,* (1901) 85 L.T. 469 (471), and *Dean of Airlie Steamship Co.* v. *Mitsui,* (1912) 106 L.T. 451 (454)=17 Com.Cas. 116], and such powers should be exercised only when the court is satisfied that a substantial miscarriage of justice will take place in the event of its refusal." Such leave is to be granted with great caution. *James* v. *Attwood,* (1839) 7 Scott, 843 as "that procedure is so awkward in form, so injurious if regarded as one to be generally adopted, and introduces a great change into a highly useful and important branch of the law, that I feel there is the strongest possible objection to it in any case which does not imperatively call for it". *Per Stephen J.* in *James* v. *James,* (1889) 22 Q.B.D. at p. 674, *per Stephen J.* cited in *Russell,* 15th Edn., p. 49. The discretion of the court to grant leave to revoke the authority of the appointed arbitrator under Section 5 of the Arbitration Act, has to be exercised within these two limits, one, the Court should not lightly release the parties from their bargain, that follows from the sanctity the Court attaches to contract ; the other, that

the Court should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal to grant the leave. *Bhuwalka Bros.* v. *Fatehchand,* 87 C.L.J. 71=A.I.R. 1952 Cal. 294.

In *Gaya Prasad* v. *Firm Muthu Lal Buddha Lal,* 78 Ind.Cas. 1050= A.I.R. 1925 All. 202, a Bench of the Allahabad High Court, consisting of *Mr. Justice Walsh* and *Mr. Justice Ryes* thus laid down the law on the subject : "In giving leave to revoke a submission the court shall be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party, who as a consideration for a contract had agreed to submit any disputes whether of law or fact, which might arise, to arbitration, when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction or refusing jurisdiction or failing to do all that their jurisdiction requires them to do. The principle underlying the exercise of the power to revoke is that the parties take the arbitrators for better or for worse, and that their decision is final both as to law and fact ; unless a substantial miscarriage of justice may take place, leave ought not to be given. It is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by." See also *In re Palmer & Co.,* (1898) 1 Q.B. 131 (140), *per Chitty L.J.* It is not misconduct for an arbitrator or umpire to refuse to state a special case before a question of law arising in the course of a reference, or to refuse to give his award in the from of a special case. *Russell* 15th Edn., p. 285 ; *Raliance Insurance* v. *Union of India,* A.I.R. 1957 Cal. 151 ; A.I.R. 1952 Cal 294.

318. Leave in cases where a suit is pending—old law.—It has already been stated that before the passing of the Arbitration Act of 1940 (X of 1940), the law of arbitration could be found in the Arbitration Act of 1899, and in the Schedule II of the Civil Procedure Code. The Indian Arbitration Act provided procedure for arbitration without intervention of the courts and in the first instance applied only to cases where the subject-matter submitted to arbitration were the subject of a suit, which could be instituted in a Presidency-town. 15 Ind.Cas. 402 ; 27 Ind.Cas. 129 ; 7 Ind.Cas. 593 ; 7 Ind.Cas. 588 ; A.I.R. 1934 Lah. 652=35 P.L.R. 482 ; A.I.R. 1934 Sind 183. The Civil Procedure Code dealt both with arbitrations pending litigation, and arbitrations without recourse to litigation. Under the Civil Procedure Code, the court could supresede arbitration on the application of the parties in cases specified in paragraphs 5 and 8 of the Schedule II. But as regards the power of court to revoke arbitration in other cases there was a conflict of opinion. In *Robindra* v. *Jogendra,* 80 *Ind.Cas.* 459=27 C.W.N. 420=A.I.R. 1923 Cal. 410, it was held that under the Second Schedule of the Civil Procedure Code, the only time for entertaining charge of misconduct against an arbitrator was when the award had been filed. See also, *Raja Har Narain Singh* v. *Chaudhurain Bhagwant Kuar,* 13 All. 300=18 I.A. 55 ; on appeal from *Har Narain Singh* v. *Bhagwant Kuar,* 10 All. 137 (140)= (1888) A.W.N. 28 ; *Chaturbhuj* v. *Raghubar Dayal,* 23 Ind.Cas. 758=36 All. 354=12 A.L.J. 529.

Similarly in *Thoongan* v. *Chinna Alagu,* A.I.R. 1927 Mad. 910=39 M.L.T. 195=(1927) M.W.N. 921=105 Ind.Cas. 92=39 M.L.T. 195, the court observed : "There is no provision in the Second Schedule of the Code for a revocation at this stage as observed by the Judicial Committee

in *Sadik Hussain* v. *Kaniz Zohra Begum*, 33 All. 743=12 Ind.Cas 15=38 I.A. 181 (P.C.), all that the courts in India can do is to take advantage of the section of the Code which enables them to keep the machinery of arbitration going. A court acting under the Second Schedule can only revoke an arbitration in the cases specified in paras, 5, 8 and 15. No doubt, in the present case if the matter had reached an award, para. 15 might have been applicable." See also, *Ganesh Prosad* v. *Damodar Das*, 10 A.L.J. 123=16 Ind.Cas. 177; *Mangar Sahu* v. *Bhatoo Singh*, 57 Ind.Cas. 473=5 Pat.L.J. 672=1 P.L.T. 416; *Shiam Sundar Lal* v. *Bharion Singh*, 3 A.L.J. 185 (187)=26 A.W.N. 51; *Halimbhai* v. *Shankar*, 10 Bom. 381; *Shanker* v. *Chunilal*, A.I.R. 1926 Nag. 37.

But in *Bhola Nath* v. *Raghunath*, 122 Ind.Cas. 685=A.I.R. 1929 All. 743=(1929) A.L.J. 918=51 All. 1010, a Bench of the Allahabad High Court, consisting of *Sulaiman* and *Niamatullah J J.* took a different view. See also *Ahmed Abdulla* v. *Cassume Ahmed* A.I.R. 1934 Bom. 388=36 Bom.L.R. 827=153 Ind.Cas. 949; *Aminchand* v. *Kashiram* ,A.I.R. 1927 Lah. 187; *Parbatamma* v. *Subbamma*, A.I.R. 1935 Mad. 349=157 Ind.Cas. 607=68 M.L.J. 537.

319. Conflict set at rest.—By the incorporation of S. 5 of the Arbitration Act of 1899 in the new Act of 1940, as section 5, the conflict has been set at rest. Now in arbitration in pending suits also, the court is empowered to grant leave to revoke an arbitration in a fit and proper case.

320. Power of court to withdraw.—Where certain matter before the court is properly referred to arbitration by the parties, the arbitrator alone can be said to be seized of the matter and it is correct for the court to assume jurisdiction to decide the point in controversy. *Akhiman* v *Ram*, A.I.R. 1958 All. 437.

321. Authority of the arbitrator—meaning of.—A reference to arbitration is nothing but the consignment of the case to particular arbitrators and the authority conferred on them. When the section speaks of the authority of the arbitrators, it implies the reference, which can therefore be revoked with the leave of the court. *Prafulla* v. *Panchanan*, 222 Ind. Cas. 597=50 C.W.N. 287=81 C.L.J. 1=A.I.R. 1946 Cal. 427.

322. Section is not limited to stage before passing of award.—There is no reason to limit the operation of this section to cases where an award has not yet been made. Until an award is made a decree of the court, the submission remains, and it can, within the language of the section, be revoked with leave. *Prafulla* v. *Panchanan*, A.I.R. 1946 Cal. 427=50 C.W.N. 287=81 C.L.J. 1=222 Ind. 597.

323. Power of Court to supersede the arbitration on good cause.—In *Prafulla* v. *Panchanan* A.I.R. 1946 Cal. 427=50 C.W.N. 287, the question arose whether the court can supersede arbitration where it is alleged that the parties have effected compromise of their dispute. In delivering his judgment in the above case *Akram, J.* said: "Once the dispute goes to arbitration the authority of the Court to proceed with the suit is suspended and it cannot deal with subject-matter of the reference so long as the reference stands; it is only when the arbitration is superseded that the suit, as it were, revives and the matter in dispute can be dealt with by the court. What is sought to be done in the present case, is to embark upon an inquiry and to determine whether in fact there has been a compromise, which one of the parties disputes. Such an inquiry in my opinion will necessitate dealing with subject-matter of the reference and that will be contrary to section 23, clause (2) and section 25, proviso to the Arbitration Act. I am, therefore, of opinion that so long as the

reference subsists the present enquiry in pursuance of the order 4th August, 1946 cannot go on. Reference in this connection may be made to the case of *Dholichand* v. *Mohanlal,* A.I.R. 1924 Cal. 722=51 Cal. 432=83 Ind.Cas. 606.

324. When arbitrator ceases to be a member of the association. —Where a person is appointed an arbitrator as a representative of the members of an association, the fact that he subsequently lost the representative capacity would not result in taking away from him the authority of an arbitrator because the Arbitration Act makes no such provision. *Jai Dayal v. Chunilal,* 1950 A.L.J. 698=A.I.R. 1951 All. 359.

325. Revocation by further reference.—Where by an agreement one of the points in dispute which have been referred to arbitration is settled by a subsequent agreement between the parties and the agreement states that the arbitrator should take note of it, the agreement cannot be construed as one revoking the earlier agreement so as to call in aid the provisions of section 5 to invalidate the second agreement. *Kosaraju* v. *Kosaraju,* A.I.R. 1951 Mad. 678=63 L.W. 1120=(1910) 2 M.L.J. 812. So where by an agreement one of the points in dispute between the parties and which had been referred to the arbitrator for settlement has been settled among themselves and the arbitrator is requested to take note of that agreement and incorporate that agreement in the award, the arbitrator would be guilty of misconduct if it fails to incorporate such an agreed solution of the point in dispute between the parties. *Ibid ;* see also *Mukund Ram* v. *Saligram,* 21 Cal. 590 (600)=21 I.A. 47 P.C. ; *Janendra* v. *Suresh Chandra,* 6 Pat. 556 (563)=A.I.R. 1928 Pat. 7 ; The *Bristol and North Somerset Ry. Co.* (1867) 16 L.T. 326.

326. Recession of contract.—In *Firm Chandra Lal* v. *Graham Trading,* A.I.R. 1941 Lah. 427=I.L.R. (1942) 23 Lah. 788=198 I.C. 17 the contract for sale of goods gave a right of re-sale to the seller in case of default on the part of the buyer and provided that any dispute arising out of the contract whatever its nature shall, unless amicably settled, be referred to arbitration ; it was held that the arbitration clause being an integral part of the contract was also cited out on the rescission of the contract by the seller by the exercise of his right of re-sale and hence no reference to arbitration could be made in pursuance of the arbitration clause. In the above case, the case of *Hirji Mulji* v. *Cheong Yue,* (1926) A.C. 497=95 L.J.P.C. 121=134 L.T. 737 was relied upon. In delivering his judgment *Tek Chand J.* observed : "The question was considered at great length by their Lordships of the Privy Council in (1926) A.C. 497, on appeal from the Supreme Court of Hong Kong. There the charter-party, the plaintiffs had agreed to place their steamship at the disposal of the defendants on a certain date for a specified period. The charter-party contained a clause by which all disputes arising out of it were to be submitted to arbitrator at Hong Kong. Before the date of performance, however, the ship was requisitioned by the Government and was not released until after expiry of the period mentioned in the charter-party. After the release the plaintiffs offered delivery of the ship but the defendants refused to accept it. Thereupon the plaintiffs referred the matter to arbitration in pursuance of the clause in the charter-party. The arbitrator awarded the plaintiffs damages for breach of contract and the plaintiffs brought an action upon the award. It was held that there had been a frustration of the charter-party, which forthwith brought an end of the whole contract, including the submission to arbitration and, consequently the arbitrator had no jurisdiction. The award was held

to nullity and the action was dismissed. *Lord Summer,* who delivered the judgment of their Lordships said : "That a person before who a complaint is brought cannot invest himself with arbitral jurisdiction to decide it, is plain. His authority depends on the existence of some submission to him by the parties of the subject-matter of complaint. For this purpose a contract that has determined is in the same position as one that has never been concluded at all. It finds no jurisdiction.

The same question was again considered by the Full Bench of the Lahore High Court in *Firm Karam Narain* v. *Volkart Brothers,* A.I.R. 1946 Lah. 116 (F.B.)=48 P.L.R. 116. It has been held in that case that where a contract of sale of goods contains an arbitration clause, and the seller expressly reserves a right of re-sale in case the buyer should make default, the arbitration clause is not wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale under the contract and hence reference to arbitration can be made in pursuance of the arbitration clause. In delievering his judgment, *Harries C.J.* said : "Frustration of a contract, therefore, puts an end to the contract without breach by either party and no question of damages can possibly arise unless the contract was partly performed before frustration. On the other hand, in cases of rescission under section 54, sub-section (4), or section 60, Indian Sales of Goods Act, questions of damages can arise though the rescinded contract is merely executory. That being so. 1926 A.C. 497 can have no application to cases falling within section 54, sub-section (4) or section 60, Indian Sales of Goods Act, and in my judgment the decision of the House of Lords in (1942) 1 All. E.R. 337 is applicable to such cases. The cases in 23 Lah. 788 and 455 P.L.R. 287, no longer, therefore, be regarded as good law and must be overruled. Where rescission occurs as a result of a re-sale under section 54, sub-section (4), Indian Sale of Goods Act, there is only a rescission in the limited sense as defined in (1942) 1 All. E.R. 337, and the arbitration clause survives for the adjudication of any claims arising from breach of contract." In *Heyman* v. *Darwins* (1942) 1 All. E.R. 337=(1942) A.C. 356, it has been held that where these has been a total breach of contract by one party so as to relieve the other of obligations under it, an arbitration clause, if its forms are wide enough, still remains even though the injured party has accepted repudiation. The contract was not put out of existence though all future performance of the obligathions undertaken by each party in favour of the other might cease. The contract survived for the purpose of measuring the claims arising out of the breach and either party may rely on arbitration clause. Where the arbitration clause is distinct from the other clauses in the contract total breach of the substantives even when it is accepted by the other party does not abrogate the arbitration clause and even the party in default may invoke the clause. But the parties are not bound to have recourse to arbitration. They may settle their disputes directly and agree not to invoke the arbitration clause for that purpose. The arbitration clause ceases to exist with reference to the disputes which are thus settled. They may also enter into a substituted agreement in complete supression of the original contract and thereby the contract and the arbitration clauses contained in it. *Union of India* v. *Kishori Lal,* A.I.R. 1953 Cal. 642. The persistent breach of substituted agreement did not revive the original contract. *Ibid.*

327. Reference made to arbitrator.—it can be abandoned by consent of parties.—(1) After a reference to arbitration has been

made in a suit through the court, the parties cannot be allowed, by mere consent, to abandon the arbitration and go on with the suit or ask for a fresh reference. (2) But if a concluded compromise in undisputed terms be placed before the court by all the parties whether before an award has been made or after, the court may grant leave to revoke the submission under S. 5 of the Arbitration Act, and on superseding the arbitration agreement under s. 12(1)(b), pass a decree in terms of the compromise. But the compromise. before it is accepted must be considered on its own account as to whether it is valid and cannot be accepted as a matter of course. (3) Where however, a compromise is only alleged by one party but disputed by the other, the existence of such a disputed compromise cannot be good ground for granting a leave to revoke the submission and the court has no power to entertain the question of such a compromise or to embark upon an enquiry as to its factum. (4) In no case can a compromise be given effect to by the court without first superseding the reference.—*Per Chakravarty, J.* in *Prafulla Chandra* v. *Panchanan,* 222 Ind.Cas. 597=50 C.W.N. 287=81 C.L.J. 1=A.I.R. 1946 Cal. 427.

328. Effect of revocation.—"If leave is granted to revoke a submission, the arbitration agreement in my view, is not superseded, but simply dissolved or revoked. If it be superseded that supersession is authorised by section 12(2)(b) of the Act and S. 23(2) is not violated. Nor is the award, if one has been made, set aside or affected by such revocation with leave, since it is only put aside and not considered." Per *Chakravarti, J.* in *Prafulla* v. *Panchanan,* A.I.R. 1946 Cal. 427 (434). The revocation of reference to arbitration would only have the effect of nullifying any adjudication made by the arbitrator and relegating the parties to the position occupied by them as if there was no adjudication. *Panchapagesa* v. *Kalyansundaram,* A.I.R. 1957 Mad. 472. But where the partition had been arrived at and the lists constituting *aide-memoire* of the partition had come into existence before the arbitrator was appointed and all that the arbitrator did was nothing more than to suggest to the parties the first way of allotting the shares to the four shares: *Held* that the revocation of the reference would neither nullify or invalidate either the partition or the admission of the lists in evidence. *Ibid.*

329. Scope of Hirji Mulii v. Cheong Yue (1926) A.C. 497— In *Firm Karam Narain* v. *Volkart Bros.,* A.I.R. 1946 Lah. 116 (F.B.) *Ramlal J.* said: "Much has been said about *Hirji Mulji* v. *Cheong Yue* (1926) A.C. 497, and is clear that the decision is binding on the courts in India.....The facts of this case have already been stated in the judgment of the learned Chief Justice. Suffice it to say here that the contract had been frustrated long before any portion of the contract could have been performed. *Lord Summer* in delivering the judgment of the Privy Council examined the meaning, scope, and effects of frustration. The doctrine of frustration rests on an implied term in the contract, that the parties would have, had they anticipated it, made provision for the happening of an event such as restraint of Princes which frustrated the object of adventure. In other words, the parties should be deemed by necessary implication to have contracted that if Government requisitioned the ship before it could be tendered, there would be no liability for failure to tender and conversely if the tender could not be made it could not be accepted. It was said at p. 505 of 1926 A.C. (497): 'The legal effect of the frustration is the immediate termination of the

contract as to all matters and disputes which have not already arisen.' Now it appears to me that the ground on which the decision in 1926 A.C. 497 rests is that no dispute could arise till the time of performance began, neither party having shewn an intention not to be bound by the contract before 1st March, 1917. When frustration took place on the requisition of the ship by Government, both parties were excused from further performance of the case and, therefore, there were no dispute that could be submitted to an arbitrator.....As I have endeavoured to show where a contract is repudiated and then rescinded, the only claim that survives is one of damages and if by factum of frustration a claim for damages cannot be put forward, there is no dispute which can be made the subject-matter of an award.....It will be seen, therefore, that 1926 A.C. 497 was one .where the contract is executory and which was frustrated long before performance could begin.....(1926) A.C. 497 dealt only with the effect of frustration of wholly executory contracts and it analogy cannot be extended to cases of contracts which have been partly performed and cases like the refusal to tender or take delivery of a whole instalment or other form of anticipatory breach." In the same case *Harris C.J.* said: "The learned Lord (*Lord Summer*), however, makes is clear that in cases of frustration the contract remains alive for the purpose of vindicating rights already acquired under it on either side." This case was cited with approval by a recent decision of the Supreme Court while discussing the law as regards frustration. *Vide Stayabrata* v. *Munguram,* A.I.R. (1954) S.C. 44 para 12, which supports the view of *Ramlal J.* in A.I.R. 1946 Lah. 116 (F.B.). But the question of frustration of a constract must be left to arbitrators, particularly when such question depends on facts. If that is the only question involved in the case, the court would refuse to grant leave to revoke the authority of the arbitrators. *Bhuwalka Bros.* v. *Rajputana,* 6 D.L.R. (Cal.) 108. It must also be mentioned that in House of Lord's case *Heyman* v. *Darwin Ltd.,* (1942) 1 All. E.R. 337 *Viscount Summer* expressed the views that the judgment in *Hirji Mulji's* case so far as the effect of frustration of contract on an arbitration clause was concerned, must not be taken as having established a general rule.

An arbitration clause is distinct from other clauses. A contract with an arbitration clause, rolls as it were, two clauses into one. No doubt if the main contract does not exist, also the arbitration agreement cannot exist. *Damodar* v. *Union of India.* A.I.R. 1959 Cal. 526; see also *Heyman* v. *Darwin,* (1942) 1 All. E.R. 337 = (1942) A.C. 356.

330. Arbitration clause—form of.—Where the parties to the arbitration under an independent agreement after discarding the contract it was not right in law or correct in fact to treat them as having gone to arbitration under a further agreement for which they utilised the piece of writing in which the arbitration clause was expressed. *In the matter of Albion Jute Mills,* 92 C.L.J. 43 = A.I.R. 1953 Cal. 458. A dispute as to whether there had been a contract at all, cannot be a dispute arising out of our concerning a contract and therefore for an agreement to refer to such a dispute the language of the arbitration clauses cannot be appropriated. *Ibid.*

331. Burden of proving just or sufficient cause for obtaining leave.—The power to grant leave to revoke a submission is exercised by the court in a sparing and cautions manner. *Scott* v. *Van Sandw,* (1841) 1 Q.B. 102; *Re Woodcroft & Jones,* (1841) 9 Dowl. 538; *S. S. Dean*

Airlie Co. Ltd. v. *Mitsui & Co. Ltd.* and *Bristol Oil and Cake Mills Ltd.*, (1912) 106 L.T. 451 C.A.J. and unless the applicant can establish that there will be failure of justice if the reference is allowed to proceed, he will not be allowed to revoke. *Halsbury*, 2nd Edn., Vol. I, p. 635. Such a leave is to be given after considering the convenience of the parties. *Scott* v. *Van Sandu, Supra : The Ithaka* (1939) 3 All. E.R. 630. In *Ram Kumar Singh* v. *Jugmohan Singh*, 33 All. 315 (319). *Tudball J.* observed: "As to the second point, the burden of proving revocation for *good cause* was upon the plaintiff, and he has failed to put forward any evidence, on the point. It was not for the defendant to prove the negative, *i.e.*, the obsence of good cause." But the onus of showing that some sufficient reason exists, why the matter should not be referred to arbitration, is upon the person opposing the application and upon the applicant to show that no such reason exists *Jokiram Koya* v. *Ghanshamdas*, 47 Cal. 894=25 C.W.N. 62=61 Ind. Cas. 380. See also, *Aboobakar Latif* v. *Reception Committee, Indian National Congress*, A.I.R. 1937 Bom. 410=171 Ind.Cas. 470=39 Bom. L.R. 476.

332. Section 5 and Section 34—Scope.—The difference between an application under this section and one under section 34 of the Act is a difference as to the point of time when the application is made. If the proceedings are commenced in court, application for stay is made under section 34 ; if proceedings have not been commenced in court, the application is made under section 5. The object of both the sections is the same, namely to prevent arbitration. There is therefore no reason why principles governing an application for stay should not be applied to an application under section 5. *Bhuwalka Brothers* v. *Fatehchand*, A.I.R. 1952 Cal. 294=87 C.L.J. 71. In the above case court observed: "It is difficult and undesirable to attempt to define the circumstances in which the court should exercise its discretion. To do so would be to crystallise into a rigid definition that judicial power and discretion which the legislature has, for the best of all reasons, left undetermined and unfettered. No hard and fast rule can be laid down. of all the facts which are material for the purpose of enabling a judge The discretion is to be exercised after appreciation and consideration to exercise a judicial discretion and after application of the right principles, remembering that the parties have for better or worse agreed to make the arbitrator the final judge in their dispute. *Russell* states that the following are the chief grounds for granting leave to revoke (p. 46) (a) error of law, or excess or refusal of jurisdiction by arbitrator ; (b) misconduct of arbitrator : (c) disqualification of arbitrator ; (d) disqualification of arbitrator ; (e) exceptional cases.

"'A material consideration' says the learned author (p. 13) 'for the court as to the order it will make on the application for leave to revoke is the time when the application is made. If it is made at an stage of the arbitration proceedings, the court will more readily grant leave to revoke, assuming always that a good case for revocation is shown' [see the remarks of *Hennedy J. Re Govard (Lord) and London & North Western Railway Co.* (1894) 2 Q.B. 915].

"The principles are thus well-settled. The difficulty in exercising the discretion arises from the fact that in human affairs there is infinite variety and no two cases are exactly the same."

'I venture to put two limits within which the discretion is to be exercised ; one, the court should not lightly release the parties from their bargain, that follows from the sanctity the court attaches to contract ; the other, that the court should be satisfied 'that a substantial miscarriage of justice will take place in the event of its refusal to grant the leave. The discretion is to be exercised within these limits.' ".

333. Arbitration cannot be revoked unless cause shown.—In the year 1868, the Judicial Committee dealing with a case under section 326, C. P. Code of 1859, observed that no party to an agreement to refer to arbitration could revoke the submission without good cause, *vide* 12 M.I.A. 112 ; see also *Prafulla* v. *Panchanan*. A.I.R. 1946 Cal. 427 (434). The Arbitration Act gives no power to the court to revoke the authority of an arbitrator, but only gives it power to give leave to a party to revoke. The other power it gives to the court is to remove an arbitrator. *Morgan* v. *Kharda Co.*, A.I.R. 1959 Cal. 169.

334. Arbitration clause—Failure of arbitration—Duty of court.—Where an arbitration has become abortive it is the duty of the court of law, in working out a contract of which such arbitration was part of the machinery, to supply the defect. Therefore, where in a contract for the sale of goods it was agreed that the purchaser should be entitled to deduct from the price the value of any goods not delivered, such value to be determined by the arbitration, and the arbitrators appointed were unable to agree, the purchaser was entitled, in an action brought by the vendor to recover the contract price, to apply to the court to fix the value of the goods not delivered and to deduct it from the price due, without bringing a cross-action. *Cimeron* v. *Cuddy*, 83 L.J.P.C. 70=(1914) A.C. 651=110 L.T. 89 (H.L.). In delivering the judgment *Lord Shaw* observed : "Where an arbitration for any reason becomes abortive, it is the duty of a court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a court in such circumstances and it is its duty to come to the assistance of the parties by the removal of the *impasse* and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practicable in its character, and it furnishes by an appeal to a court of justice the means of working out and a preventing the defeat of bargain between the parties. It is unnecessary to cite authority on the subject., but the judgment of *Lord Watson* in *Hamlyn & Co.* v. *Talies Ker Distillery* (1894) A.C. 202, might be referred to."

335. Vagueness of arbitration clauses.—Where the arbitration clauses provide that either party shall have the right to call for arbitration on the matter in dispute under the rule of the local Chamber of Commerce without indicating which local Chamber of Commerce is to arbitrate in such dispute, the arbitration clause is invalid as being vague and uncertain. *Karanji* v. *Indo China*, 56 C.W.N. 763.

GROUNDS FOR REVOCATION OF ARBITRATION AGREEMENT

336. By mutual consent.—In *Ram Kumar Singh* v. *Jugmohan Singh*. 33 All. 315=8 A.L.J. 66 *Stanley C.J. observed* : "It appears to me that in this case by mutual consent the contract to refer to arbitration was rescinded, and further, as I think, the arbitrators declined with the arbitration. Consequently, the arbitration proceedings became abortive." See also *Hari* v. *Inder*, A.I.R. 1934 All. 95=1934 A.L.J. 473. If a concluded compromise in undisputed terms is placed before the court by all the parties, whether before an award has been made or after, the court may

grant leave under this section. *Prafulla* v. *Panchanan,* 222 *Ind.Cas.* 597 = 50 C.W.N. 287 = 81 C.L.J. 1 = A.I.R. 1946 Cal. ; 27 ; see also *Luchminarain* v. *Hoare Miller,* 21 Ind.Cas. 217 = 41 Cal. 35.

337. Refusing jurisdiction.—The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction, or refusing jurisdiction, or failing to do all that their jurisdiction requires them to do. *Gaya Prosad* v. *Mutha Lal Budda Lal,* 78 Ind.Cas. 1050 ; *Madras Mills* v. *Krishna,* A.I.R. 1937 Mad. 406 ; *Fariell* v. *Eastern Counties,* 2 Ex. 344 ; *East & West* v. *Kirk,* 12 A.C. 738 ; *Re Gevard,* (1894) 2 Q.B. 915 ; (1895) 1 Q.B. 459.

338. Fraudulent collusion of arbitrators.—Although no party to an agreement of reference can revoke the submission to arbitration, unless for good cause, and a mere arbitrary revocation of the authority is not permitted, the fact, if proved, that the arbitrator was in fraudulent collusion with one of the opposite side might be a good ground for revocation of the submission. *Bansidhar* v. *Sital Prosad,* 29 All. 13.

339. Insolvency of a party.—The insolvency of a party may be a ground for granting leave under this section. *Official Receiver* v. *Karsondas,* A.I.R. 1926 Sind 209 (211).

340. Apprehension of bias.—It is not necessary to show that the arbitration has in fact been biased. It would be enough to show that there is reasonable ground for apprehension that the arbitrator would be biased. *Ramsarup* v. *Khesardeo,* 89 C.L.J. 332. In India, as in England, the court will not refuse an application for leave to revoke the authority of an appointed arbitrator on the ground that a party knows or ought to have known that the arbitrator by reason of his relation towards any party to the agreement or his connection with the subject-matter referred might not be capable of impartiality. *Bhuwalka Bros.* v. *Fatehchand,* A.I.R. 1952 Cal. 294 = 87 C.L.J. 71. In that case the court observed : 'An arbitrator who has an interest dependent upon his decision is disqualified if either party at the time of his appointment was ignorant of the fact that this would be so, and the interest is of such a nature that it ought to have been disclosed.....In England, therefore, the court at present will not refuse an application to revoke a submission or to stay arbitration on the ground that a party knew or ought to have known that the arbitrator by reason of his relation towards any party to the agreement or his connection with the subject-matter referred might not be capable of impartiality. There is no section in our Act of 1940, yet I think we can adopt the principle underlying the English section for the purpose of doing substantial justice.

"It is the most fundamental principle of justice that a judge or a tribunal should not decide a dispute if there is a probability that he would be biased in the case."

In an application for leave to revoke the authority of an arbitrator, it is not necessary to say that the arbitrator will in fact be biased. All that is necessary is to show that there is a probability of bias or a reasonable prospect or apprehension of bias.....Where some circumstance exists in situation of an arbitrator, which tends to produce a bias in his mind, he should not act as an arbitrator in the matter concerned. *Bhuwalka Bros* v. *Fatechtnd,* 87 C.L.J. 71 = A.I.R. 1952 Cal.294. Different consideration may arise in an application to set aside an award on the ground that the arbitrator is biased. *Ramgopal* v. *Ramsarup,* 89 C.L.J. 332.

If after a reference to arbitration, it transpires that the arbitrator has been acting as an *ammuktear* of one of the parties without any remuneration, the other party is entitled to withdraw from the reference, and the award made by the arbitrator after receipt of notice of revocation cannot be enforced by suit. *Mahomad Wahidain* v. *Hakiman*, 29 Cal. 279=6 C.W.N. 235. If the arbitrator is indebted to one of the parties at the time of the reference or becomes so indebted after the reference, and in either case does not disclose the fact to the other party, such party would be entitled to revoke the reference upon discovery of the fact, and any award made by such arbitrator would be invalid on the ground of judicial misconduct. *Ibid. See also, O. R. Coley* v. *A. Dacosta*, 17 Cal. 200; *Toosimoni Dasi* v. *Sudevi Dasi*, 3 C.W.N. 361; *Kali Prosanna Ghose* v. *Rajani Kanto Chatterjee*, 25 Cal. 141. There is an inherent jurisdiction in a court to intervene and supersede arbitration where such an order is necessary for the ends of justice or to prevent the abuse of the process of the court. *Bhola Nath* v. *Raghunath*, A.I.R. 1929 All. 743=(1929) A.L.J. 918=51 All. 1010. See also, *Jackson* v. *Barry Rail*, (1893) 1 Ch. 238; *Neittal* v. *Manchester Cor.*, 8 T.L.R. 513; *Re Barring Bros.*, 61 L.J.Q.B. 704; *Re Frankenberg*, 10 T.L.R. 393; *Karamdin* v. *Mohammad*, 38 P.L.R. 480. In the case of a named arbitrator all those considerations which affect the qualification of a person who may be suspected, though unreasonably of bias in a judicial position must be laid aside, unless it can be shown that the arbitrator has prejudiced the case or his actual bias. *Narayan* v. *Kalwanti*, I.L.R. (1959) 1 Cal. 506.

341. New contract—arbitration clause in the old contract whether enforceable.—Where a new contract has been arrived at between the parties superseding the old contract containing an arbitration clause, the origial arbitration clause cannot be enforced. *Luchmi Narain* v. *Hoare Miller & Co.*, 21 Ind.Cas. 217=17 C.W.N. 1098=41 Cal. 35; see also *Bahadur* v. *Nagar Mal*, 45 C.W.N. 795=I.L.R. (1941) 1 Cal. 451=A.I.R. 1941 Cal. 594.

342. Excess of jurisdiction by arbitrator.—When an arbitrator exceeds the jurisdiction which has been given to him by the parties a good ground is made out for making an aplication under this section. *Russell*, 15th Edn., p. 50. "The question of jurisdiction" says the learned author "generally arises upon the reception or rejection of evidence, but when the reception or rejection of evidence is merely a question of law and not of jurisdiction, the court in the exercise of its descretion will usually refuse leave to revoke the submission." *Russel*, 15th End., p. 51.

343. Misconduct of arbitrator.—"Legal misconduct" is a term which is commonly used in reference to awards. It does not necessarily involve any moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of justice. *Abooba-ker Latif* v. *Reception Committee, Indian National Congress*, 171 Ind.Cas. 470=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410. In *Williams* v. *Wallis*, (1914) 2 K.B. 478=83 L.J.K.B. 1296=110 L.T. 999, *Atkin J.* observed: "With regard to the main question, I think the Deputy Judge formed a misconception of the meaning of misconduct. It does not necessarily involve an imputation of personal turpitude in the arbitrator. It really does not mean much more than such a mishandling of the arbitration as is likely to cause some substantial miscarriage of justice, and one instance of this is where the arbitrator refuses to hear evidence upon a

material issue. It is clear that the evidence tendered by the appellant was material, and if in fact the arbitrator did respect it, that, in my opinion, would be evidence of misconduct entitling the Country Court Judge to set aside the award." See also, *Kanhaya* v. *Sheo Karan,* 39 P.L.R. 582. The expression "misconduct" is of wide import and includes on the one hand bribery and corruption and on the other a mere mistake as to authority conferred by the submission. An arbitrator is not tied down to rigid or technical rules of evidence or procedure. But he must observe the first principles of justice and in accordance with the principles of justice, equity and good conscience. *Carter* v. *Oakley Duncan,* 12 Mys. L.J. 81=39 Mys. H.C.R. 263.

The court has power to give leave to revoke a submission to arbitration where it appears that the arbitrator is going wrong in point of law, even in a matter within his jurisdiction. *East and West India Docks Co.* v. *Kirk,* 57 *L.J.Q.B.* 295=12 App.Cas. 738=58 L.T. 158 (H.L.). In the above case the question, arose upon a contract for the construction of docks, containing a clause for the settlement by the arbitrator of differences as to the meaning of the contract and anything to be done thereunder, and for the submission to be made a rule of court. An arbitrator was duly appointed and in the proceedings before him certain evidence was tendered by the contractors which was objected to by the company on the ground that the rights and obligations between the parties were contained in the contract in writing, and could not be affected by the alleged fact (which was denied) that the soil, or the depth of the work proved to be of an unexpected character. The arbitrator overruled the objections on grounds which he embodied in a written decision. The company moved for leave to revoke the submission (i.e., "to revoke the authority of the arbitrator appointed in pursuance of the submission"). A rule *nisi* was granted by *Smith J.* and *Gratham J.* accordingly ; but was discharged by a Divisional Court consisting of *Grove J.* and *Stephen J.* The latter decision was affirmed by the Court of Appeal (*Lord Coleridge C.J., Lindley L.J.* and *Lopes L.J.*) and the company appealed to the House of Lords. The ground of decision both in the Divisional Court and in the Court of Appeal was that the court had no jurisdiction to interfere with a pending arbitration, unless it was shown that the arbitrator was acting in excess of the jurisdiction. The Lords present at the hearing of the appeal in the House of Lords were *Lord Halsbury L.C., Lord Watson, Lord Fitzgerald* and *Lord Macnaghten ;* and in the course of the argument *Lord Halsbury L.C.* intimated that the House had no doubt that it had jurisdiction to give leave to revoke the submission (*i.e.,* authority of the arbitrator) *if there was reasonable ground for supposing that the arbitrator was going wrong in point of law, even in matter within his jurisdiction.*

The effect of the decision of the House of Lords in *East and West India Docks Co.* v. *Kirk,* 12 App.Cas. 738, is commented on by the Court of Appeal in a case which came before them shortly afterwards. *James* v. *James,* (C.A. 1889) 23 Q.B.D. 12=58 L.J.Q.B.D. 424. The Queen's Bench Division, *Denman J.* and *Stephen J.* had refused the leave, and the Court of Appeal (*Lindley L.J.* and *Lopes L.J.*) affirmed that refusal. *Lindley L.J.* says in his judgment at page 15 of 23 Q.B.D. : "I do not understand the case of *East and West India Docks Co.* v. *Kirk* (*ante*), as laying down any general rule opposed to what had been the ordinary practice previously. That case being one of a very exceptional character, the House of Lords took the view that it was expedient and right under the circumstances to compel the arbitrator to state a special case with

regard to the purposes for which he had received, and the effect which he had given to, certain classes of evidence as to matters involving enormous expense. It was a question of discretion this court did not think the circumstances of the particular case such as to render it right to interfere ; the House of Lords differed from that view ; but I do not think they intended to lay down any general principle on the subject". See also, *Re Gerard (Lord) and London and North Wester Railway Co.* (1894) 2 Q.B. 915, on appeal (1895) I Q.B. 459 (C.A.).

Doubtless, in regard to the "leave of the court" under the 1st section of the Arbitration Act, 1889, the court has the same discretion as it had under the 39th section of the Act of 3 & 4 Will. IV, so that the two last-mentioned decisions will still furnish a rule as to jurisdiction and the discretion of the court under the latter Act *Campbell's Ruling Cases,* Vol. III, p. 369.

Viscount Hailsham thus states the law on the subject : "Formerly, where it could be shown that the arbitrator was going to make some mistake in the matter of law, the court would in certain cases grant leave to revoke the submission, unless he undertook to state his award in the from of a special case for the opinion of the court [*Fariell* v. *Eastern Counties Railway Co.,* (1848) 2 Ex.Ch. 344 ; *Re Hart and Duke,* 32 L.J.Q.B. 55 ; *Robinson & Co.* v. *Davies & Co.,* 5 Q.B.D. 26 ; *East and West India Docks Co.* v. *Kirk and Randall,* 12 App.Cas. 738] ; but in such a case the proper application to be made is not for leave to revoke the submission but for an order directing the arbitrator to state a special case [Arbitration Act, 1889 section 19 ; *Re Palmer & Co.,* and *Horkin & Co.,* (1898) I Q.B. 131 (139]." *Halsbury,* 2nd Edn., Vol. I, p. 636. In the last-named case *Chitty L.J.* observed : "In the *East and West India Docks case,* 12 App.Cas. 738 decided before the Arbitration Act, 1889, was passed, it was held by the House of Lords that the court had jurisdiction to give leave to revoke the submission if there was reasonable ground that the arbitrator was going wrong in point of law, even in matter within his jurisdiction. The leave would have been given in the circumstances of that case if the parties had not come to terms that the arbitrator should state a special case for the decision of the court. This jurisdiction, as was held in *James* v. *James,* 23 Q.B.D. 12, is discretionary and to be exercised according to the circumstances of the case. In the *East and West India Docks case,* 12 App.Cas. 738, the discretion was exercised while the arbitration was still pending and consequently the decision does not directly bear on the present case. *Granting leave to revoke is a strong measure and a drastic remedy.* As the law then stood, it was considered the right mode of controlling the arbitrator in matters of law : and the case shows the importance attached by he House of Lords to keeping the arbitrator right in point of law ; and in this respect it has an indirect bearing on the present case." In this connection it should be borne in mind that in England the court can compel an arbitrator to state a case. The courts in India have no such power. The Indian Arbitration Act, 1899, section 10 as well section 13 of this Act leave it to the discretion of the arbitrators to state a special case or not as they choose : and the court has no power to enforce its rulings or directions upon the arbitrators if they do not choose to follow the rulings or obey the direction. *Re Atlas Insurance Co.,* 10 Bom.L.R. 351. In this connection *Russell* says : "The court has power to give leave to revoke on the ground that the arbitrator is going wrong in point of law (even in a matter within his jurisdiction) : but it has never been the practice to

exercise this power except when the parties refused to consent to the arbitrator's stating a special case, on the point of law involved. Since 1934, no such consent can be required [*Vide* section 21 (1)], while the court has power at any stage to order a case to be stated. It is therefore submitted that the power to give leave to revoke merely upon this ground would not now be exercise." *Russell,* 15th Edn. 50.

Gross misconduct tnd unfairness on the part of an arbitrator is sufficient for grant of leave of court. *Drew v. Drew & Leburn,* 2 Maq. 1, *European and American Steam Shipping Co.* v. *Crossky,* 8 C.B.N.S. 397. To induce the courts to permit a party to rescind his submission, strong grounds must have been laid before them. *James* v. *Attwood,* 7 Scott. 813. See also, *Re Dreyfus & Sons and Paul,* 9 T.L.R. 358. Where there did not appear to have been any misconduct on the part of the parties or arbitrators, the court refuscd to direct a submission to be revoked. *Woolcroft, In re,* 9 D.P.C. 538=5 Jur. 771. An arbitrator having erroneously refused to require the plaintiff to produce his books, the court, upon application before award, ordered that the arbitrator's authority should be revokcd unless the plaintiff allowed the defendant to open and look at the book. *Hart* v. *Duke,* 32 L.J.Q.B. 55. See also, *Re Atlas Insurance Co.,* 10 Bom.L.R. 351.

344. Interminable delays.—The power of court to grant leave to revoke the authority of an appointed arbitrator is discretionary and ought to be cautiously and sparingly exercised, but such power should be exercised by the court in favour of the applicant if it appears to the court that the main object of all submissions to arbitration, which is to obtain "speedy end of the strife," is not likely to be attained and the applicant is likely to be subjected to "multiplied expenses" and "interminable delays" by the conduct of the arbitrators. *In re, Indian Arbitration Act, Re Atlas Insurance Co.,* 10 Bom.L.R. 351. See also, *Coley* v. *Da Costa,* 17 Cal. 200 : *Bhogilal* v. *Chimanlal,* 52 Bom. 116=30 Bom.L.R. 92=107 Ind.Cas. 707=A.I.R. 1928 Bom. 49 ; *Vishwas* v. *Bhalchand,* A.I.R. 1931 Bom. 529=33 Bom.L.R. 1022=134 Ind.Cas. 733 : *Madho* v. *Sambhasiva,* 54 Ind.Cas. 126 : but see, *Kunjlal* v. *Banwarilal,* 48 Ind.Cas. 711=4 P.L.J. 394 ; *Secretary of State* v. *Balwant Singh,* A.I.R. 1933 Lah. 18. But the failure of the arbitrator to make his award within four months under section 3 does not automatically result in the cancellation of the arbitration agreement. *Shiv Ram* v. *Ram Rakha.* A.I.R. 1951 Pepsu. 45=6 D.L.R. (Pepsu.) 13.

In *Kishore Lal Ramdayal* v. *Laxman Rao,* A.I.R. 1940 Nag. 386=(1940) N.L.J. 443, the court observed : "Unreasonable delay on the part of the arbitrator amounts to legal misconduct as laid down in *Coley* v. *Dacosta,* 17 Cal. 200, and *Bhogilal* v. *Chimanlal,* A.I.R. 1928 Bom. 49=107 Ind.Cas. 707=52 Bom. 116=30 Bom.L.R. 92. In 17 Cal. 200 (*supra*), the delay was not for more than a year and there it was held that it was such a delay as entitled a party making the submission to the arbitration to revoke the reference and withdrew the proceedings from the arbitrator. In 52 Bom. 116 (*supra*) the delay was for about five years, but the length of the delay was not the criterion for the decision of the case. At its page 120 the case in 17 Cal. 200 (*supra*) was noticed by their Lordships of the Bombay High Court and it is stated in that case that 'there was an agreement to go to arbitration on 31st March, 1886. Nothing appears to have been by the arbitrators beyond the fact that two or three meetings were held and matters so continued till 8th December, 1886, on

which date one of the parties wrote withdrawing from the arbitration. The point was whether he was entitled to do that, and the court held that he was. What is necessary in such a case of arbitration is that once an arbitrator is appointed the parties to the arbitration are entitled to insist that the arbitration should be proceeded with reasonable speed and if there be an unreasonable delay which is unexplained and not justified by the circumstances of the case the parties to arbitration will be justified in revoking the reference and if an award is given after a long delay he will be entitled to ask court to file the award'. . . The authorities therefore clearly indicate that even a delay of one year in arbitration proceedings, if not properly accounted for, vitiate the awards. As there is no explanation whatever in this cause as to why the delay occurred the award would be set aside." See also 34 Bom. 1. Under S. 5. of the Arbitration Act an agreement to refer disputes to arbitration is irrevocable. Once there is valid reference to arbitration the parties can not resile from it merely because the arbitrators have allowed their time to expire without making any award. *Shyamlal* v. *Hukum chand* 1963 M.P.L.J. (Notes) 60.

345. Failure of justice.—The Court should exercise its discretion in granting leave to revoke a submission, in a sparing and cautious manner and should do so, unless the applicant can establish that there is good ground for apprehending that there will be failure of justice if the reference to arbitration is allowed to proceed. *Goverdhan* v. *Ram Chand*, 47 Ind. Cas. 783 : *Gaya Prosad* v. *Mathulal*, A.I.R. 1925 All. 202 : *Lachuman* v. *Moghal*, 86 Ind.Cas. 540 : *Ganguram* v. *Sumangal*, A.I.R. 1933 Sind 347. See also *Cooper* v. *Shuttleworth*, (1856) 25 L.J. Ex. 114.

346. Revocation of reference, where arbitrator is interested.—An arbitrator who has an interest upon his decision will be disqualified if the fact has not been disclosed at the time of the appointment. If the parties with full knowledge of the facts, select an arbitrator who has to perform other duties which will not permit him of being an impartial person, the court will not release them from the bargain they have agreed upon. Where, however, one of the parties to the reference is an illiterate woman, unable to sign even her name, mere knowledge on her part of the arbitrator being interested is not enough. It must be shown—the burden being on the party desiring to uphold the reference—that she thoroughly comprehended the transaction, and was made aware of the implications and consequence of her act. If that onus is not discharged, the reference can be revoked. It is not necessary for her to wait for the award to be made and then attack it. The court has inherent jurisdiction to revoke such a reference. *Parvathamma* v. *Subbamma*, 157 Ind.Cas. 607=41 L.W. 261=(1935) M.W.N. 141=A.I.R. 1935 Mad. 349=68 M.L.J. 537. But see *Mr. Justice Banerjee's* judgment in *Bhuwalka Brother* v. *Fatehchand*, 87 C.L.J. 71=A.I.R. 1952 Cal. 291 quoted under the heading of *Apprehensive of bias.*

347. Improper appointment of umpire.—In the *European and American Steam Ship Co.* v. *Croskey & Co.* (1860) 29 L.J.C.P. 115, leave was granted by court to revoke where a person not known to one of the arbitrators was appointed an umpire by lot. Where the umpire is not an impartial person leave to revoke may be granted. *Goverdhandas* v. *Ramchand*, 47 Ind.Cas. 783=12 S.L.R. 41.

348. Where third party sought to be made liable in damages was to sign agreement of reference.—Leave to revoke a reference to arbitration will not be given unless a substantial miscarriage of justice will take

place in the event of leave being refused. S filed a prosecution under section 500, Indian Penal Code against one C. The gist of the complaint was that the accused insinuated that the complainant was not a fit person to associate with socially or religiously. After several hearings the criminal case was compromised and the disputes regarding damages were referred to the pleader of the parties as to what compensation if any should be allowed to the complainant. The reference was signed by S, C and one G, on whose misrepresentations it was alleged the offence was committed. G applied to revoke the reference : *Held* that in making himself a party to the reference and executing it G had done a most extraordinary thing. It was absolutely necessary to have clear definite evidence that G was aware of the nature of the transaction embodied in the reference which he signed and of the risk and liability to which he was exposing himself. G had in the circumstances not the least notion of what he was signing, and his application for revocation should be granted—*Gangaram Gurnath* v. *Sumangal Bhikaji,* A.I.R. 1933 Sind 347. In the above case *Lobo, A.J.C.* said : "By signing a reference to arbitration the applicant has given up his ordinary right to resort to the ordinary court of law and to have his civil liabilities decided thereby. A contract appointing arbitrators is a contract *uberrima fides,* and unless there is complete confidence between the tribunal and the parties it would be wrong to bind a party to his contract when there is a probability that injustice would result from doing so."

349. Charges of fraud.—The English Arbitration Act of 1950. section 24 (2) re-enacts section 14 (2) of the English Arbitration Act of 1934. Section 24 (2) of the English Arbitration Act of 1950 runs as follows : —"(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so for as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement." *Russell says* : "It is expressly provided that where there is an agreement for the arbitration of future disputes, and a dispute arises under it involving a charge of fraud, the court may order that the agreement cease to have effect and revoke any submission of the dispute, so far as is necessary to enable the charge of fraud to be investigated by the court. There is no authority upon the operation of this section, but presumably the discretion will be exercised in the same manner as the discretion to refuse a stay of a concurrent action in such cases." *Russell,* 15th Edn., p. 53. It is doubtful whether this rule can be followed here in India in the absence of a corresponding section in the Indian Arbitration Act of 1940.

350. When arbitration should not be revoked.—Arbitration agreement cannot be revoked where one of the arbitrators appears as a witness for prosecution in case under section 107, Cr. Pro. Code pending the party seeking to revoke the arbitration. *Sheonarain* v. *Balaram,* A.I.R. 1932 All. 346. A compromise which is disputed by some of the parties to reference cannot be a good cause for such leave as in that case, there is not a mere possibility but certainty of further contention. *Prafulla* v. *Panchanan,* A.I.R. 1946 Cal. 427.

351. Notice of filing revocation application.—In order to revoke

the authority of an arbitrator, a notice of revocation should be given to him before the completion of the award. *Nagaswamy Naik* v. *Rangaswamy Naik,* 8 M.H.C.R. 46. In the above case the court observed as follows : "The Judge held that there had been a revocation (for reasons which he could not call inadequate) of the arbitrator's authority before the award was made, and that the parties therefore were not bound by the award. After a careful examination of the evidence, we think it appears that the arbitrators closed their enquiry on the 21st, and that, on the 22nd and 23rd, a rough draft of their award was prepared, and the award itself was afterwards, on the 27th, formally made and published. The arbitrators' decision was made known by themselves, or became known, on the the 23rd, and it is in evidence that both the plaintiff and the defendant were present when the arbitrators on that day stated what their decision was. Upon this evidence, even according to the law relied on by the Judge, there could be no revocation of authority, for the arbitrators had in substance fully executed their task, and the reference was at end before the 14th, when the defendant's letter of revocation was received." That observation was made on the supposition that revocation could be made at the sweet will and pleasure of one of the parties. But in India an arbitrator's authority can be revoked only with the leave of the court. So this rule is not applicable in a case contemplated under this section but by analogy we can say that the notice of filing revocation application must be served on an arbitrator before he fully executed his task in order to entitle the applicant to have the leave of the court in a fit and proper case. See also, *Coley* v. *Dacosta,* 17 Cal. 200. But if one party to a submission has been guilty of such laches as to entitle the other party to repudiate submission, the latter will not be deprived of his right to repudiate merely owing to the absence of formal legal notice of revocation. *Vishwas* v. *Bhalchand,* A.I.R. 1931 Bom. 529=38 Bom.L.R. 1022=134 Ind.Cas. 733 ; *Bhogilal* v. *Chimanlal,* A.I.R. 1928 Bom. 49= 107 Ind.Cas. 707=52 Bom. 116=30 Bom.L.R. 92.

352. Leave to be obtained by making application.—The proper procedure to be followed in moving for leave to revoke a submission to arbitration under this section should be by motion in court. *Re Atlas Insurance Co. and Ahemedbhoy Hubbibhoy,* 10 Bom.L.R. 351. According to English practice by such an application a decision of court can be obtained for other purposes. *In re, Gerard,* (1894) 2 Q.B. 915 (918) ; *Tebernach* v. *Knight,* (1892) A.C. 298 (301) ; *East* v. *Kirk,* (1887) 12 A.C. 738. Under S. 5. a party to the arbitration has got a right to revoke the authority of an arbitrator. The only limitation is that revocation is to be done with the permission of the courts. Section 5 does not contemplate the revocation of an agreement but only the revocation of the arbitrator. There is no particular method provided under S. 5. for making an application for revocation of each case. *Union of India* v. *Bahadur Singh* A.I.R. 1963 Assam. 195. If after hearing the parties, the court appoints another arbitrator, the orders of the court constituties permission and the conduct of parties itself amounts to revocation of the arbitrator. *Ibid.*

353. Duty of arbitrator pending proceeding for revocation.—The authority delegated to an arbitrator cannot be revoked except by the leave of the court, and so long it is not revoked he has power to make an award, and there would be no impropriety of conduct on his part in proceeding with the reference after suit field, unless he has notice that there has been an application for leave to revoke the authority conferred

on him, to some court competent to grant such relief. *Firm Dhanapat* v. *Firm Kishinlal,* 35 Ind.Cas. 536. The court can also pass an order for *interim injunction, vide* S. 41 and Sch. II, Cl. 4 "The court undoubtedly has power," says *Russell* "to grant injunction restraining either a party or the arbitrator from proceeding with reference. This power may in general be regarded as analogous to the power to allow revocation of an arbitrator's authority, and these two remedies are often treated as supplementing each other ; an injunction being asked for only where leave to revoke would be inappropriate." *Russell,* 15th Edn., p. 170 Cf. *Jackson* v. *Barry* (1893) 1 Ch. 238 at p. 246 *per Lindley, L.J.*

354. Agreement to refer—reference to private arbitrator—parties whether can resile from agreement.—Where during the course of a proceeding the parties agree that they should be bound by statement of a third party who is not appointed arbitrator under the Civil Procedure Code, and to whom no oath is administered, *held,* that the agreement might be valid under section 23 of the Contract Act, but that it was open to a party to resile from the agreement before the referee had statement. *Bishambar* v. *Radha Kissen,* 133 Ind.Cas. 29=(1931) A.L.J. 393=A.I.R. 1931 All. 557. See also, *Tumman Singh* v. *Sheodarshan,* A.I.R. 1930 All. 162=122 Ind.Cas. 186=52 All. 235.

355. Appeal.—No appeal lies from an order under the section .—*Vide* S. 9 (1) *infra.* But an application for revision in a proper case lies. The order allowing leave to revoke the authority of the appointed arbitrator is not an order superseding the arbitration such as can be appealed against. *Bhaiyalal* v. *Sawani* A.I.R. 1944 Nag. 152=I.L.R. (1944) Nag. 447=1944 M.L.J. 167 ; *Madura Mills* v. *Krishna Ayyar,* A.I.R. 1937 Mad. 405.

356. Injunction against arbitration.—"The court undoubtedly has" says *Russell* "power to grant injunctions, restraining either a party or the arbitrator from proceeding with a reference. This power may in general be regarded as analogous to the power to allow revocation of an arbitrator's authority, and these two remedies are often treated as supplementing each other : an injunction is asked for only where leave to revoke would be inapproprite or inadequate. Thus the cases where an injunction may be asked for seems in general to fall into two classes : (1) Where the contract containing the arbitration clause concerned is impeached—that is where for some reason (*i.e.* fraud, mistake or illegality) the contract can be shown to be not binding, and (2) Where there is lack of impartiality of the arbitrator appointed by an arbitration agreement, or where the validity of the arbitrator's appointment is disputed. The court will always be disinclined to interfere by injunction where the normal machinery of the Act provides adequate safeguards against injustice : for instance where the only grievance could be met by an order for statement of a special case. *Jackson* v. *Barry Ry.,* (1893) 1 Ch. 246." *Russell,* p. 170 (15th Ed.). Injunction was not granted in the following cases, namely, on the ground that the arbitrator had no jurisdiction, that the dispute was outside the agreement to refer or proceedings would be vexatious or futile. *North London Ry* v. *Great Northern Ry.,* II Q.B.D. 30 ; *S. S. Den* v. *Mitsud,* (1912) 106 L.T. 451. So also where damages are adequate remedy, injunctions are not granted. *London & Blackwell Ry.* v. *Cross,* (1886) 31 Ch.D. 354 (369)—*Russell Ibid.* Where the validity of the contract is in question the court can restrain the arbitration proceeding by issuing temporary injunction. *Kitts* v. *Moore,*

(1894) 1 Q.B. 253. It is, however, insufficient in such cases merely to establish a posibility that the contract is illegal and void. *Smith* v. *Backer,* (1916) 2 Ch. 86—*Russell,* 15th Ed., p. 170.

357. Court's power to make declaration.—There may be circumstances where the court could appropriately make a declaration, where it might not be able to grant an injunction, as where certain of the matters referred to an arbitrator are not beyond the arbitration clause. *Government of Gibralter* v. *Kenny,* (1956) 3 All.E.R. 22. In the above case it has been held that the expression "arising out of" was very much wider than "under" and the arbitration clause having used both the expressions, everything which was claimed in the arbitration could be said to be a dispute or difference in relation to something "arising out of" the agreement. *Ibid.*

6. (*1*) *An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.*

Arbitration agreement not to be discharged by death of party thereto.

(*2*) *The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.*

(*3*) *Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.*

358. Notes.—This section is new and taken verbatim from S. 1 of the English Arbitration Act, 1934 (Stat. 24 & 25 Geo. V, c. 14). See now English Arbitration Act, 1950, section 2.

359. Death whether revokes arbitration agreement.—Under the old English law, if either of two parties to submission died before the award was made, the power of arbitrator was wholly gone. *Toussaint* v. *Hartop,* 7 Taunt 571; *Cooper* v. *Johnson,* 2 B. & A. 394); *Rhodes* v. *Haigh,* 2 B. & C. 345. The same rule was applicable where one of the parties to arbitration died before an arbitrator had been appointed. *Re Percival,* (1885) 2 T.L.R. 150. But in India the rule was otherwise even before the enactment of this section. In *Sanday Patrick* v. *Ramrattan,* 7 Ind.Cas. 590=4 S.L.R. 14, the court observed : "In *Morrison's* edition, of the *Indian Arbitration Act* at p. 7, it is stated, 'it is a general rule that if one of the parties to an arbitration dies before award is made, the submission is revoked', and there are passages, both in *Redman* (pp. 106, 107) and in *Russell* (8th Edition, p. 114) which seem to support this view of the law.

" 'Submission', is defined in section 4 of the Act as 'a written agreement to submit present or future differences to arbitration, whether arbitrator is named or not.' But an agreement is, by its very nature irrevocable; the word 'revoke' is wholly inappropriate to the process by which the contractual obligations created by an agreement are made to lose their binding effect. Contracts are, in their nature, bilateral.

"A proposal, or an acceptance, may be revoked under certain circumstances (section 5, Contract Act), but once the contractual obligation is created, it cannot be revoked at the will of one party. Agreements to submit differences to arbitration were never revokable.

"But the essential part of a submission, in its active operation, is the giving of authority to a named arbitrator. In practice a ' submission' is frequently included in commercial contracts and on differences arising, a second document, commonly called the reference, is drawn up defining the dispute and conferring the authority of an arbitrator on a specified person. An arbitrator is in law, a *mandatory ;* he acts by virtue of the authority given to him by the parties, as an agent for a principal. By the common law of England, any mandate can be revoked, and the authority of an arbitrator could be revoked under the same circumstances as could the authority of an ordinary agent. It was in this sense only that a submission to arbitration was revocable. Seen *Randell* v. *Thompson,* 1 Q.B.D. 748 (757) *Re Rouse & Meyer,* L.R. 6 C.P. 212 ; *Fraser* v. *Ehrensperger,* 12 Q.B.D. 310 ; *Deutsche Springstaff, Detien* v. *Briscoe,* 20 Q.B.D. 177 (180), and *In re Smith & Service and Nelson Co.,* 25 Q.B.D. 545.

"The circumstances under which the authority of an agent is revoked are given in section 201, Indian Contract Act, and if the terms of that section be compared with the section in *Russell on Awards* headed 'Of revoking the arbitrator's authority', it will be found that the former represents with fair accuracy the old common law as to the revocation of a submission.

"As early as 1868, it was pointed out by *Lord Romily,* in the case of *Pestonji Nusserwanji* v. *Maneckjee,* 12 M.I.A. 112 (130)=10 W.R. (P.C.) 51, 'that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration ; and to put such agreement for arbitration on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract.'

"The Indian Arbitration Act states in the clearest possible terms that a submission, unless a different intention is expressed therein, *shall be irrevocable, except by leave of the court.* The courts of this country have no traditional prejudice aggainst domestic tribunals and no sacred principle is outraged by carrying out the intention of the Legislature ; that intention clearly was to definitely and thoroughly complete the task at which the Legislature both in England and in this country had so long been labouring—'to put an agreement to refer to the same footing as all the agreements.....to put an end to the distinction between the agreement to refer and the authority thereby conferred.'

"There is nothing in the Act which justifies treating the death of a party as an exception to the general rule laid down so emphatically by section 4". See also, *Beni Dutt* v. *Baijnath,* 174 Ind.Cas. 369=A.I.R. 1930 Oudh 125. In *Venkatachellam* v. *Suryanarayana,* A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 M.L.W. 556, it has been held that in India there is no rule that the death of a referring party of itself recalls the reference to arbitration, that is, brings it to an end. Whether it must continue depends upon the special circumstances of each case. The courts in India are not bound by any English rule of the common law

or statutory law except in so far as it furnishes a standard of justice, equity and good conscience to be applied to the decision of question arising for consideration by the courts of India. *Ibid.*

360. Reason of difference between the old English law and the Indian Law.—In *Ramji Ram* v. *Salig Ram*, 11 Ind.Cas. 481=14 C.L.J. 188, the court observed: "In support of the first objection taken by the defendants, it has been broadly contended by the learned counsel that when matters in dispute have been referred to arbitration without the intervention of a court, the death of one of the parties at any time before the award is made, operates in law a revocation of the authority of the arbitrator, and the court must consequently set aside the award made subsequent to such death; as authorities for this proposition reference has been made to the cases of *Potts* v. *Words*, 1 Marshall 336; *Toussaint* v. *Hartop*, 7 Taunt 571; *Cooper* v. *Johnson*, 2 B. & Ald. 394; *Rhodes* v. *Haigh*, 2 B. & C. 345, and *Tyler* v. *Jones*, 3 B. & C. 144. Now, it may be conceded that the cases to which reference has been made, as also other cases of high authority one of which was decided by the Judicial Committee (*President of Orphans Board* v. *Van Reenen*, 1 *Knapp* P.C. 83), and another by the House of Lords (*Caledonian Ry. Co.* v. *Lockhart*, 3 Macq. 808), support the proposition that as a submission to arbitration confers no more a naked power, the death before award of a party to common law submission has the effect of a revocation of the submission (*Blundell* v. *Brettargh*, 17 Ves. 232, and *Edmunds* v. *Cox*, 3 Douglas 406). As was pointed out by *Mr. Justice Subramania Ayer in Perumalla* v. *Perumalla*, 27 Mad. 112, which was accepted as good law in *Hara Krishna Mitter* v. *Ram Gopal Mitter*, 14 C.W.N. 759=6 Ind.Cas. 170, this doctrine was apparently a corrollary of the rule of common law that the authority of an arbitrator might, at any time before the award was made, have been revoked at the instance of any party to the submission, whether the submission was by agreement in writing, by bond, deed. Judge's order, or order at *nisi prius* (*Deutche Stringhtaff* v. *Briscoe*, 20 Q.B.D. 759=57 L.J.Q.B. 4: *Vynyor's case*, 8 Coke, 81 (*b*): *Fraser* v. *Ehrensperger*, 12 Q.B.D. 310)—a rule which was founded probably on the view that, with reference to agreements to refer to arbitration, any contracting party, might without the consent of the other, put an end to the contract on the mere ground that he had changed his mind, and which was due to the disfavour with which contract to refer to arbitration were formerly looked upon in England, as contracts tending to oust the jurisdiction of the ordinary courts. But, in country, as pointed out in *Nagaswamy* v. *Rangaswamy*, 8 M.H.C.R. 46, the policy of the Legislature has always been different, and the English common law rule has not been adopted. According to the law here, the submission of an existing dispute once validly made, is not revocable without just and sufficient cause, even in the case of a submission which has not been made a rule of court (*Pestonji* v. *Maneckjee*, 32 M.I.A. 112. See also, *Piercy* v. *Younf*, 14 Ch.D. 200: *Christie* v. *Noble*, 14 Ch.D. 203). Agreements to arbitration cannot, therefore, be hightly deemed as essentially of a personal nature, revocable at the mere will of a party. From this point of view, whether a legal representative of a deceased party is or is not bound by, or entitled to enforce, the contract to refer to arbitration, must depend upon the nature of the right which forms the subject-matter of the reference, that is, upon the question whether the right is purely personal or survives to the legal representatives. It is worthy of note, that in England the rule in question was by no means inflexible, and

various exceptions were engrafted upon it. To take an illustration, a distinction was made as to the effect of death as a revocation when the reference had to state a case instead of making an award (*James* v. *Crane,* 15 M. & W. 379). The distinction dependent upon the nature of the right which forms the subject-matter of the submission was recognised in *Lord Selkirk* v. *Nasmeth, Morison* 627, and it was stated expressly that the authorities for the proposition that the submissions are not binding upon the heirs of the original parties apply only to submissions unconnected with any contract or transaction implying an obligation on heirs, so that if the parties have in view a transaction that is to affect their heirs, they cannot be supposed to intend that the heirs should not be obliged to the reference. (See also, *Caledonian Ry. Co.* v. *Lockhart,* 3 Maq. 808). Again when one submission included several parties on the same side who had each of them separate interest, the death of one was held to avoid the submission only as to him (2 Archibald, Practice, 1323, 13th Edn.; 1605, 14th Edn.). Cases are to be found in the books in which it was ruled, that a clause in submission to arbitration might properly be inserted so as to prevent the death of one of the parties acting as a revocation. (*MacDougall* v. *Robertson,* 4 Bing. 435; *Dowse* v. *Coxe,* 3 Bing. 20; *Clarke* v. *Crofts,* 4 Bing. 143; *Lewis* v. *Winter,* W.W. & D. 47; *Prior* v. *Humbrow,* 8 M.&.W. 873; and *Lewin* v. *Halbrook,* 2 *Dowling.* 90). The acceptance of the position that the insertion of such a clause is efficacious to keep alive the authority of the arbitrator shows conclusively that the rule cannot be treated as inflexible . If the principle on which it is said to be based were of universal application, no exception would be permissible, not even at the instance of the parties themselves. The matter, therefore, must be treated as one of intention either expressed or to be determined from the nature of the right in controversy. We must consequently decline to accept the comprehensive proposition that the death of one of the parties to a submission before the award is made operates as a revocation of the submission by operation of law."

The same rule is obtained in case of arbitration in pending suits. There also the authority of an arbitrator is not necessarily revoked by the death of one of the parties to a proposed arbitration. *Datta* v. *Khedu,* 11 Ind.Cas. 935=8 A.L.J. 678=33 All. 645. See also, *Manindra Nath Mandal* v. *Mahananda Roy,* 13 Ind.Cas. 160=15 C.L.J. 360: *Harakrishna* v. *Ramgopal,* 14 C.W.N. 759=6 Ind.Cas. 170: *Binayak* v. *Sashi,* 70 Ind. Cas. 459=26 C.W.N. 804: *Tegha* v. *Ram,* 79 Ind.Cas. 67=A.I.R. 1924 Lah. 725; *Sanday* v. *Ram Rattan,* 7 Ind.Cas. 590.

361. Scope and object of this section.—This section has been enacted with the avowed object of keeping arbitration agreement alive even after the death of the signatories to the agreement. The death of the party will not operate as revocation of the agreement and the agreement will be enforceable by or against the legal representative of the deceased party, provided however, that the right to sue or be sued servives. *Balika Debi* v. *Kedar Nath,* A.I.R. 1956 All. 377. The Arbitration Act does not purport of its own force to restrict the contractual rights of parties, but only gives effect to restrictions which they may choose to impose on themselves as regards the form to which their disputes shall be taken. *India Hosiery* v. *Bharat Woollen Mills,* 92 C.L.J. 7=A.I.R. 1953 Cal. 488. An arbitration agreement sets up a private tribunal of the parties. The tribunal must consist of persons appointed as arbitrators. Outsiders

who had never been appointed as arbitrators cannot give a decision which will be binding on the parties. *Lachman* v. *Makar*, 32 Pat. 304 = A.I.R. 1954 Pat. 27 = 1953 B.L.J.R. 498.

362. Such agreement is enforceable by or against the legal representative of the deceased.—After the death of a party to the agreement in all cases other than those in which the right of action is extinguished by his death an arbitration agreement is enforceable by or against his legal representative. This follows as a corollary to the rule that an arbitration agreement shall not be discharged by the death of any party thereto. Whether a legal representative of a deceased party is or is not bound by, or entitled to enforce, the contract to refer to arbitration, must depend upon the nature of the right which forms the subject-matter of the reference, that is, upon the question, whether the right is purely personal or survives to the legal representatives. *Ramji Ram* v. *Salig Ram*. 11 Ind.Cas. 481 = 14 C.L.J. 188. In the above case which was decided many years before the enactment of this section, the court said : "It cannot be reasonably disputed that if, upon the death of a party to arbitration proceedings, his representative in interest becomes a party thereto and proceeds with the investigation, the award is binding upon him. (*Bacon* v. *Cranston*, 15 Pick. 79 : *Edmunds* v. *Cox*., 3 Doug. 406 : *Ruston* v. *Dunwoody*, 1 Binn.Pa. 42)". See also *Manindra Nath Mandal* v *Mahananda Roy*, 13 Ind.Cas. 161 = 15 C.L.J. 360 : *Tega* v. *Ram*, 79 Ind.Cas. 67 = A.I.R. 1924 Lah. 725 : *Binayakdas* v. *Sashi Bhusan*, 70 Ind. Cas. 459 = 26 C.W.N. 804. But after the enactment of this section, no option is left to the representatives of the deceased where the right survives. The representatives are not bound when the right is merely personal or, in other words, where by operation of any law the right of action is extinguished by the death of a person. [*Vide* sub-section (3).]

In *Perumalla Satyanarayya* v. *Perumalla Venkata Rangayya*, 27 Mad. 112 (116), the court observed : "It follows, therefore that the contracts to refer to arbitration should not, in this country, be treated as standing upon the peculiar footing of such contracts as are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature, as the District Judge seems to have thought, and the question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representative. Accordingly, where the submission has been made a rule of court and the right is one which falls under the latter description, the proceeding must, under section 361 of the Code of Civil Procedure, be held not to abate by reason of the death of the party. And as the right to partition which is the subject-matter of the submission in the present case would survive to the deceased plaintiff's adopted son, if there is one the District Judge should have proceeded under section 367 of the Code of Civil Procedure." In *Binayakdas* v. *Sashi Bhusan*, 70 Ind.Cas. 459 = 26 C.W.N. 804 = A.I.R. 1922 Cal. 226, two of the second party died during the arbitration and their representatives were not made parties and no new guardian was appointed in place of one of the deceased party. Hence it was contended that the award was null and void. In overruling the submission, the court observed : "The appellants also rely on the case of *Manindra Nath Mandal* v. *Mahananda Roy*, 13 Ind.Cas. 161 = 15 C.L.J. 360. The decision in that case does not support the appellants. But they say relying on a passage in the report that as the hearing before the arbi-

trators had not been completed before the death of the person referred to, it was necessary to bring their representatives on the record and to make them parties and as this was not done the award is a nullity. It is nullity. It is true as a general principle that a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. But proceedings before arbitrators, are not intended to be carried on according to the rule of procedure contained in the Civil Procedure Code. If there is a binding reference to arbitration all that it is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. In this case the reference was binding on the representatives of Nilmony. *There is no rule of procedure by which the arbitrators could substitute those representatives or appoint guardian ad litem* for infants.

"If we were to hold that the arbitrators could not go on with the arbitration as the representatives or some persons on their behalf did not choose to come before the arbitrators, the result would be that although the reference would not abate on the death of a party under the law the arbitrators would in fact be unable to make an award and the arbitration would come to an end. We are, therefore, of opinion that the proposition urged by the appellant cannot be of universal application. The question whether the award would be binding or not must depend upon the circumstances of each case." See also, *Beni Datt* v. *Baijnath*, A.I.R. 1938 Oudh 125; *Abdul Ghani* v. *Serajuddin*, A.I.R. 1939 Lah. 154.

Following the case of *Binayak* v. *Sashi (ante)*, it was held in *Tegha* v. *Ram Singh*, 79 Ind.Cas. 67 = A.I.R. 1924 Lah. 725, that where a dispute was referred to arbitration and one of the parties died before the hearing had been concluded, the representatives of the party who had not agreed to the submission would not be bound by the award. Now by the enactment of this section this conflict has been set at rest.

363. Latest Federal Court decision on the subject—Effect of not making parties.—By a registered agreement dated 15th August, 1938 three brothers K. T. &. N., members of a Davabhaga joint family appointed an arbitrator for partitioning the family property. The agreement provided that none of the parties or their representatives in succession could object to the arbitration. The arbitrator was authorised to make his award in instalments within six months but if more time was necessary to complete the work of partition, the arbitrator was entitled to extend the time by giving the three brothers intimation or notice. K died during the pendency of these proceedings leaving his surviving five sons and a widow. K's five sons expressed their willingness to abide by the reference and they were treated as parties to the proceedings. The existence of K's widow was ignored as neither the arbitrator nor the parties were aware of the fact that she was entitled to the same share as each of the five sons under the Hindu Women's Rights of Property Act, 1937. On the 10th February, 1940 the arbitrator gave a notice to the parties namely the two brothers and five sons of the extension of time for a further period of 6 months to complete the partition. A partial award was passed on 2nd October, 1940 after one more extension. *Held*, that as the widow was not made a party to the arbitration proceedings and as no notice of the extension of time to make the award was given to her, there was no valid extension of time to make the award and defect was fatal to the award so far as she is concerned. K's estate was not properly represented by his five sons in the absence of the sixth co-sharer, the widow, and therefore the award

passed in her absence and without notice to her was not binding on her. *Tirtha Lal* v. *Bhusan Dasi*, A.I.R. 1949 F.C. 195. In the above case *Mahajan, J.* in delivering his judgment said : "It is axiomatic that if a person is not a party to, or properly represented in any proceeding, he cannot be bound by those proceedings. The ordinary rule of law is that in case of death of a party a valid award cannot be given which will bind the estate unless the legal representatives of the deceased are made parties to the reference. This can be done by giving notice to them where the reference is not through court and where proceeding for substitution of the legal representatives is not necessary. As pointed out by that learned Judge, *Sir Ashutosh Mukherjee*, in *Manindra Nath* v. *Mahananda Ray*, 13 Ind.Cas. 161=15 C.L.J. 360 the submission to arbitration is not revoked by the death of one of the parties if the intention is that not merely the parties themselves should be bound by the decision of the arbitrator but also their representatives-in-interest ; but if the hearing is not completed, it will be necessary to bring the representatives of the deceased party on the record or to make them party to submission. If, on the death of a party, his representative-in-interest proceeds with the arbitration and becomes a party to it, the award pronounced in the reference is binding on him. The principle that in a pending suit all parties must join in the reference also applies to arbitration out of court. If one of the parties dies and his representatives do not join, the reference would be bad."

But *Patanjali Sastri, J.* in the same case said : "The principle that, generally, where a party dies *pendente lite* his estate is sufficiently represented by one or more of his representative substituted in his place, so as to make the entire estate, including the interest of others not made parties, bound by the outcome of that *lis*, provided the substitution was effected *bona fide* and the proceeding was continued without fraud or collusion, has often been acted upon by courts in this country and has received the sanction of the highest authority." See *Khirajimal* v. *Dain*, 32 Cal. 296=32 I.A. 23 P.C. ; see also *Venkatchellam* v. *Surynanarayanamurty*, A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 M.L.W. 556, where it has been held that so long as a dispute is pending before arbitrators on a private reference, the proceedings before them are not governed by the provisions of Order 22, and there can be no question therefore of legal representative of the deceased party being brought on the record."

364. Effect of a person becoming lunatic during arbitration.— Although according to Hindoo law, a lunatic has no right of inheritance, he is not debarred from taking an estate duly conveyed to him. If a person was in a fit condition to manage his affairs down to the time when the proceedings before an arbitrator in which he was interested were substantially concluded, the award will not be invalidated by reason of the person having become insane before the final publication of the award. The incapacity of joint owners confers powers of arbitration in certain cases of necessity upon the managing owner. *Sheoprasad* v. *Collector of Monghyr*, 7 W.R 5.

365. "Legal representatives."—For definition of "legal representatives" *vide* section 2(*d*) (*ante*). This definition has been taken from section 2 (11) of the Civil Procedure Code. It includes the following classes of persons :—

(1) a person who in law represents the estate of a deceased person ;

(2) a person who intermeddles with the estate of a deceased person; and

(3) where a party acts in a representative character the person on whom the estate devolves on the death of the party so acting.

The expression "legal representatives" means all persons on whom the estate of a deceased party devolves. *Sidik* v. *Saran,* 76 Ind.Cas. 314=A.I.R. 1925 Sind 2. The definition of it is very wide. *Shiromoni Gurdwara* v. *Har Charan,* A.I.R. 1934 Lah. 1. The definition is meant for the Act only and does not contain a general statement of the substantive rule of law. *Amar Chand* v. *Premanand,* 150 Ind.Cas. 323=A.I.R. 1934. All. 474. A "legal representative" is defined as meaning a person who in law represents the estate of a deceased person. *Official Receiver* v. *Imperial Bank,* 58 Mad. 403=154 Ind.Cas. 934=(1935) M.W.N. 23=41 L.W. 28=A.I.R. 1935 Mad. 151=68 M.L.J. 78.

366. Person who in law represents the estate of a deceased.— In case of deceased persons who are solely governed by the Indian Succession Act, and in other cases where probate or letters of administration have been obtained as regards the estate of the deceased, the executor or administrator, as the case may be, of a deceased person is his legal representative (*vide* section 211 of the Indian Succession Act, 1925). In *Ramdui* v. *Rajrani,* 17 Ind.Cas. 101=8 N.L.R. 113, the court observed: "Upon a careful consideration of the subject it seems to us that much of the difficulty which has arisen proceeds from the assumption that the only person who can continue a suit already begun by a plaintiff since deceased, is one who would have been bound by the decree if the original plaintiff had lived to complete the litigation. It is also assumed that the legal representative of a deceased plaintiff, entitled to continue the suit, is necessarily the heir, of the latter. We consider such assumption ti be fallacious. The continuance of a suit depends not on the qualitification of the representative of the deceased plaintiff but on the nature of the suit. A man may die leaving an heir to his estate who may yet have no right to continue a pending suit,—*e.g.* the case of a plaintiff who leaves a son and a pending suit for damages for defamation. On the other hand, the legal representative of a deceased person entitled to carry on a pending suit may not be his heir, e.g. the case of an executor or creditor who has obtained letters of administration." Where there is a will of the deceased and an executor has been appointed, he alone is the legal representative of the deceased testator. *Shaik Moosa* v. *Shaik Essa,* 8 Bom. 241; *Meghraj* v. *Krishna Chandra,* 46 All. 286=22 A.L.J. 193=78 Ind.Cas. 243=A.I.R. 1924 All. 365; *Mathura Das* v. *Gokul Das,* 10 *Bom.* 468; *Naran Das* v. *Naran Das,* 31 Bom. 418 (428); *Administrator-General* v. *Premlal,* 22 I.A. 107=22 Cal. 778; *Munisami* v. *Maruthammal,* 34 Mad. 211 (214); *Ganapathi* v. *Swamalai,* 36 Mad. 575; *Chidambara* v. *Krishnaswami,* 39 Mad. 365 (373). Under the English law "representatives" or "legal or personal representatives" *prima facie mean* executors or administrators. *In re, Best's Settlement,* (1874) 18 Eq. 686. See also, *Price* v. *Strange,* 6 *Madd.* 159; *Stockdale* v. *Nicholson,* L.R. 4 Eq. 359; *Re Crawfords' Trusts,* 2 Dhewer 230; *Corbyn* v. *French,* 4 Ves. 418; *Re Turner,* 2 Dr. & Sm. 501.

The executor derives his title from the will and an administrator derives his title from the letters of administration granted to him. The naming of A and B as executors is by implication of a gift or donation to them of all the goods and chattels, credits and personal estate.

(*Wentworth*, 10). They are the legal representatives of a deceased person in all respects and all the property of the deceased vests in them as such. The executor is entitled to represent the deceased from the date of his death and an administrator is entitled to represent him from the date of the grant of the letters of administration. *Wills* v. *Rich*, 2 Atk. 285 ; *Wankford* v. *Wankford*, 1 Salk 299. Under section 211 of the Indian Succession Act, all the properties of the deceased vest in the executor and as such probate is not necessary to make a person an executor. *Ganapathi* v. *Sivamalai*, 17 Ind.Cas. 4=36 Mad. 575=23 M.L.J. 306=(1912) M.W.N. 112. In *Shaik Moosa* v. *Shaik Essa*, 8 Bom. 241, *Sarjeant, C.J.* states that the law is the same in this country as in England as to the title of an executor to the property devised by a will, that probate is regarded as an authentic evidence of the will itself, from which the executor derives his title by virtue of which the property vests in him from the death of the testator, from which time the executor would be entitled to collect the debts due to the deceased. See also, *Mathura Das* v. *Gokul Das*, 10 Bom. 468 ; *Kishan Lal* v. *Kanhailal*, (1938) A.M.L.J. 91. But an administrator does not derive his title from the will but from the grant of letters of administration.—*Vide* section 212 of the Indian Succession Act of 1925 ; *Antony* v. *Makis*, 34 Mad. 395. So far as representatives are concerned, the property of the deceased person vests in the executor or administrator and section 211 of the Succession Act makes no distinction between them. So an administrator like an executor after the grant of letters of administration fully represents the estate of a deceased person. *Ambika Churn* v. *Kala Chand*, 10 C.W.N. 422 ; *Wooly* v. *Clark*, 5 B. & A. 745 ; *Chetty* v. *Chetty*, (1916) A.C. 603.

There is clear provision in section 211 of the Indian Succession Act, that the executor is the legal representative of the deceased for all purposes, and all the property of the deceased person vests in him as such. Where the probate of the will is subsequently taken out, the estate of the deceased vests in the executor from the date of the testator's death. The probate establishes the will from the date of the testator's death and is conclusive proof of the appointment of the executor. It is further provided by law, that once probate is taken out by the executor all intermediate acts which he has done in connection with the estate of the testator are validated. *Meghraj* v. *Krishna Chandra*, 46 All. 286=22 A.L.J. 193=L.R. 5 All. 193=78 Ind.Cas. 243=A.I.R. 1924 All. 365 ; *Naran Das* v. *Naran Das*, 31 Bom. 418 (428) ; *Administrator-General* v. *Premlal*, 22 I.A. 107=22 Cal. 778 ; *Munisami* v. *Maruthammal*, 34 Mad. 211 ; *Ganapathi* v. *Sivamalai*, 36 Mad. 575 ; *Chidambara* v. *Krishnaswami*, 39 Mad. 365 (373).

367. Power of executor before the passing of the Hindu Wills Act or as regards will not governed by the Indian Succession Act.—Before the passing of the Hindu Wills Act, 1870, the estate of a deceased Hindu did not vest in the executor even though he obtained probate, and in case not governed by the Act the right of the executor or legatee could be established either by production of probate or other proof of the will, probate being only treated as one of the modes by which a will can be proved in court, and District Courts had no power to grant probate or letters of administration of Hindu Wills which were not governed by the Hindu Wills Act. *In Administrator-General* v. *Premlal Mullick*, 22 Cal. 788=22 I.A. 107, their Lordships of the Privy Council in describing the powers of such executors observed: "His powers and functions were not those of an English executor but rather those of a manager, but he did

not require probate, and probate, if obtained, would not vest in him any title of the estate, either real or personal, which he administered." See also, *Prosonno* v. *Kristo,* 4 Cal. 342=3 C.L.R. 154; *Kherodamony* v. *Doorgamony,* 4 Cal. 455=3 C.L.R. 315; *Sarat Chandra* v. *Bhupendra Nath,* 25 Cal. 103; *Amulya Charan* v. *Kalidas,* 32 Cal. 861=1 C.L.J. 270; *Manik Lal* v. *Mancherghi,* 1 Bom. 269.

368. Legal representatives of an intestate Hindu, Muhammadan, Buddhist, Sikh, Jaina, etc.—Section 212 of the Indian Succession Act, 1925, enacts, "(1) No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

"(2) This section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Indian Christian".

So under this section an administrator of a deceased person who is neither a Hindu, Muhammadan, Buddhist, Sikh, Jaina or an Indian Christian, is his legal representative and no right to any part of his property can be established in a Court of Justice unless letters of administration have been granted. *P. L. M. Firm* v. *Dassy M. Stracey,* 9 Bur.L.T. 122; *Subh Nandan* v. *Ramrick,* 4 All. 192; *Rajnarain* v. *Universal Life Assurance,* 7 Cal. 574; *Administrator-General* v. *Lalit Mohan,* 12 C.W.N. 738; *Framji* v. *Adarji,* 18 Bom. 337. But section 212 of the Indian Succession Act of 1925, does not apply in the intestacy of a Hindu, Muhammadan, Buddhist, Sikh or Jaina, as in their case the estate at once vests in the heirs by succession, Taking of letters of administration is not obligatory where the estate has already vested. The heirs are liable for the debts of the deceased to the extent of the property inherited by them. So where no letters of administration is taken in such a person's estate, his heirs represent his estate fully. *Jogendra* v. *Apurna,* 13 C.W.N. 1190; *Re Manavala Chetty,* 33 Mad. 93; *Timaji* v. *Rama Piraji,* 45 Ind.Cas. 862=20 Bom.L.R. 175; *Ma Man Thu* v. *Ma Shurz Mi.* 4 Bur.L.J. 76=A.I.R. 1925 Rang. 233; *Ma Hla* v. *Maung Pyin,* 1 L.B.R. 193; *Secretary of State* v. *Parijut,* 63 Cal. 677; *Secretary of State* v. *Girdhari Lal,* 54 Mad. 226; *Subbarayadu* v. *Ramadasu,* 45 Mad. 872=68 Ind.Cas. 942; *Dinomoni* v. *Elahadut,* 8 C.W.N. 843; *Mani* v. *Bai Rewa,* 17 Bom. 758.

369. Executor of will dealing with part of property.—Where the testator makes a will with respect to a part of his property, he dies intestate with regard to his other part, and therefore, a person appointed his executor cannot be his representative with regard to his other property. *Nathu Ram* v. *Alliance Bank,* A.I.R. 1929 Lah. 546=30 P.L.R. 326=116 Ind.Cas. 558.

370. Heir or legatee as legal representative.—Where there is an executor or administration he alone is the legal representative of the deceased. But where there is no executor or administrator but succession is by heirship as in cases governed by the Bengal School of Hindu law, the Muhammadan law, or in cases of separate and self-acquired property under the *Mitakshara* law, the heir of the deceased is his legal representative. *Dinomoni Choudhurani* v. *Elahadut Khan,* 8 C.W.N. 843 (856). Where there is a will but there is no executor or administrator a legatee is a legal representative of the deceased testator. *Dakojee Subbarayadu* v. *Musti Ram,* 68 Ind.Cas. 942=45 Mad. 872=42 M.L.J. 301. In *Bisheswar Dayal* v. *Bajrang Bahadur,* A.I.R. 1929 Oudh 353=

6 O.W.N. 469=117 Ind.Cas. 452, the court observed: "The term 'legal representative' as defined in the Code of Civil Procedure, only denotes the class of persons on whom the status of a representative is fastened by reason of the death of a person whose estate they are held to represent." The same observation holds good in the case of Arbitration Act as well. The definition of "legal representative" includes a universal legatee. *Dwarka* v. *Harihar,* 157 Ind.Cas. 956=(1935) O.W.N. 1031. In respect of the separate estate of a deceased coparcener, his brothers who constituted a joint family along with him would be his legal representatives within the meaning of section 2. *Sumeshar Bind* v. *Baldeo Sahu,* 157 Ind.Cas. 51=(1935) A.L.J. 293=A.I.R. 1935 All. 390.

In *Jamburdo* v. *Annappa,* A.I.R. 1941 Bom. 23=42 Bom.L.R. 1066 (F.B.), *Beaumont, C.J.* in delivering the judgment of the Full Bench observed: "In my judgment the son of a Hindu where there has been no appointment of an executor or administrator, in law (this is the personal law, in this case Hindu law) represents the estate of his father and is therefore his legal representative within the meaning of section 2(11)."

371. "Legal representative"—meaning of.—The expression "legal representative" means and includes one person as well as several persons according as they represent the whole interest of the deceased person. *Chunilal* v. *Tulsi Ram,* 14 Lah. 543=142 Ind.Cas. 649=34 P.L.R. 1=A.I.R. 1933 Lah. 356.

372. Legal representative—pleas open to.—A legal representative who comes in as such is not at liberty to depart from or contradict the position taken by the party in the suit whose legal representative he is. *Gopalan* v. *Sankaraunni Variar,* (1934) M.W.N. 1102=40 L.W. 730.

373. Person who intermeddles.—The definition in sub-section (2) (*d*) merely means that a person who intermeddles with the estate may be treated as the legal representative. It does not mean that a person intermeddling with the estate as the legal representative. It does not mean that a person intermeddling with the estate of the deceased is to be preferred to a person who is found to be the true legal representative of the deceased's property. *Suraj Prosad* v. *Lukher Kuer,* 180 Ind.Cas. 812=A.I.R. 1939 Pat. 117. The term "intermeddle" has been used to mean an intermeddling with the assets of a deceased person in such a way as to denote an assumption of the authority, or an intention to exercise the function of an executor or administrator. *Halsbury,* Vol. XIV, pp. 147-148. Such an intermeddler is called executor *de son tort.* Section 303 of the Indian Succession Act enacts: "A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

"*Exceptions.*—(1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral for the immediate necessities of his family or property, does not make an executor of his own wrong.

"(2) Dealing in the ordinary course of business with goods of the deceased received from another does not make an executor of his own wrong."

The reason of the rule is thus laid down in *Read's case* (5 Rep. 336):—

"When no one takes upon him to be executor, nor hath taken letters of administration, there the using of the goods of the deceased by anyone, or the taking of them into his possession, which is the office of executor or administrator, is a good administration to charge them as executors of their own wrong, for these to whom the deceased was indebted in such a case have not any other against whom they can have action for recovery of their debts."

374. Illustrations of acts which contitute executor de son tort.—A is sued, and he not being executor of the deceased pleads in that character. A is an executor of his own wrong. *Stoke's Succession Act,* p. 169. The deceased in his lifetime makes a deed of gift of all his property to B in fraud of creditors. He is an executor of his own wrong: *Stokes' Succession Act,* p. 169. If a man takes the goods of the deceased and sells or hands them to another, this shall charge the former but not the latter as executor *de son tort* in the absence of collusion, although the latter acted knowingly. *Ingpen,* p. 59; *Paull* v. *Simpson,* 9 Q.B.D. 365; *Hill* v. *Gurtis,* L.R. 1 Eq. 90.

375. Representative suits.—Where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued is his legal representative. In *Tirumalai* v. *Arunachela,* A.I.R. 1926 Mad. 540=92 Ind.Cas. 520, it was held that trustees are not legal representatives of their predecessors-in-office.

376. Hindu law—joint family—legal representative.—Hindu sons governed by the *Mitakshara* law are not the legal representatives of their deceased father within the definition given in section 2 (11), Civil Procedure Code, nor are the properties allotted to them at a partition with their father any part of the estate of the latter. *Atul Krishna* v. *Lala Nandanji,* 14 Pat. 732=157 Ind.Cas. 53=16 Pat.L.T. 393=A.I.R. 1935 Pat. 275 (F.B.).

377. Court of Wards a legal representative.—The Court of Wards acting under the Central Provinces Courts of Wards Act (1899) is, on the death of the ward, in the position of a legal representative within the meaning of section 2 (11) of the Civil Procedure Code. *Gobrulal* v. *Court of Wards,* 144 Ind.Cas. 368=29 N.L.R. 118=A.I.R. 1933 Nag. 85.

378. Sub-section (2)—authority of arbitrator whether revoked.—According to the old English cases a submission to arbitration confers no more than a naked power, and as such by the death of a party the authority of an arbitrator is revoked. *Potts* v. *Ward,* 1 Marshall 366; *Toussaint* v. *Hartop,* 7 Taunt 571; *Cooper* v. *Johnson,* 2 B. & Ald. 394; *Rhodes* v. *Haigh,* 2 B. & C. 345. In *Hara Krishna* v. *Ram Gopal,* 14 C.W.N. 759=6 Ind.Cas. 170, the court observed: "Now it may be conceded that the cases to which reference has been made, as also other cases to which has been made, as also other cases of high authority, one of which was decided by the Judicial Committee and another by the House of Lords (*President* v. *Van Runen,* 1 Knapp.P.C. 83; *Caledonian Railway Co.* v. *Lockhart,* 3 Mac.H.L. 808; *Blundell* v. *Brettargh,* 17 Ves. 232; *Edmund* v. *Cox,* 3 Doug. 406), support the position that as a submission to arbitration confers no more than a naked power, the death, before award, of a party to a common law submission has the effect of a revocation of the submission." But the above rule has not been followed in India. *Vide Sanday Patrick* v. *Ram Rattan,* 7 Ind.Cas, 590=4 S.L.R. 14; *Ramji Ram* v. *Salig Ram,* 11 Ind.Cas. 481=14 C.L.J. 188; *Pestonji* v. *Maneckjee,* 12 M.L.A. 112; *Perumalla* v. *Perumalla,* 27 *Mad.* 112;

Nagaswamy v. *Rangaswamy,* 8 M.H.C.R. 46 ; *Manindra* v. *Mohananda,* 13 Ind.Cas. 161 = 15 C.L.J. 360. This sub-section gives statutory recognition to the law as laid down in the above cases.

379. Sub-section 3 of Section 6—Scope and applicability.—Sub-section (3) is founded upon the well known maxim *actio personalis moritur cum persona* which means that a personal right of action dies with the person. It is obvious that clause (3) refers to actions in torts where the right claimed by a person against a tort bearer does not survive after his death. *Sm. Balika Devi* v. *Kedar Nath,* A.I.R. 1956 All. 377.

380. Sub-section (3)—what right of action is extinguished by the death of a party.—In *Bowker* v. *Evans,* (1885) 15 Q.B.D. 565 C.A. = 54 L.J.Q.B. 421, it has been held that where an action of tort dying with the person was referred to arbitration by an order made by consent, and with a stipulation that the award should bind the representatives in the case of death of either party, and the plaintiff died before the award, the action abated and the plaintiffs' executors could not be substituted. The same principle is obtained here in India also. *Vide Perumalla* v. *Perumalla,* 27 Mad. 112 ; *Manindra* v. *Mohananda,* 15 C.L.J. 360. Order XXII, rule 1, of the Code of Civil Procedure enacts : "The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." So the first point to be decided after the death of a party is whether the right of action survives, and that must be decided with reference to the nature of the subject-matter of submission for arbitration. *Ram Din* v. *Rajkani,* 17 Ind.Cas. 101 = 8 N.L.R. 113. With respect to such personal actions as are founded upon any obligation, contract, debts, covenant or other duty, the general rule has been well-established from the earliest times, that the right of action on which the testator or intestate might have sued in his lifetime survives his death, and is transmitted to his legal representative. Therefore it is clear that an executor or administrator shall have actions to recover debts of every description due to the deceased, either debts on record, as judgments, statutes, or recognisances, or debts on special contracts, as for rents, or one bonds, covenants, and the like, under seal, or debts on simple contracts, as notes unsealed, and promises not in writing, either express or implied. *Williams on Executors,* 11th Edn. 606-607. A right of action as regards movable and immovable property always survives the deceased. *Perumalla* v *Perumalla,* 27 Mad. 112. In the above case, where the question was whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer the dispute as regards immovable property to arbitration, the court observed: "Accordingly, where the submission has been made a rule of court and the right is one which falls under the latter description, the proceeding must, under S. 36 of the Code of Civil Procedure, be held not to abate by reason of the death of the party." See also, *Ramji Ram* v. *Salig Ram,* 14 C.L.J. 188 ; *Manindra* v. *Mohananda,* 15 C.L.J. 306 ; *Nagendra* v. *Robindra,* A.I.R. 1926 Cal. 490 = 53 Cal. 132 & 30 C.W.N. 389 = 94 Ind.Cas. 212 : *Denomoyee* v. *Chooney Money,* 4 C.W.N. 280 ; *Jadubansi* v. *Mahabal,* 32 Ind.Cas. 104 = 38 All. 111 ; *Gandi* v. *Puramsetti,* 27 Ind.Cas. 1001 = 17 M.L.T. 186 = 39 Mad. 382 ; *Parbutty* v. *Higgin,* 17 W.R. 475 : *Hills* v. *Sookhee,* 10 W.R. 59 ; *Dharamsi* v. *Narotam,* 5 Bom.L.R. 1041 ; *Jaikali* v. *Baldeo,* 50 Ind.Cas. 833 = 17 A.L.J. 576 = 41 All. 515 ; *Nawabuddin* v. *Mussamat Kami,* 77 P.L.R. 1901 = 12 P.R. 1901 ; *Premmoy* v. *Preonath,* 23 Cal. 636.

381. Actio personalis moritur cum persona * and its history.—In *Mohant Saligram* v. *Charan Das,* A.I.R. 1939 Lah. 492=41 P.L.R. 610; *Tekchand, J.* observed: "It is no doubt true that the right to get compensation for malicious prosecution is personal to the person wronged, and to such a right the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) fully applies. If therefore, such person dies before suing the wrong-doer, his heirs, executors or administrators cannot after his death, maintain an action for the same relief against the wrong-doer. In such a case clearly there is a 'discharge of the tort' by the death of the person wronged and the wrong-doer is relieved from all liability for his tortuous act. It is equally clear that if the injured person had brought a suit in his lifetime, but had died before a decree had been passed in his favour, the suit would have abated and his legal representatives could not have contined the suit after his death, for the 'right to sue' in such a case being personal to the deceased did not survive (Order XXII, rule 1, Civil Procedure Code)." See also, *Muhammad Husain* v. *Khushato,* 9 All. 131 (F.B.); *Ram Kour* v. *Jiwan Singh,* 63 Ind.Cas. 540=2 Lah. 189=83 P.L.R. 1921=A.I.R. 1921 Lah. 52; *Ma Shwe Thit* v. *Maung Po,* 65 Ind.Cas. 66; *Satyanarayan* v. *Harnarain,* 25 Bom.L.R. 435=73 Ind.Cas. 367=47 Bom. 716; *Ramchode* v. *Rukmoney,* 28 Mad. 487; *Subramanier* v. *Venkata,* 31 Ind.Cas.4; *Palaniappa* v. *Rajah of Ramnad,* A.I.R. 1926 Mad. 243=50 M.L.J.34=22 M.L.W. 858=92 Ind.Cas. 366=49 Mad. 208; *Bhagwant* v. *Joti Sarup,* 4 P.R. 1897; *Mani Ram* v. *Chattibai,* 170 Ind.Cas. 159=A.I.R. 1937 Nag. 216; *Mazaffar Khan* v. *Ghulam Muhammad,* 28 Ind.Cas. 455=62 P.R. 1915=83 P.L.R. 1915=A.I.R. 1915 Lah. 378; *Bhim Sain* v. *Muhammad Ali,* A.I.R. 1929 Lah. 607=120 Ind.Cas. 9=11 Lah. 1=31 P.L.R. 134; *Paraman Chetty* v. *Sundararaja Naick,* 26 Mad. 499; *Tiru Vengada Chariar* v. *Swami Iyengar,* 34 Mad. 76=5 Ind.Cas. 937=20 M.L.J. 760; *Gopal* v. *Ramchander,* 26 Bom. 597=4 Bom. L.R. 325; *Sharifa* v. *Munekhan,* 25 Bom. 574=3 Bom.L.R. 167; *Balk Puri* v. *Durga,* 30 All. 49; *Anand* v. *Hardil,* 52 Ind.Cas. 545; *Chelimi* v. *Subbana,* 42 Ind.Cas. 860.

In *Bhupendra Narayan* v. *Chandramani,* A.I.R. 1927 Cal. 277=53 Cal. 987=100 Ind.Cas. 286, *Page,* J. observed: "In our opinion, this contention is misconceived. In India the doctrine of *actio personalis moritur cum persona* does not from part of the law. Claims by and against the representatives of a deceased person are regulated by section 89 of the Probate and Administration Act (V of 1881) (=section 306 of the Succession Act, 1925), and also by the 'Legal Representatives' Suit Act, 1855, so far as the latter enactment is not inconsistent with the former. It is, therefore, not necessary to refer to the English case-law in connection with the doctrine of *actio personalis moritur cum persona.*" See also the observations of *Sadasiva Ayyar, J.* in *Rustomji* v. *Nurse,* A.I.R. 1921 Mad. 1=44 Mad. 357 (F.B.); *Punjab Singh* v. *Ramautar Singh,* 52 Ind.Cas. 348=4 P.L.J. 676; *Ratan Chand* v. *Municipal Committee,* A.I.R. 1931 Nag. 9=27 N.L.R. 237=130 Ind.Cas. 86; *Dehra Dun* v. *Nansraj,* A.I.R. 1935 All. 995=159 Ind.Cas. 997=58 All. 342 per *Niamatulla, J.*; *People's Bank* v. *Des Raj,* A.I.R. 1935 Lah. 705. The view taken by the Calcutta High Court was also adopted by a Bench of the Rangoon High Court in *D. K. Cassim & Sons* v. *Sara Bibi,* 13 Rang. 385=A.I.R. 1936 Rang. 17=160 Ind.Cas. 715=8 R.R. 431. In that case *Page, J.* in his elaborate judgment discussed all the cases English and Indian in his judgment.

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*A personal right of action dies with the person—*Broom's Legal Maxims,* p. 681 (7th Edn.).

382. Suit for malicious arrest.—Right of action in a suit for damages for malicious arrest does not survive to the legal representatives of the deceased. *Haridas* v. *Ramadas,* 13 Bom. 677.

383. Suit for malicious search.—In a suit for damages for malicious search the rule of English law *actio personalis moritur cum persona* is applicable. *Gadigi Mareppa* v. *Firm of Marwari,* 38 Ind. Cas. 823=31 M.L.J. 772=20 M.L.T. 303=(1916) 2 M.W.N. 280=4 M. L.W. 351.

384. Suit for damages for malicious prosecution and for obstruction of plaintiff's right of way.—Where a suit was filed for damages for (1) malicious prosecution and (2) for obstruction of right of way and before the suit came on for hearing the defendant died and where there was no suggestion that the estate of the wrong-doer had been benefited by his act of wrongful obstruction, it was held that the action was a personal one and the defendant's wrongful acts died with him. *Ma Shwe Thit* v. *Maung* Po, 65 Ind.Cas. 66=(1921) 4 U.B.R. 73; *Nga Kyet Sim* v. *Mi Kyin Mya,* 34 Ind.Cas. 249=9 Bur.L.T.38=10 10 Bur.L.T. 8. The same rule is applicable in a suit for malicious procession. *Mahatab Singh* v. *Hub Lal,* A.I.R. 1926 All. 610=24 A.L.J. 796=48 All. 630; *Haridas* v. *Ramadas,* 13 Bom. 677; *Motilal* v. *Har Narayan,* A.I.R. 1923 Bom. 408=73 Ind.Cas. 365; but see *Krishna Behari* v. *Corporation of Calcutta,* 31 Cal. 993=8 C.W.N. 745.

385. Suit for damages for illegal distraint for cess.—An action for damages for distraint illegally levied by a person on certain movables to the plaintiff, some of which either perished or deteriorated owing to the negligence the defendant's servants while the rest were misappropriated by the servants, is not in the nature of a suit for the recovery of specific movables appropriated by the defendant or their value. To such an action the maxim *actio personalis moritur cum persona* applis, in the absence of any statutory provision to the contrary. *Tummala* v. *Venkatadri,* 17 Ind. Cas. 226=23 M.L.J. 255=(1912) M.W.N. 899=12 M.L.T. 383. See also, *Ranmalsingji* v. *Maha Sankar,* 12 Ind.Cas. 716=13 Bom.L.R. 104=36 Bom. 174.

386. Suit for injunction against defendant restraining him from preventing the plaintiff's standing at a particular place in the Srirangam Temple.—It was held that such a suit is a personal action and does not survive the death of the parties. *Josiam* v. *Venkata,* 5 Ind. Cas. 937=7 M.L.T. 195. See also, *Satagopa* v. *Mahabir,* 8 M.L.J. 180.

387. Suit to recover custody of a minor.—A Mohammedan sought to recover possession of his minor daughters, who were alleged to have been illegally detained by the defendant Mukhimbhai. Pending the suit Mukhimbhai died, and the suit was continued against his widow Sharefa as his heir and legal representative, on the ground that the minors were in her possession. It was held that the cause of action did not survive as against the widow of the deceased defendant, and that therefore the suit could not proceed. The cause of action which gave rise to the suit was extinguished when the defendant Mukhimbhai died. *Sharifa* v. *Munekhan,* 25 Bom. 574=3 Bom.L.R. 167. In that case *Chandravarkar, J.* observed: "It was of the nature of an *actio personalis,* and it is clear law that the cause of action in a suit does not survive when the defendant dies."

388. Breach of a betrothal contract.—A suit for the recovery of

damages for breach of a contract for betrothal abates upon the death of the plaintiff. *Balubhai* v. *Nanalal,* 55 Ind.Cas. 624=22 Bom.L.R. 143=44 Bom. 446.

389. Loss caused by breach of fiduciary relationship.—Where a a director of a company has been guilty of misconduct in canctioning a loan frauduletly and in violation of the rules, a suit against him by the company for compensation is not one for tort committed but is one of breach of fiduciary obligation towards the company. Even if it be viewed as a suit for compensation for a mere tort, the right to sue survives, on his death against his legal representatives by the application of section 306, Succession Act. *Peoples Bank of Northern India* v. *Des Raj,* A.I.R. 1935 Lah. 705=160 Ind.Cas. 759. In the above case *Jai Lal, J.* observed; "Secondly, it may be that, as was contended by the respondent's counsel according to the English law, a suit for compensation for a more tort does not survive against the legal representatives of the person who committed the tort, but the law in India appears to be different in this respect."

So where the tort directly affects the estate of the deceased or by which the wrong-doer has been directly benefited in his estate the maxim *actio personalis moritur persona* has no application and the right of action will survive to the legal representatives. *Rustomji* v. *Nurse,* A.I.R. 1921 Mad. 1=44 Mad. 357=40 M.L.J. 173=14 M.L.W. 200=62 Ind.Cas. 260=1921) M.W.N. 121; *Brij Nath* v. *Lakshmi,* 137 Ind.Cas. 217= A.I.R. 1932 Oudh 165=9 O.W.N. 239; *Nujuf Ali* v. *Patterson,* 2 N.W.P. 103; *Tirumale* v. *Venkatadri,* 17 Ind.Cas. 226=23 M.L.J. 255= (1912) M.W.N. 899; *Kishen Bahadur* v. *Ramaswami,* 14 Ind.Cas. 491= 11 M.L.T. 240.

390. Suit for malicious prosecution when partly ripens into decree—whether survives.—In a suit for malicious prosecution the plaintiff's right, which is a mere right to sue for damages for personal injury, changes its character once it is merged in a decree. It then becomes a matter of record which is a right of higher nature. The rights and liabilities arising under a decree awarding damages for malicious prosecution thereof continue when the plaintiff dies during the pendency of an appeal against the decree, so far as the appeal is concerned, but as regards the cross-objections they abate. *Gulabrao Ramchandra Marathe* v. *Deorao Krishnarao,* A.I.R. 1934 Nag. 119=30 N. L.R. 186=149 Ind.Cas. 1079=2 L.R. 1934 Nag 130.

See also, *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.,* (1895) 2 Ch. 273=64 L.J.Ch. 523=72 L.T. 703. But in a personal action like a suit for damages for malicious prosecution, if in the first court, the result was a dismissal of the suit, the plaintiff, in appealing against it, is only seeking to enforce the very claim which he unsuccessfully sought to enforce in the suit. The appeal, therefore, partakes of the character of the suit and the "right to sue" will not survive on the death of either party. *Maniramlala* v. *Mt. Chattibai,* 170 Ind.Cas. 159=A.I.R. 1937 Nag 216.

391. Ex delicto—English law.—According to the common law of England, if an injury was done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done. *Ingpen's Executors,* citing *Whincup* v. *Hughes,* L.R. 6 C.P. 78, *Ferns* v. *Carr,* 28 Ch.D. 409; *Re Thompson,* 1 Ex. 848. To an action in form *ex delicto,* the maxim *actio personalis moritur cum persona* is peculiarly

applicable. In *Rymond* v. *Fitch,* 2 Cr·M & R. 588 (597), *Lord Arbinger* observed that this maxim "is not applied in the old authorities to causes of actions in contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another; which latter are annexed to the person, and die with the person except where the remedy is given to (or by) the personal representatives by the statute law." Similarly, in *Blyth* v. *Floodgate,* (1891) 1 Ch. 337 at p. 366, *Sterlinf, J.* observed: "Now, if the claim for Mr. P. W. Blyther be considered to arise *ex delicto*, the maxim *actio personalis moritur cum persona* affords an answer on the part of the legal representatives of the deceased partner, Mr. William Mark Floodgate. The claim may, however be regarded as arising *ex contractu,* and as founded on and implied promise on the part of the firm to exercise reasonable care and skill in the performance of their duties as solicitors of the plaintiff in the counterclaim." Here also the implication is that the maxim is not applicable in action arising *ex contractu.* See also, *Wheatley* v. *Lame,* 1 Wms· Saund 216 (*a*).

An action for defamation, either of private character or of a person in relation to his trade, comes to an end on the death of the plaintiff, but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate survives. *Hatcherd* v. *Mege,* 18 Q.B.D. 77 So also no action lies for damages for breach of promise of marriage against the personal representatives of the promisor, unless in respect of special damage—that is, actual loss to the promisor, estate of the promise, flowing directly from the breach, or which may reasonably be supposed to have been in contemplation of both parties at the time of the promise as the probable result of the breach of it. *Finlay* v. *Chirney,* 20 Q.B.D. 494=57 L.J·J.B. 247. Now this rule has been incorporated in the Law Reform (Miscellaneous Provisions) Act, 1934 (Stat. 24 & 25 Geo. V, c. 41).

An action by the registered owner of a trademark claiming an injunction restraining infringement and fraudulent imitation, and the usual consequential relief, is not extinguished by the death of the plaintiff, but survives to his personal representatives. *Oakey* v. *Dalton,* 35 Ch.D. 700.

392. Contracts.—The personal representatives are, as a general rule, entitled to sue on all covenants broken in the lifetime of the covenantee; as for rent then due, or for breach of covenant for quiet incumbrance (*Lucy* v. *Levington,* 2 Lev· 26), or to discharge the land from incumbrance (*Smith* v. *Simons,* Comb. 64). The representation of the deceased, in matters of contract, by his executor or administrator is so complete, that, generally speaking it is not necessary, in order to transmit to the executor or administrator a right of enforcing a contract, that he should be named in terms of it. *Williams on Executor,* 11th Edn., p. 617. So the personal representative may sue not only for the recovery of all debts due to the deceased by specialty or otherwise, but on all contracts with him, whether broken in his lifetime or afterwards, of which the breach occasions an injury to the personal estate (*per Tindal, C.J. in Orme* v. *Burghton,* 10 Bing. 537; *Stubbs* v. *Holywell,* R.Co.L·R. 2 Ex. 311; *Edwards* v. *Grace,* 2 M. & W. 190; *Webb* v. *Cowdwell,* 14 M. & W. 820), and which are limited to the lifetime of the deceased, nor determined by his death (*Cooper* v. *Johnson,* 2 B. & Ald. 394; *Rhodes* v. *Haigh,* 2 B. & C. 346; *M'Dougal* v. *Roberston,* 4 Bing. 143; *Broker* v. *Evans.* 15 O.B.D. 565; *Knights* v. *Quarles,* 2 B. & 102)—*Brown's Legal Maxims,* 7th Edn., p. 682. An action by administrator also lies for piece of goods sold and

delivered between the death of the deceased and the grant of letters of administration (*Foster* v. *Bates,* 12 M. & W. 226), but he cannot maintain such a suit where the contract was made after the death of the intestate in the course of carrying on the business of the intestate (*Bolingbroke* v. *Kur* L.R. 1 Ex. 222).

393. Indian Law.—According to Indian law promises bind the representatives of the promisors in case of death of the promisors before the performance unless a contrary intention appears from the contract. *Vide* section 37 of the Contract Act. Where the document itself contains nothing to indicate that the intention of the parties was that the promisor alone should have right of re-purchase the legal representatives also of the promisor have a right to require performance or are bound by the promise to perform. *Vaman* v. *Changi,* 49 Bom. 862=91 Ind.Cas. 360= A.I.R. 1926 Bom. 97. See also, *Ram Kishore* v. *Parameshri,* 33 Ind.Cas. 123=14 A.L.J. 255; *Jai Kali* v. *Baldeo Singh,* 50 Ind.Cas. 883=41 All. 515=17 A.L.J. 576. A covenant in a deed of sale giving an option of pre-emption without any limit of time to the vendor and his heirs from the purchaser and his heirs is void as offending the rule against perpetuity. *Pollock & Mulla's Contract Act,* 6th Edn., p. 263 citing *Dinkarrao* v. *Narayan,* (1923) 47 Bom. 191=82 Ind.Cas. 628, *Maharaj* v. *Balchand,* 48 I.A. 376=61 Ind.Cas. 702; *Kalatpu* v. *Ranga,* 38 Mad. 114; *Nabin* v. *Rajani,* 25 CW.N. 901=63 Ind.Cas. 196; *Gopi* v. *Jest,* 45 All. 478= 82 Ind.Cas. 646=A.I.R. 1923 all. 514; *Charamudi* v. *Raghavalu,* 39 Mad. 462. A universal ligatee is liable to the extent of the property of the testator in his hands for the debts and liabilities of the testator. *Dwarka Singh* v. *Harihar Singh,* 157 Ind.Cas. 956=(1935) C.W.N. 1031. Section 40 of the Contract Act thus lays down the rule as regards the persons by whom the promise is to be performed: "If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it." See also, *Bholanath* v. *Prabhu,* 2 Bom. 67; *Sayya* v. *Sitarum,* 36 Bom. 144; *Davies* v. *Hood,* 88 L.J. 19; *Wilson* v. *Tucker,* 3 Stark.N.P.C. 154.

394. Implied contracts.—In cases of implied contract or of obligation or duty arising from the relation of parties, though the breach may be treated as a substantive wrong to the person or property, the action does not die with person and the executor may sue or be sued in respect of the personal estate of the deceased; as in cases of carriers, bailees, innkeepers and the like, in which the action may be framed either in contract or in tort. *Leake on Contract,* 4th Edn., p. 891, citing *Knights* v. *Quarles,* 2 B. & B. 102; *Bradshaw* v. *L. & Y. Ry.,* 10 C.P. 189; *Leggott* v. *G. N Ry.,* 1 Q.B.D. 599.

395. Extent of liability of executors, etc., for contracts.—The personal representatives are liable so far as they have assets, on all covenants and contracts of the deceased broken in his lifetime. *Broom's Legal Maxims,* p. 683. "Where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer a promise by each party to do what is to done by him." And for a breach of such a promise, executors may sue or be sued. *Ibid.,* citing *Morgan* v. *Rovey,* 6 H. & N. 265 (276); *Rattkyany* v. *Walford,*

36 Ch.D. 269=56 L.J.Ch. 881. But if executors do not admit assets, there must be judgment for administration on the basis of the form adopted. *Hills* v. *M'Rae*, 9 Hare 294 ; *Beckett* v. *Ramsdale*, 31 Ch.D. 177 ; *Toomey* v. *Ram Sashi*, 17 Cal. 115.

396. Contracts which are not binding on executors.—Where, however, personal considerations are the foundation of the contract, as in the cases of principal and agent. (*Compansi* v. *Woodburn*, 15 C.B. 400) and master and servant (*Farrow* v. *Watson*, 4 C.P. 744), the death of either puts an end to the relation, and in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contract. So also an agreement to compose a work is discharged by the death of the author. *Marshall* v. *Broadhurst*, 1 Tyr. 348, *per Lord Lyndhurst*. See also, *Stephens* v. *Benning*, 1 K. & J. 168 ; *Hale* v. *Bradbury*, 12 C.D. 886 ; *Griffith* v. *Tower Publishing Co., Ltd.*, (1897) 1 Ch. 21. Such agreements determine by death. *Ingpen's Executors*, 264. So "when considerations connected with the person with whom a contract is made, form a material element of the contract, it may well be that such a contract on that ground alone is one which cannot be assigned without the promisor's consent, so as to entitle the assignee to sue him on it." *Toomey* v. *Ram Sashi*, 17 Cal. 115 (121), *per Pigot and Rampini, J.J.*

397. Right of pre-emption.—The general rule is that the right of pre-emption which is a purely personal one will not survive but which is incidental to the ownership of property will survive to the deceased's legal representative. In *Dahyabhai* v. *Chunilal*, 22 Ind.Cas. 289=15 Bom.L.R. 1136, a Bench of the Bombay High Court consisting of *Beaman* and *Macleod, JJ.* held that the right of pre-emption is a personal right which under the Muhammadan law, would not descend to heirs. But under section 306 such right survives only to executors and administrators but not heirs or representatives who are not executors or administrators. *Jiaul Hussain Khan* v. *Sitaram*, 12 Ind.Cas. 720=13 Bom.L.R. 1040=36 Bom. 144. According to the Allahabad High Court such right is incidental to the ownership of land and as such it survives to the legal representatives. *Yusuf Ali* v. *Dal Kuar*, 20 All. 148=(1897) A.W.N. 226 : *Kausella* v. *Gobal Prosad*, 28 All. 424=3 A.L.J. 191=(1906) A.W.N. 73. The same view was also taken by the Punjab Chief Court in *Fateh Khan* v. *Muhammad*, 98 P.R. 1898 : *Faquir* v. *Ram Kishen*, 88 P.L.R. 1908=84 P.W.R. 1907=133 P.R. 1907.

398. Right to office.—Right to office such as *Mahant* is personal one and comes to an end on death of persons claiming it. *Gulzar* v. *Sardar Ali*, A.I.R. 1930 Lah. 703=125 Ind.Cas. 891=12 Lah. 1=32 P.L.R. 197 : *Shamchand* v. *Bhayaram*, 22 Cal. 92.

399. Whether person not party to agreement is entitled to enforce agreement, arbitrator can decide.—Where a reference comes before the arbitrators and a party who is not the original contracting party seeks to enforce the arbitration agreement, it is within the competence of the arbitrators to determine whether the party is entitled to enforce the agreement and the decision of the arbitrators on that question cannot be challenged on the ground that the decision was come to without adequate materials, *i.e.*, materials on which a court of law would not have decided to that effect. *Shivchandrai* v. *Panno*, A.I.R. 1943 Bom. 197=I.L.R. (1943) Bom. 280=45 Bom.L.R. 392.

400. Application to statutory arbitration.—Sub-section (1) is not applicable in statutory arbitration. *Vide* section 46.

Provisions in case of insolvency.

7. (1) Where it is provided by a term in a contract to which an insolvent is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party to the agreement or the receiver may apply to the Court having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

401. N.B.—This section follows closely section 2 of the English Arbitration Act, 1934 (Stat. 24 & 25 Geo. V, c. 14) and S. 3 of the English Arbitration Act of 1950. The purpose of this section is to standardise the law as to the effect on an arbitration agreement and proceedings on insolvency of a party thereto.—*Notes on Clauses.* After the enactment of the English Arbitration Act of 1950, the law is thus laid down by *Russell*: "Where any contract to which a bankrupt is a party contains an agreement to refer to arbitration any dispute which may arise thereunder, and the trustees in bankruptcy adopts the contract, the agreement to refer will be enforceable by or against him. Even where there has been no such adoption, the court has a discretion upon the application either of the trustee with the leave of the committee of inspection, or of any other party to the agreement, to make an order that the matter be referred to arbitration." *Russell,* 15th Edn., p. 15.

402. Old English law.—Under the old English law the bankruptcy of a party does not operate as a revocation of a submission. *Andrews* v. *Palmer,* (1821) 4 B. & Ald. 250; *Snook* v. *Hellyer,* (1818) 2 Chit. 43; *Ex Parte Edwards,* (1886) 3 Morrells Bankruptcy Rep. 179; *Hemsworth* v. *Brain,* (1845) 1 C.B. 131; *Taylor* v. *Shuttleworth,* 8 Drol. 281=9 L.J. (N.S.) C.P. 138; *Taylor* v. *Marling,* (1840) 2 M. & G. 55=10 L.J.C.P. 26; *Russell* on *Arbitration,* 13th Edn., p. 451; *Halsbury,* 1st Edn., Vol. 1, p. 449. But the fact that one of the parties has become bankrupt may be a sufficient ground for granting the other party leave to revoke. *Marsh* v. *Wood,* (1829) 9 B. & C. 659; *Gaffrey* v. *Killen,* 12 Ir. C.L. Rep. App. xxv. This sub-section has effected a change in the old law.

Andrew v. *Palmer,* 4 Burn. & Ald. 250=23 R.R. 267, was a leading case on this point. In that case court observed: "The bankruptcy did not operate as a revocation of the submission. It would not have put

an end to the suit which the bankrupt had instituted, nor could it, therefore, put an end to the arbitration founded upon that suit; and if he has commenced an action without having any cause for it, the bankruptcy neither does nor ought to protect him against the consequences of it." The old law is thus stated by *Lord Halsbury*: "The bankruptcy of a party to a submission does not operate as a revocation of the arbitrator's authority—that is to say, the bankrupt is bound by the arbitrator's sward—but the submission is as a general rule not binding on his trustee in bankruptcy; but where the submission forms one of the terms of the contract, it is conceived that the trustee cannot take advantage of the contract and at the same time repudiate the arbitration clause." *Halsbury*, Vol 1, p. 450-451.

403. Reason for the change.—In *Marsh* v. *Wood*, (1829) 9 B. & C. 659, it was held that the fact that one of the parties has become bankrupt may be sufficient ground for granting the other party leave to revoke. But a trustee under bankruptcy was not entitled to take any action under section 4 of the English Act of 1889 which corresponds to section 19 of the Indian Act of 1899. Therefore in the Report of Committee on the law of Arbitration it is stated: "The death or bankruptcy of a party to a submission at present seems to revoke the submission, and the personal representative of a deceased party, or the trustee in bankruptcy of a party, do not appear to be included in the words 'any persons claiming through or under him' in section 4 of the Act of 1889.

"We think that an amendment should provide (*a*) that these words in section 4 shall include the trustee in bankruptcy of a party, and the personal representatives of a deceased party to a submission, and (*b*) that the death or bankruptcy of a party to a submission shall not revoke it." See also, *Official Receiver* v. *Kersondas*, A.I.R. 1926 Sind 209=19 S.L.R. 24=95 Ind Cas 750.

404. Effect of insolvency on suits by or against a party.—Rule 8 of Order XXII of the Civil Procedure Code enacts:

"(1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

"(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate."

The above rule is applicable only where the plaintiff in a pending suit becomes insolvent. It does not apply where the defendant becomes insolvent. *In re, Hunt, Mount & Co.* v. *Khologar*, 1 B.H.C.R. 251 (257); *Ramchandra* v. *Sripati*, A.I.R. 1929 Bom. 202 (204)=31 Bom.L.R. 357=118 Ind.Cas. 352. In such a case the procedure laid down in rule 10 is to be followed. So it is clear from the rules stated above that arbitration proceeding in a pending suit does not abate by the insolvency of a party. Where such party is the plaintiff, the suit as well as arbitration proceeding will not abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the court otherwise

directly) to give security for the costs thereof within such time as the court may direct. *Vide Official Assignee* v. *Chindambara,* 61 Ind.Cas. 300=(1920) M.W.N. 704; *Kishen Gopal* v. *Sukalal,* A.I.R. 1927 Cal. 76=53 Cal. 844=98 Ind.Cas. 781=31 C.W.N. 22. On the same principle in cases of arbitration without the intervention of court, the Official Assignee or the Receiver is given by this section the option to continue the arbitration proceeding.

405. Rule of law under Act IX of 1899.—In *Official Receiver* v. *Kersondas Mawji,* A.I.R. 1926 Sind 209=19 S.L.R. 24=95 Ind.Cas. 750. *Rupchand Bilaram, A.J.C.* observed: "Several objections have been raised as to the validity of this award. I shall deal with only two of them which go to the root of it. Firstly, whether a Receiver of the estate of a bankrupt is a party within the purview of section 9 of the Indian Arbitration Act and entitled to enforce an agreement to submit future differences to arbitration in pursuance of a submission clause contained in a contract for sale of goods by appointing the arbitrator selected by him as the sole arbitrator on refusal of the opposite party to submit to arbitration.....

"The Official Receiver has purported to act under section 9 of the Indian Arbitration Act which empowers a party to the submission to enforce arbitration by appointing the arbitrator selected by him in pursuance of the submission clause as the sole arbitrator, as if he had been appointed by consent of both parties. According to its literal or ordinary meaning a 'party' would refer to the contracting party, and whatever doubts may exist as to the expression 'party' having been used in section 8 and 9 in an extended or wider sense so as to include parties and persons claiming through or under them, so as to include their legal representatives, I am of opinion that the Official Receiver or the trustee in bankruptcy does not come within the purview of this extended meaning. The Official Receiver claims adversely to the bankrupt by operation of the statute. *He cannot be compelled to be a party to the submission in a case where the bankrupt's estate is the debtor and not the creditor.* It would appear that in such a case even where there is a reference to a named arbitrator, the trustee in bankruptcy is not, as a general rule, bound by the submission: *Halsbury's Laws of England,* Vol. I, para. 944, p. 444.

"In *Pennell v. Walker,* 107 R.R. 444, the court was inclined to the view that an assignee in bankruptcy was not a person claiming through or under the insolvent within the meaning of section 11 of 17 & 18 Vict., c. 125. The case, where the Official Receiver institutes a suit to enforce his claim on contract containing the submission clause, stands on a different footing. In such a case it may be conceived that the Official Receiver cannot take advantage of the contract and at the same time repudiate the arbitration clause, or be permissible to approbate and reprobate at the same time: *Halsbury's Laws of England,* Vol. I, paras. 944 and 952; and the opposite party may compel him to go to arbitration. It does not follow that the Official Receiver can compel a submission when the estate of the bankrupt is a debtor or that he can exercise the privilege conferred on the bankrupt to appoint a sole arbitrator so as to bind the defaulting party. It is of the very essence of an arbitration that the submission should be mutual and that the award should be mutual and binding. If the subsequent insolvency of one party destroys this mutuality and prevents the opposite party from

enforcing the submission against the Official Receiver, it stands to reason that the Official Receiver may not in his turn enforce the submission clause, if the insolvent's estate is the claimant instead of being the debtor. In *Marsh* v. *Wood*, (1829) 9 B. & C. 659=4 M. & R. 504=7 L.J.K.B. (O.S.) 327, the subsequent bankruptcy of one of the parties to a reference to a named arbitrator was held to entitle the other party to revoke the reference on the ground of want of mutuality, and would now be considered sufficient ground to entitle the court to revoke the reference under section 5 of the Indian Arbitration Act.

"I am of opinion that the Official Receiver was not a party within the purview of section 9 of the Act and could not, therefore, appoint Mr. Brachi as the sole arbitrator, whose award could bind both the parties as if he had been appointed by consent and this award is, therefore, unsustainable." Now the question has been set at rest by enactment of the present section and the inequity which has been pointed out by *Rupchand Bilaram, A.J.C.* has obtained statutory recognition.

406. If the receiver adopts the contract.—By sub-section (3) the expression "receiver" includes an Official Assignee. These words mean that if the assignee adopts the contract within the meaning of section 64 of the Presidency-towns Insolvency Act (III of 1909), he is a receiver. Section 64 of the Act runs as follows:—

"The Official Assignee shall not be entitled to disclaim any property in pursuance of section 62 in any case where an application in writing has been made to the Official Assignee by any person interested in the property requiring him to decide whether he will disclaim, and the Official Assignee has, for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice that he disclaims the property; and, in the case of a contract, if the Official Assignee after such application as aforesaid, does not within the said period or extended period, disclaim the contract, he shall be deemed to have adopted it." This section is based on section 55(4) of the English Bankruptcy Act of 1883.* Time runs not from the posting of the application, but from its receipt. *Red* v. *Harvey*, (1880) 5 Q.B.D. 184. If the Official Assignee neglects to give notice within 28 days he is personally liable. *Re Page*, (1884) 14 Q.B.D. 401. There is no corresponding provision in the Provincial Insolvency Act, as such the procedure directed in section 64 of the Presidency-towns Insolvency Act cannot be followed in cases governed by the former Act.

407. Section 62 of the Presidency-towns Insolvency Act—Where any part of the property of an insolvent consists of unprofitable contracts, the Official Assignees may by writing signed by him, at any time within twelve months after the insolvent has been adjudged insolvent, disclaim the property. Provided that, where such property has not come to the knowledge of the Official Assignee within one month after such adjudication as aforesaid, he may disclaim the property at any time with twelve months after he has first become aware thereof.—*Vide S. 62 of the Presidency-towns Insolvency Act.* The party to the contract has given power by S. 64 to call on the Official Assignee to disclaim. If the Official Assignee does not within 28 days after the receipt of the application declines or neglects to give notice that he disclaims the property, he shall be deemed to have adopted it. This period of 28 days may be extended by that court.

*English Bankruptcy Act 1914

408. Power of Liquidator to refer.—The powers which a living company as regards reference of disputes to arbitration may possess are not co-extensive with the power to be exercised by the liquidators. The directors of the company are supposed to know their own business being businessmen, while an Official Liquidator is very often a new man unconnected with the business carried on by the company. His knowledge and information of men and things is not likely to be co-extensive with similar knowledge of the directors. It, therefore, does not follow that because a living company is allowed to refer matters in difference to arbitration in a particular way that an official assignee is allowed to make a reference to private arbitration. *In the matter of Dehra Dun Mussorie Tramway Co.*, A.I.R. 1928 All. 553=26 A.L.J. 810=50 All. 867=110 I.C. 695. But where an arbitration agreement has been entered by a company and then goes into liquidation it appears that the principles underlying this section should apply in the case of a liquidator.

409. Sub-section (2).—If the case is one "to which sub-section (1) does not apply" i.e., in a case where the party interested has not served the Official Assignee with notice in writing under section 64 of the Presidency-towns Insolvency Act, or where the Official Assignee has not adopted the contract under the same section, or where there is no provision for adopting the same procedure, then if any matter to which the arbitration agreement applies require to be determined in connection with or for the the purposes of insolvency proceedings any other person to the agreement, or the Official Assignee or the Receiver may apply to the court having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the court may make such an order in a fit case.—*Vide* also, *Russell* on *Arbitration*, 13th Edn., p. 452. Section 65 of the Presidency-towns Insolvency Act enacts : "The Court may, on the application of any person, who is, as against the Official Assignee, entitled to the benefit, or subject to the burden of a contract made with the insolvent, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the insolvency." Under section 68 of the Presidency-towns Insolvency Act, subject to the provisions of the said Act, the Official Assignee shall with all convenient speed realise the property of the insolvent, and for that purpose may "refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon." For similar provision in the Provincial Insolvency Act, vide section 59 of the Provincial Insolvency Act of 1920.

Where during the pendency of the insolvency proceedings the receiver and the secured creditors referred the matter to arbitration and the award directed the receiver to bring the insolvent's property, which was ancestral and revenue-paying, to sale and realise the sale proceeds through court : *Held*, the Insolvency Act has no provision to prevent secured creditors from acting according to the award, but the better way would be to obtain the insolvent's discharge under section 38 and deal with the property outside the jurisdiction of the insolvency court. The receiver under the insolvency, but being a person vested by the arbitrator with authority to sell the property under the arbitration provisions, would be able to sell the property under the terms of the award. *Ram Devi* v.

Ganesh Lal, A.I.R. 1926 All. 501=24 A.L.J. 480=95 Ind.Cas. 416=All. 475.

410. Sub-section (3).—Under the Presidency-towns Insolvency Act, the trustee in bankruptcy is called the "Official Assignee" and under the Provincial Insolvency Act he is called "Receiver."

411. Section whether applicable to statutory arbitration.—This section is not applicable to statutory arbitration.

Power of Court to appoint arbitrator or umpire

8. (*1*) *In any of the following cases*—

(*a*) where *an arbitration agreement* provides that the reference shall be *to or more arbitrators to be appointed by consent of the parties*, and all the parties do not, after differences have arisen, concur in the appointment or appointments ; or

(*b*) if any appointed arbitrator *or umpire* neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties *or the arbitrators, as the case may be*, do not supply the vacancy : or

(*c*) *where the parties or the arbitrators are required to appoint an umpire and do not appoint him ;*

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the *appointment or appointments or in supplying the vacancy*.

(*2*) If the appointment is not made within *fifteen clear days* after the service of the *said* notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, *as the case may be*, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

412. N.B.—This section dealing with the court's power to appoint an arbitrator in certain cases, reproduces with some verbal changes section 8 of the Act, 1899 Act (Act IX of 1899)—*Notes on clauses Cf.* para. 5 of the second Schedule of the Civil Procedure Code of 1908 and section 10 of the English Arbitration Act of 1950 given in the Appendix. In the English Act of 1950, in Section 10, there is one more clause, namely clause (*a*) which runs as follows:—"(*a*) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or die, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy" ; see also *Probodh* v. *Union of India,* A.I.R. 1953 Cal. 385. This section would be complete if such a clause be added.

413. Changes made by the Select Committee.—"We have removed an obscurity from clause 8(1)(a) where it was not clear whether a failure to concur in any one of the appointments or failure to concur in all the appointments was contemplated. We have omitted the words 'or is removed' from clause 2(1)(*b*) and also from clause 9(*a*) to remove the inconsistency which would otherwise exist between these clauses and

clause 12, which gives to the court and not to the parties power to appoint arbitrators in place of arbitrators removed by the court. In sub-clause (2) we have extended the time for making an appointment to fifteen days from the service of notice under sub-clause (1)".—*Report of the Select Committee.*

414. Law in England before the English Arbitration Act of 1889. —At common law, if a party failed to appoint or concur in the appointment of an arbitrator persuant to the agreement to refer, an action for damage would lie. *Thomas* v. *Fredericks,* (1847) 10 Q.B. 775=16 L.I.Q.B. 393 ; see also *Livingstone* v. *Ralli,* 5 El. & Bl. 132=24 L.J.Q.B. 269=1 Jur. N.S. 594.

415. Scope of section.—"Section 8 empowers the court to appoint an arbitrator or an umpire in certain cases so that the arbitration agreement may not become abortive. It provides a machinery for effectively working out and enforcing the arbitration agreement. The umpire appointed under this section has the like power to act on the reference and to make an award as if he were appointed by consent of the parties. The scheme and object of the section shows that the application under the section can be made by persons by or against whom the arbitration agreement is mutually enforceable." *Probodh* v. *Union of India,* A.I.R. 1953 Cal. 385=56 C.W.N. 436. In *India Hosiery Works* v. *Bharat Woollen Mills,* A.I.R. 1953 Cal. 488=57 C.W.N. 500, *Chakravarty, C.J.* observed: "In my opinion, it is clear that even under the present Act, an arbitration agreement neither specifying the number of arbitrators nor specifying the mode of appointment, is perfectly effective and valid and the incidents of such an agreement are that it is to take effect as an agreement for reference to a sole arbitrator, to be appointed by consent of the parties or, where the parties do not concur in making an appointment, to be appointed by the court, except where the operation of Rule 1 of the First Schedule is excluded.....Consent of the parties is the very essence of arbitration. Where the agreement provides for more than one arbitrator and they are not each to be appointed by all the parties, it is necessary to provide expressly which of them will be appointed by whom, as in the case of the agreement contemplated by Ss. 9 and 10. But where different arbitrators are not to be appointed by different parties and the intention is that all of them must concur in the appointment of sole arbitrator or each of the arbitrators where there are more than one, it is not necessary to make any express provision in the agreement that appointment or appointments are to be made 'by consent of the parties'. Without consent, no arbitrator can be appointed or can act in such a case.

"Where therefore, the agreement does not assign the right of appointment distinctively to different parties in respect of different arbitrators, it is inherent in the agreement that the appointment of the arbitrator or each of the several arbitrators must be by the consent of all parties. There may be an express provision to such effect, but even in the absence of any express provision, such a provision must be taken to be necessarily implied. It is for that reason that where the agreement does not specify the number of arbitrators, nor specifies the mode of appointment, the court first takes the agreement as providing for reference to a single arbitrator by reason of the provisions of Rule 1 of Schedule 1, then takes the mode of appointment intended necessarily to be appointed by consent of the parties and, next, if it finds that the parties cannot

concur in the appointment of an arbitrator, it appoints one itself. It takes and can take the agreement to be an effective agreement, because the mode of appointment by consent of the parties is implied in it, and it is not required to supply the mode of appointment and does not require any provision in enabling it to do so."

The true meaning of clauses (*a*) and (*b*) is that where the parties will not appoint any arbitrator or any appointed arbitrator refuses to act, or is incapable of acting or dies, and there is no machinery in the submission whereby an appointment can be obtained, then after following the procedure laid down in sub-section (2) the judge may appoint an arbitrator. *Wilson and Eastern Counties Navigation etc., In re,* (1892) 1 Q.B. 81, *Per A. L. Smith, J.* In the above case *Mathews, J.* observed: "By the original contract *Mr. Martineau* was appointed standing referee to settle any difference which might arise from time to time between the parties. Certain differences arose, and *Mr. Martineau* made an award, and gave directions as to what was to be done. He then left his country and went to America. During his absence further differences arose, and the company then obtained from the President of the Institute of Civil Engineers the appointment of *Mr. Shelford* as arbitrator. *Mr. Shelford* hesitated to act until the order of a judge was obtained for his appointment, and accordingly an application was made to *Collins, J.* who made the order which is the subject of the appeal. The question turns on S. 5 of the Arbitration Act, 1889. It is contended that *Mr. Shelford* refused to act within the meaning of sub-section (b) of that section. I cannot agree with the view that he refused, but even if he had done so the proper course would have been to apply again to the President of the Institute of Civil Engineers, and obtain the appointment of some other person. It is argued that the judgment of the court of Appeal in *In re, Williams & Stepny* (1891) 2 Q.B. 257, amounts to a statement of law to the effect that a submission may be overriden by the Act, but that case only decided that the Act might add things which were not in the submission, unless the intention that they should not be added was expressed". Where in a pending suit the underlying object of the agreement was to entrust the determination of the matters in difference to a person of their own choice and not that if the named arbitrator was unable to act for one reason or another, the arrangement would automatically come to an end. S. 8 read with S. 25 of the Arbitration Act would seem to apply to the case. *Jawaharlal* v. *Jagadish,* A.I.R. 1951 All. 335=6 D.L.R. (All.) 146. Where a proposal to refer a dispute to arbitration and the nomination of an arbitrator are abandoned owing to an assurance by the opposite party that the matter will be amicably settled, but a reference becomes necessary subsequently, this section has no application to the case, and a fresh nomination of an arbitrator may be made. *Firm of Khalsa Brothers* v. *Hariram,* 83 Ind.Cas. 539=17 S.L.R. 164=A.I.R. 1924 Sind 29. Where three parties to the deed of partnership provide for reference of disputes to a single arbitrator in case the parties agree upon one, otherwise to two arbitrators, one to be appointed by each party to the difference, it cannot be construed as an agreement to refer the dispute to a single arbitrator *simpliciter* so as to attract the operation of this section. *Subal Chandra* v. *Mahomed,* 47 C.W.N. 570=A.I.R. 1943 Cal. 484=I.L.R. (1943) 2 Cal. 298=210 Ind.Cas. 454. In above case *Das, J.* said: "The arbitration clause is extremely wide in its terms. It is also rather peculiar having regard to the fact that there are three parties to the deed of

partnership.....If in such circumstances the parties do not agree to a single arbitrator then the alternative provision for appointment of two arbitrators, one by each of the parties to the difference would obviously be inappropriate and unworkable and I had doubts whether in such circumstances and in the exercise of my discretion I should stay the suit and drive the parties to an arbitration which will inevitably be infructuous. *Mr. S. N Banerjee* argued that the arbitration cannot be infructuous because under section 8 of the Act, the court will appoint an arbitrator on the application of any party after giving requisite notice. I do not agree with *Mr. Banerjee* that S. 8 could have any application to the present arbitration agreement. This arbitration agreement cannot be construed as an agreement to refer the disputes to a sigle arbitrator *simpliciter* so as to attract the operation of section 8 of the Act. Reference to single arbitrator is conditional on all the parties agreeing to do so and there is an alternative mode of appointment of two arbitrators. To construe this arbitration agreement as an unconditional agreement to refer to one arbitrator is to cancel the arbitration provision altogether and will amount to making a new contract for the parties, which is obviously not permissible". This section empowers the court to appoint an arbitrator or an umpire in certain cases so that an arbitration agreement may not become abortive. It provides a machinery for effectively working out and enforcing an arbitration agreement. The umpire appointed under this section has the like power to act on the reference and to make an award as if he was appointed by consent of the parties. *Probodh* v. *Union of India,* A.I.R. 1953 Cal. 385. In a lease it was provided that in case of disagreement on the question of royalty for renewed period, the dispute was to be referred to arbitration. Held that the whole procedure relating to arbitration was available to the parties for determination of royalty. *State of Behar* v. *Indian Copper Corporation* 1960 B.L.T.R. 105=I.L.R. 38 Pat. 1160. The provision of s. 8 clearly contemplate the appointment of an arbitrator appointed by the parties to arbitrate provide the agreement to reference indicates that the vacancy on the refusal of the arbitrator to arbitrate was not intended to be supplied. *District Co-operative Federation* v. *Khub Chand* A.I.R. 1961 H.P. 35.

416. Sub-section (1) of Section 8 of Arbitration Act of 1899.— Clause (a) runs as follows:—Where a submission provides that reference shall be to a single arbitrator and all the parties do not after differences have arisen, concur in the appointment of an arbitrator.....any party may serve the party or arbitrator notice to concur etc. In construing this section it was held in *Gopalji Kuverji* v. *Morarji* 50 Ind.Cas. 411= 21 Bom.L.R. 308, that in a case of submission of a dispute to three arbitrators, all of whom after acting had declined to proceed any further the court had no jurisdiction to appoint new arbitrators. But the Calcutta Hight Court in the case of *General Electric Trading Co.* v. *Siemens (India) Ltd.*, A.I.R. 1929 Cal. 177=116 Ind.Cas. 625=56 Cal. 848=49 C.L.J. 19=33 C W.N. 418, took a contrary view. Again the Madras High Court in *Kuthi Ammal* v. *Sarangapani,* A.I.R. 1931 Mad. 170=54 Mad. 198=130 Ind.Cas. 668, supported the view taken by the Bombay High Court. See also, *Ramchandra* v. *Continental Stores,* 10 Luck. 268=11 O.W.N. 1347=A.I.R. 1935 Oudh. 26=152 Ind.Cas. 319, where the view taken by the Bombay High Court was supported. See also, *James Mackintosh* v. *Scindia Navigation,* 75 Ind.Cas. 221=47 Bom.L.R. 250=A.I.R. 1922 Bom. 444; *Ramji Purshotam* v. *Hari Samla,*

A.I.R. 1939 Sind 81=181 Ind.Cas. 337 where all the previous cases have been discussed and the views of the Bombay and Madras High Courts have been followed.

In *In Re Smiths Service & Nelson & Sons Ltd.*, (1890) 25 Q.B.D. 545=59 L.J.Q.B. 533 in construing the corresponding section of the English Act of 1889, it has been held that "Where an agreement to refer dispute to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties and the third by the two so appointed and one of the parties refuses to appoint one arbitrator, the court has no power under or apart from the Arbitration Act, 1889, to order him to do." In that case *Lindley, L.J.* said: "It certainly looks like a bolt in the Act, that by reason of there being no provision as to three arbitrators as distinguished from two arbitrators and an umpire, sections 4, 5 and 6 do not apply, but we cannot help that." Section 8 must be read as a whole and clause (b) of sub-section (1) must be read as qualified by sub-section (2). It is consistent with the language of entire section to construe clause (b) as covering the case of a vacancy where the submission provides for references to a single arbitrator and any other construction would render clause (b) of sub-section (1) inconsistent with the words of sub-section (2). Hence where the parties have jointly appointed to arbitrators and one of the arbitrators dies or a vacancy otherwise occurs, the court has no power under S. 8(1)(b) to supply the vacancy and appoint an arbitrator. *Ramji Purshotam* v. *Hari Shamla*, A.I.R. 1939 Sind 8=181 Ind.Cas. 337; see also *Uttam Chand* v. *Balmokand*, A.I.R. 1929 Sind 55=107 Ind.Cas. 435. To set at rest all these conflicting views and to remove the bolt already removed in the English Act on which it was based, the Legislature at last enacted section 8 in its amended form. Now parties can appoint two or more arbitrators and their places can be filled up by the court in case of necessity. The cases already mentioned do not interpret the law as it now stands in its amended form, but it shows the gradual development of the law.

417. Civil Procedure Code Schedule 2 paras 5 and 17.—Where the agreement provides for arbitration by named arbitrators, and such arbitrator or any one of such arbitrators is not available on account of death, refusal to act or other reasons, before an application is made under para. 17, the court has power to appoint an arbitrator in his place. It is only if there is no provision in the agreement for the appointment of an arbitrator and the parties cannot agree, that the court has power to appoint an arbitrator. *Satyanarayana Murthi* v. *Venkataramana Murthi*, 61 L.W. 165=1948 M.W.N. 185=2 D.L.R. 601=(1948) 1 M.L.J. 190 (F.B.)=A.I.R. 1948 Mad. 312 (F.B.); see also *Saligram* v. *Kishan Singh*, I.L.R. (1939) 20 Lah. 23=A.I.R. 1938 Lah. 859=179 Ind.Cas. 584; 19 Pat. 927=A.I.R. 1941 Pat. 155=193 Ind.Cas. 756. In the first named case, *Rajamannar, J.* observed: "There are cases in which the agreement may disclose a general intention to have the disputes decided by arbitration without emphasis on the particular individual or individuals as arbitrators. As observed by *Henderson J. in Rajani* v. *Panchanan*, I.L.R. (1937) 2 Cal. 434=A.I.R. 1937 Cal. 388=172 Ind.Cas. 243, 'an agreement to have a dispute settled by one or more individuals is one thing; an agreement to go arbitration rather than to litigate in the courts is quite another.' Where by agreement parties decide to settle disputes by the arbitration of ascertained persons without intervention of the court, the court has no power under para. 5 to

direct the appointment of a new arbitrator in the place of one declining to act."

It is one of the essential principles of law of arbitration that the arbitrator should discharge his duties freely and of his own accord, and the court should compel him to give his award. *Lal Khan* v. *Kashminlal*, A.I.R. 1930 Lah. 125=31 P.L.R. 386=124 Ind.Cas. 676; see also *Shib Charan* v. *Rati Ram*, 7 All. 20=(1884) A.W.N. 212; *Basdeo* v. *Kanhaiyalal*, A.I.R. 1921 All. 361=43 All. 101; *Ahmed Noor* v. *Abdur*, 42 All. 191=54 Ind. Cas. 366. But if the arbitrator acts in accordance with the request of the court, the award will not be vitiated. *Mahadeo* v. *Badri*, A.I.R. 1928 All. 741; *Harnarain* v. *Bhagwant*, 10 All. 137=(1888) A.W.N. 22; *Keshav* v. *Luxmi*, A.I.R. 1929 Bom. 50=52 Bom. 568; *Joymangal* v. *Mohan*, 23 W.R. 429.

418. Arbitration agreement.—No particular form can be laid down as universal for forming arbitration agreement, but this much is certain, words used for the purpose must be words of choice and determination to go to arbitration and not problematic words of of mere possibility. *Jyoti Brothers* v. *Shree Durga*, 60 C.W.N. 420=A.I.R. 1956 Cal. 280. In the above case the arbitration clause was: "In the event of any dispute arising out of this contract the same can be settled by arbitration held by a chamber of commerce at Madras," the clause means that after a dispute has arisen, the parties have further to agree that their dispute shall be referred to arbitration and then to decide also which chamber of commerce at Madras. But the arbitration clause as it stands is not an arbitration agreement and is not a present contract to submit dispute to arbitration. The word "can" in this clause cannot be construed as a kind of an option given to either of the contracting parties. *Jyoti Brothers* v. *Shree Durga*, 60 C.W.N. 420=A.I.R. 1956 Cal. 280 distinguishing I.L.R. (1960) 1 Cal. 550 and A.I.R. 1930 Cal. 10.

The definition of "arbitration agreement" as given in the Act makes it clear that future differences can form the basis of an agreement to refer those disputes, as and when they arise to the arbitrator. Parties to such an arbitration clause cannot predict as to what actual point of difference would arise between them at some later stage. All that they can do is to prescribe the limits by mentioning the nature of disputes which will be referable to a domestic tribunal. What is necessary is that the subject-matter of reference should be clearly defined so that the arbitrator may be in a position to know that he has to decide only those disputes which appertain to the subject-matter of reference. Where the arbitration clause lays down that all matters arising out of or incidental to partnership business of the two parties shall be referred to an arbitrator, the arbitrator will be in a position to know that he has to decide only those matters in dispute which relate to partnership business. It will be for the arbitrator to ascertain the points in issue when he proceeds with the reference. And for that purpose the arbitrator can order the parties to define the matter in controversy by delivering to each other points of claim and defence In this view the arbitration clause in question affords a good basis for making a reference. *Balika Debi* v. *Kadarnath*, A.I.R. 1956 All. 377. Where the partnership deed provides that if any dispute were to arise concurring the partnership business, they should be referred to arbitrator whose decision would be binding on the two partners, the claim of a partner that certain sums were advanced by him for investment in the partnership business will be a proper matter for reference and it

will be for the arbitrator to decide whether or not these sums can be taken into consideration in settling the partnership account. *Ibid.*

Where a deed of partnership provides for arbitration in respect of all disputes in connection with partnership or partnership deed, whether during or after the partnership, and a difference has arisen between the partners as to whether rights and liabilities under the partnership deed have come to an end by "flux" of time or not and whether one of them is dischargtd from complying with the terms of arbitration agreement or not, these disputes should be considered to arise in connection with the partnership or partnership deed particularly when one side is asserting discharge under Art. 106 Limitation Act, and the other party is denying it. *Brahm Nath* v. *Dhami Ram,* A.I.R. 1956 Punj. 125. Arbitration clause in an agreement was in the following terms : "Every litigation as to the validity or construction or execution of the present agreement shall be finally decided in Paris, according to "*Reglement de conciliation et d'arbitrage*" of the International Chamber of Commerce, 38 Quasi Albert ler Paris, by one or several arbitrators appointed according to their "Regiment" *Held,* that the ambit of the arbitration clause was wide enough to include the question of limitation. It is included in the expressions, "validly", "construction" or "execution." The word "execution" in the arbitration clause means in this context the entire range of performance and enforcement of the agreement. Enforcement of an agreement would raise questions of limitation. The word "validly" would also include the question of limitation, because a claim barred by limitation is no longer valid. *Held,* further that the word "litigation" in the clause mean "dispute" and every such dispute had to be decided by the arbitration specified thereon. *Mury Exportation* v. *Khaitan,* A.I.R. 1956 Cal. 644.

Where an arbitration clause provides for an arbitration to be conducted according to particular Rules and Regulations, the system of exchange of letters provided by the Bengal Chamber of Commerce cannot be imported into such a kind of arbitration. *Muray Exportation* v. *Khaitan,* A.I.R. 1956 Cal. 648.

419. Arbitration agreement.—Construction.—One of the conditions of a building contract provided that upon the expiration of a certain period "the architect shall issue a final certificate of the value of the words executed by the contractor and such final certificate shall be conclusive evidence as to the sufficiency of said works and materials" Another condition provided *inter alia,* "without prejudice to the generality of his powers the arbitrator shall have power to direct such measurement and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate....." and "to open up, review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given." *Held,* the conditions must be read as meaning simply that the certificates were final and conclusive subject to the arbitrator's powers. The arbitrator's powers were as words as they could possibly be. Any sort of dispute and any certificate might be referred to him, and he had power to deal with the whole matter as if no such certificate has been given. The arbitrator had power to make such an award in respect of the rights of the parties as he might think proper in the same manner as

if no final certificate had been given. *Windsor Rural District Council* v. *Otterway,* (1954) 3 All.E.R. 721.

420. Arbitration agreement, construction of.—Arbitration agreement that disputes are to be settled by arbitration in New York according to the rules of the American Arbitration Society does not suffer from any infirmity of vaguenes or indefinitness. *Michel* v. *Serajuddin,* 63 C.W.N. 128. The arbitration clause spoke of disputes to be referred to arbitration in accordance with the rules of the Mill Owners' Association, Bombay. *Held,* that the arbitration clause suffered from no vagueness or uncertainty. The entire emphasis was on arbitration : If emphasis was shifted from the word "arbitration" to the word "refer" the content of the arbitration clause is missed and it would lose sight of real intention of the parties. *Kamala Mills* v. *Ganpati,* 63 C.W.N. 67.

421. Sections 8 and 9.— Where in an arbitration agreement provision is made for reference to two appointed arbitrators, the procedure to be followed in a case where the appointed arbitrator refuses to act or is incapable of acting or dies, is laid down in section 8. The procedure which has been followed by the defendants is the procedure laid down by section 9, Arbitration Act, which has no application to an arbitration agreement which provides for a reference to appointed arbitrators as distinguished from arbitrators to be appointed. Where one of the appointed arbitrators had refused to act as far back as 1943 and no attempt had been made at any time to supply the vacancy through the assistance of the court as provided by section 8, Arbitration Act, 1940, the Civil Court was directed to proceed with the suits and dispose of them according to law. *Hari Ram* v. *Gobind Ram,* P.L.D. 1949 Sind 30=A.I.R. 1949 Sind 27. If any arbitrator appointed by the parties themselves refuses to act, the court can call upon him, and if he still declines to act, it can ask the parties to appoint another, but if the parties cannot appoint, the court can appoint a fresh arbitrator. *Yar Muhammad* v. *Ghulam Sarwar,* Pak.L.R. 1950 Lah. 285. Where in the case of an arbitration agreement in which provision is made for reference to two arbitrators, one of the appointed arbitrators refuses to act or is incapable of acting or dies the procedure to be followed is the one that is laid down in S. 8 and not the one laid down in section 9. *Hariram* v. *Gobindram,* A.I.R. 1949 Sind 24. In the above case *Thadani, J.* observed : "The learned Judge does not appear to have appreciated the difference in the language of S. 8 (1) (b) and S. 9 of the Act. On a plain reading of S. 8, it should have been manifest to the learned Judge that whereas under S. 8(1) (a) the arbitration agreement contemplates a reference to one or more arbitrators *to be* appointed by the consent of parties, clause (b) of section 8 (1) contemplates an appointed arbitrator or umpire. The learned Judge has apparently construed the arbitration agreement in question to fall within the purview of S. 9, Arbitration Act of 1940. But S. 9 does not refer to an arbitration agreement in which provision is made for a reference to appointed arbitrators. Section 9 deals with an arbitration agreement in which provision is made for a reference to two arbitrators, one to be appointed by each party.

"In the arbitration agreement before us, provision is made for reference to two appointed arbitrators. The procedure to be followed in a case where the appointed arbitrator refuses to act or is incapable of acting or dies, is laid down in S. 8 itself, which lays down that "any party may serve the other parties or arbitrators' as the case may be, with a written notice to concur in the appointment or in supplying the

vacancy.....Sub-section (2) of section 8 of the Act lays down that, If the appointment is not made within fifteen clear days after the service of the said notice, the court may on the application of the party who gave the notice.....appoint an arbitrator'.

"In the present case it is an admitted position that no such application was ever made in the court. The procedure which has been followed by the defendants is the procedure laid down by S. 9, Arbitration Act which has no application to an arbitration agreement which provides for a reference to appointed arbitrators as distinguished from arbitrators to be appointed.

"This aspect of the case has been considered by the Division Bench of the Calcutta High Court in *General Electric Trading Co.* v. *Siemens (India) Ltd.*, 56 Cal. 848=A.I.R. 1929 Cal. 177.....*C. C. Ghose, J.* in delivering the judgment of the Division Bench observed : 'Now, in this case two arbitrators have mutually agreed upon and they have been appointed as such by the parties. Therefore, S 9, Arbitration Act has no application, because the language used therein has reference to a case where the submission is to two arbitrators one to be appointed by each party. Let us next see whether there is anything in the language used in section 8, Arbitration Act (of 1899), which prevents the application of S. 8 to this case, having regard to the events that have happened. Section 8 (1) (a) obviously has no application, because it deals with the case of a reference to a single arbitrator. Turning to S. 8 (1) (b), there is nothing in my opinion, in the language used therein which would render it inapplicable to this case. To start with, the arbitrator who has refused to act, etc., is an appointed arbitrator. In the second place, the submission does not show that the place of arbitrator who has refused to act, etc., should not be filled up. In the third place, it is clear that the parties have not cared to fill up the vacant place. Therefore, I do not see why S. 8 (1) (b) should not apply. This is the conclusion I come to on the language used in the section.' "

422. Section 8—Applicability—Conditions.—Section 8 will be attracted only if difference or disputes have arisen between the parties. Such differences should exist at the time when the court makes the order under section 8. *Balika Devi* v. *Kedarnath*, A.I.R. 1956 All. 377. Under the present law as embodied in the section the court has power to appoint not only a single arbitrator but also more than one arbitrator if the arbitrator appointed by the parties refused to act. *Kashi Prosad* v. *Gupteshwar*, A.I.R. 1956 All. 431=1956 All.W.R. (H.C.) 58. Where one of the parties to the arbitration agreement refuses to concur in the appointment of an arbitrator under the arbitration clause, the other party has the option either to move the Court under S. 8, or under S. 20 of the Act. There is nothing in S. 20 to compel the other party not to take recourse of S. 8 of the Act. It is his concern whether to apply under S. 8 or under S. 20 and his application under S. 8 cannot be rejected merely on the ground that S. 20 was perhaps more appropriate. If a relief can be given under S. 8, it will be available to him. *Balika Devi* v. *Kedar*, A.I.R. 1956 All. 377.

423. Cases within clause (a) of Sub-section (1).—The Court may appoint an arbitrator or arbitrators under clause (a) of sub-section (1) if the following conditions are satisfied :—

(i) there must be a valid arbitration agreement,

(ii) there is provision in the arbitration agreement for the appointment by consent of one or more arbitrators,

(iii) that the arbitrator or arbitrators is or are to be appointed with the common consent of all parties,

(iv) the differences have arisen between the parties to the agreement as regards subject-matter of arbitration,

(v) that all the parties do not concur in the appointment or appointments,

(vi) that notice has been served by one party to another party or parties following the procedure laid down in section 42 of the Act calling upon him or them to give his or their consent to the appointment,

(vii) that no consent was given within fifteen days after the service of notice, and

(viii) that opportunity was given to the defaulting party or parties to say his say before the court.

424. Clause (a) of S. 8 (1) of Jammu and Kashmir Arbitration Act.—Clause (a) of S. 8 (1) gives power to a court to appoint an arbitrator on failure of the parties to do so, if (a) there is a valid arbitration agreement ; (b) there is provision in the arbitration agreement for appointment of an arbitrator by the consent of the parties ; and (c) all the parties do not concur in the appointment of an arbitrator and notice to the parties has given in terms of Ss. 8 and 42, J & K. Arbitration Act. Where the clause of the arbitration agreement provided that one of the parties alone had the power to appoint an arbitrator the other party's consent or no consent was immaterial. *C. Rai* v. *Union of India*, A.I.R. 1957 J. &. K. 27.

425. Application of this clause in arbitration in suits.—Section 25 enacts. "The provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter :

Provided that the Court may, in any of the circumstances mentioned in sections 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit."

426. Existence of arbitration agreement.—The existence of arbitration agreement is a pre-requisite for conferring jurisdiction on courts. *Boss* v. *Helsham*, (1866) L.R. 2 Ex. 72 ; *Collins* v. *Collins*, (1858) 26 Beav. 306=28 L.J.Ch. 184.

427. To be appointed by consent of parties.—This clause has no application where arbitrators already been named. Satutory provisions which confer jurisdiction must be strictly construed. *Sanday Patrick* v. *Shivlaldas* 6 Ind.Cas. 857=3 S.L.R 221.

428. After differences have arisen.—The powers of the court do not arise until difference have arisen, and it would seem, that it is for court to decide whether in fact differences have arisen or not. *Russell*, 13th Edn., p. 116 ; *Russell*, 15th Edn., p. 185 ; see also *Miller, Gibbs & Co.* v. *Smith and Tyrer Ltd.*, (1916) 1 K.B. 419=85 L.J.K.B. 627. In the above case *Avory, J.*, said : "In *Dinny Mott & Dickson, Ltd.* v. *Standard Expert Lumbro Co.*, 81 L.J.K.B. 811=(1912) 2 K.B. 542 disputes arose under the contracts in question, and the arbitrators failed to agree, and also failed to appoint an umpire. An originating summons, taken out by one of the parties asked for the appointment of an umpire by the court, and an umpire was appointed by a Master in Chambers. An appeal was taken direct to the court of Appeal and the order was affirmed."

429. "All the parties do not concur."—This expression means all the parties to the arbitration agreement and after any party's death his

legal representatives (*vide* section 6). A notice calling on the other party to name an arbitrator to act with one appointed by the party issuing the notice cannot possibly be construed as a notice to concur in appointing a single arbitrator under the provisions of section 8 of the Indian Arbitration Act. 1899. *Sanaday Patrick* v. *Shivaldas*, 3 S.L.R. 221=6 Ind.Cas. 857 The Arbitration Act does not limit in any way the number of arbitrators, nor does it prevent the parties, if they choose to do so as a matter of business by common consent, altering the number or the constitution of the tribunal so constituted. *Abdus Shakur* v. *Mohammed*, 62 Ind.Cas. 426=19 A.L.J. 348=43 All. 456. Where a proposal to refer a dispute to arbitration and the nomination of an arbitrator are abandoned owing to an assurance by the opposite party that the matter will be amicably settled, but a reference becomes necessary subsequently, this section has no application in the case, and a fresh nomination of an arbitrator may be made. *Firm of Khalsa Brothers* v. *Harriram Sriram & Co.*, 83 Ind.Cas. 539=17 S.L.R. 164=A.I.R. 1924 Sind 29.

A contract, which stated that in all disputes that might arise out of it all the parties agreed to submit the same to arbitration. was signed by the purchasers and by the vendor's brokers "by the authority of our principals as agents." Disputes having arisen, the purchasers called on the brokers to appoint an arbitrator, which they refused to do on the ground that they, as mere agents, were parties to the submission to arbitration. An order for the appointment of an arbitrator was made by the District Registrar. On appeal *Younger, J.* in Chambers discharged the order and cancelled the appointment. *Miller, Gibb & Co.* v. *Smith and Tyrer*, (1916) 1 K.B. 419=85 L.J.K.B. 627=114 L.T. 562. On appeal *Luch, J.* observed : "In this case the applicants took out an originating summons before the District Registrar on an alleged submission to arbitration between themselves and the respondents. The latter opposed the summons, on the ground that they never agreed to submit matters to arbitration. That was the matter in controversy and what the Registrar had to decide. He decided that there was a submission, and made the order for the appointment. The Judge in Chambers reversed the order, and cancelled the appointments."

430. First Schedule—para. 1.—"Unless otherwise expressly provided, the reference shall be to a sole arbitrator."

431. Cases within clause (b) of sub-section (1).—The court may appoint an arbitrator or arbitrators or umpire, as the case may be, in the following cases :—

(i) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting or dies,

(ii) the arbitration agreement does not show that it was intended that the vacancy should not be supplied,

(iii) the parties or the arbitrators, as the case may be, do not supply the vacancy,

(iv) that notice has been served by one party to another party or parties following the procedure laid in section 42 of the Act,

(v) that no appointment was made within 15 days after the service of notice, and,

(vi) that opportunity was given to the defaulting party to say his say before the court.

432. Scope of clause (b).—Where an arbitrator appointed by one party is made sole arbitrator under section 9, the other party having refused to appoint its own, but he afterwards refuses to act, the procedure

to be followed is not that laid down in section 8 (1) (b) ; but that in section 9 will be repeated and the party, who appointed the arbitrator, who became the sole arbitrator, may appoint a fresh arbitrator after giving notice to the other side. *Uttamchand* v. *Balmokand,* A.I.R. 1929 Sind 55. Where the appointed arbitrator expresses his unwillingness to act, if the party concerned did not give any notice under this section, it is not for the court to give any notice to him regarding supervision of the arbitration. *Kanhayalal* v. *Ram Kumar,* A.I.R. 1956 Raj. 129. The fact that one of the parties to the agreement is constituted an arbitrator has significance where the question arises whether it was intended to replace that party by another person. Further, the fact that the arbitrator is mentioned by his office also supports the contention that it was not intended that he should be replaced by some other person as an arbitrator. *Chief Engineer* v. *Harbans Singh,* A.I.R. 1955 Raj. 30. Two of the conditions mentioned in cl. (b) of S. (1) would never arise in the case of an arbitrator who is appointed by office, that is, he would neither die, nor would be incapable of acting *Ibid.* The actual words in the arbitration clause were "the Chief Engineer shall be the sole arbitrator and judge in the dispute." *Held,* that the intention behind the terms of the agreement was that the dispute would only be referred to the arbitration of the Chief Engineer, and that no one else would replace the Chief Engineer in case of vacancy. *Ibid.* The provision as to the intention not to apply the vacancy applies to all the four conditions mentioned in cl. (b) of the section. After all if the arbitrator refuses to act one can say that there is vacancy without any violence to the language. Further, the case of neglect to act is not very different from the case of a refusal to act. A vacancy arises when an arbitrator neglects or refuses to act. *Ibid.*

Where an arbitration clause in a Government construction contract concerning disputes arising out of it provided that the Chief Engineer was to act as the sole arbitrator and provided further that if the Chief Engineer was unable or unwilling to act as the sole arbitrator then he must appoint another person in his place as an arbitrator, under the arbitration agreement, the Chief Engineer has to perform two duties. Firstly, it is his duty to act as as an arbitrator himself and if he does not do so, he clearly refuses or neglects to perform the duties of the arbitrator. His second function is if the Chief Engineer is unable or unwilling to act as the sole arbitrator, that he must appoint another person in his place as an arbitrator. The second function of the Chief Engineer is a function which is performed by him not as an arbitrator but as a *persona designata* having certain duties to perform not as an arbitrator but as a person appointing somebody else to act as an arbitrator. In the event of the Chief Engineer not himself functioning as an arbitrator, the case becomes one contemplated by S. 4 of the Act.

The Arbitration Act provides no machinery on the failure of the *persona designata,* under S. 4 failing to act. The parties must in these circumstances approach the Court in the ordinary manner and either bring a suit for a mandatory injunction or take such other steps in a civil suit as they may be advised, but no appointment can be made by the Court under the Arbitration Act. In this view the Court is not justified in appointing another arbitrator. *Per Soni, J.* in *Union of India* v. *New India Contruction,* A.I.R. 1955 Punj. 172=57 Punj.L.R. 192. But *Khosla, J.* in the above case said : "The arbitration clause means that the Chief Engineer was appointed sole arbitrator but that he was given the authority either to enter the arbitration himself or to appoint another

arbitrator. This means in substance that he could himself or some one else and unless such appointment was made he could not be said to have acted as arbitrator or to have entered upon arbitration. His silence therefore does not mean that he neglected or refused to act as arbitrator. When a notice calling upon him to enter upon the arbitration is served upon him he can choose one of two courses. He can reply and say he was going to enter upon the arbitration or he can say that he was going to appoint some one else as the sole arbitrator. Upon this decision being taken the provisions of S. 8 (1) (b) would come into play, but until then it could not be said that he had neglected or refused to act as arbitrator." *Union of India* v. *New India*, A.I.R. 1955 Punj. 172=57 Punj.L.R. 192.

Where there is no manner of doubt that the parties are at liberty by mutual consent to choose another arbitrator, but it is completely contrary to the scheme of the arbitration that it should be within the favour of one party by its unilateral act to supersede an arbitrator and appoint another arbitrator in his place. *Shamji* v. *Sefton*, A.I.R. 1954 Punj. 190=56 Punj.L.R. 187. The court has direction under S. 8(1)(b) in the matter of appointment of an arbitrator. The court will not allow a party to keep a stale claim indefinitely alive by delaying in making an application for the appointment of an arbitrator under S. 8 after the death of the arbitrator by the court. *Hindusthan Flash Light* v. *Great American Insurance Co.*, A.I.R. 1963 Cal. 419. See also *Om Prakash* v. *Union of India* A.I.R. 1963 All. 242=1962 All. L.J. 1006.

433. Section 8 (1)(b)—Vacancy—Interpretation of.—Where a Major General is named to be an arbitrator in an arbitration agreement no vacancy would arise within the meaning of S. 1 (b) simply because the particular Major-General who was holding the office at the time of the contract ceased to hold the office, if he was succeeded by a successor who was a Major-General. So long as the Major-General was succeeded by a Major-General in the particular office and so long as the course of such succession was not broken by the introduction of an officer holding a different rank, no vacancy in the office of the arbitrator would arise at all. A vacancy would arise only when the officer is no longer a person holding the rank of a Major-General. *Bharat Construction* v. *Union of India*, A.I.R. 1954 Cal. 606. But it is doubtful whether clause (b) of S. 8 (1) at all applies to a case where a named arbitrator obviouslf chosen for the possession of qualifications special to him, has become unavailable or refuses to act. But in any way the applicability of that clause in a particular case, must be determined by the test laid down in the section itself. The test is that the arbitration agreement must not show that it was intended that the vacancy should not be supplied. In other words however individual the original choice may appear to be, if the agreement itself contains sufficient indication that the parties nevertheless intended that, in default of their original nominee, they would be prepared to fill up the vacancy by choosing another arbitrator, the section will apply and a new appointment may be made either by the parties or by the Court, as the case may be. *Ibid.* Although under the terms of the lease deed disputes between the parties arising out of the Patta were to be referred to the decision of the Executive Council, Chamba nevertheless with the merger of Chamba state in the Union of India on the 15th April, 1948, the Executive Council was dissolved and it ceased to exist.

Held that since the Executive Council had ceased to exist when the suit was instituted the jurisdiction of the Civil Court was not ousted. *Union of India* v. *Sanusar Chanel* A.I.R. 1960 H.P. 1.

434. Section 20 (5) and Section 47 and Section 8 (1) (b).— After the court has ordered the filing of the agreement under sub-section (5) of section 20, the arbitration at once comes into operation. Similarly are the terms of S. 47. Thus the Act makes a provision for the application of the other provisions of the Act. Hence provisions of S. 8 are also attracted. Under sub-section (1) (b) of this section. it can be presumed that it was intended to supply the vacancy and the burden to show otherwise must rest on the party objecting to it. It is therefore for the objector to show that the intention of the parties was not to refer the dispute to any other arbitrator than that of the named arbitrator. Where the only objection raised by the objector against the filing of the arbitration agreement is the unfitness of the named arbitrator on account of his close relationship with the other party to the agreement, this by itself does not show that the parties do not intend to render their dispute to arbitration. In such a circumstance the Court is justified in allowing the filing of the agreement. *Karam Chand* v. *Sant Ram*, A.I.R. 1958 Punj. 418.

In *In re an Arbitration between Wilson and Son, etc.*, (1892) I.Q.B. 81, *A. L. Smith, J.* observed : "I think, the true meaning of section 5, sub-sections (*a*) and (*b*), is that where the parties will not appoint an arbitrator, or an appointed arbitrator refuses to act, or is incapable of acting, or dies or there is no machinery in the submission whereby an appointment can be obtained, there the Judge may appoint an arbitrator." In *Sadiq Hussain* v. *Nazir Begam*, 12 Ind.Cas. 15=33 All. 743=38 I.A. 181=15 C.W.N. 1005=(1911) 2 M.W.N. 132=13 Bom.L.R. 826=21 M.L.J. 1151 =14 C.L.J. 313=14 Oudh Cas. 289=8 A.L.J. 1164=10 M.L.T. 173 (P.C.), in construing section 510 of the Civil Procedure Code of 1882, which corresponds to para. 5 of the new Civil Procedure Code, *Lord Shaw observed* : "By section 510 of the Code of Civil Procedure, 1882 (Act XIV), it is provided that "if the arbitrator, or, where there are more arbitrators than one, any of the arbitrators.....dies, or refuses or neglects or becomes incapable to act.....the court may in its discretion..... appoint a new arbitrator.....or make an order superseding the arbitration, and in the case shall proceed with the suit." What had happened in the present case was that after the arbitrator had been appointed he refused to accept office as such, and to act. It appears, however, that the courts in India have construed this section of the Code as meaning that the section can only apply if the arbitrator who refuses had accepted office before refusing. These decisions are *Pugardian Ravatan* v. *Moidinsu Ravatan*, 6 Mad. 414, and *Bepin Behari Chowdhury* v. *Annoda Prosad Mullick*, 18 Cal. 324 [see also, *Fayazuddin* v. *Aminuddin*, 1 Ind.Cas. 354=6 A.L.I. 351 ; *Radha* v. *Daulat*, 38 P.L.R. 1901=110 P.R. 1900 ; *Troyluckonath Roy* v. *Collector of Birbhoom*, (1864) W.R.Gap. 338]. In both of these cases it was held that the court has power, under section 510, to appoint a new arbitrator in the place of another only when that other had first consented to act and thereafter refused or became incapable. In their Lordships' opinion this is not proper construction of section 510 of the Code. It appears to their Lordships that, when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment." The fact that the person named as arbitrator in the contract between the parties refused to arbitrate is no ground for refusing to enforce the arbitration clause of the contract as

section 8(*b*) provides for the case when an appointed arbitrator refuses to act or is incapable of acting. *Mckenzies Ltd.* v. *Sulleman & Co.*, A.I.R 1933 Sind 75=140 Ind.Cas 626=27 S.L.R. 109. If a valid nomination has been made and the arbitrator refuses to act the right of the party or a third person to nominate or appoint another arbitrator is exhausted and section 8 of the Arbitration Act comes into force. *Ramjibhai* v. *Yusuf Ali*, 76 Ind.Cas. 261=A.I.R. 1925 Sind 12. In the above case the court observed : "The parties, however, in the submission or agreement to refer, may in certain cases, when providing for a subsequent appointment, intend by the word 'appoint' the appointment of an arbitrator, who is willing to act, or the party or third person appointing may expressly appoint 'subject to acceptance." In such case, it seems to me the party or person appointing has the right to appoint another arbitrator, if the arbitrator refuses to act but not otherwise. See *Reynold* v. *Gray*, (1698) 1 Salk. 70=91 E.R. 64 ; *Ringland* v. *Lowndes*, (1863) 33 L.J.C.P. 25 ; *Russell*, 12. And the acceptance of the appointment by the arbitrator completes the appointment not in the sense that it is an acceptance of an offer, but in the sense that it is the fulfilment of a condition precedent." But see *Shamdas Tenmal* v. *Khimanlal*, 29 Ind.Cas. 602=8 S.L.R. 302, where it is stated that until "acceptance there is nothing more than an agreement to refer to him and there can be no question of revoking or cancelling his authority, for he possesses none." Formal acceptance by the arbitrator is not necessary so long he consents to act. *James Finlay* v. *Gurdayal*, 76 Ind.Cas. 600=17 S.L.R. 93. After valid submission, it cannot be revoked by the parties. *Dwarka* v. *Dipchand*, 44 Ind.Cas. 360=11 S.L.R. 101.

435. When acceptance is complete.—In *James Finlay* v. *Gurdayal*, A.I.R. 1924 Sind 91=17 S.L.R. 93=76 Ind.Cas. 600, it has been held that the appointment of a person as arbitrator is not complete till such person has accepted the reference and consented to act and till such acceptance there is nothing more than an agreement to refer to him (*vide* head note of that case quoted in A.I.R. 1927 Sind 126). Commenting on this head note, *Lobo, A.J.C.* in *Macdonald* v. *Narsindas*, A.I.R. 1927 Sind 126=99 Ind.Cas. 554, observed : "A closer reading, however, of the judgment of *Raymond, A.J.C.* in the case to which I have closer reading, however, of the judgment of *Raymond, A.J.C.* in the case to which I have referred above makes it positively clear that the head notes which I have quoted above is not only misleading but wrong. At page 98 of 17 S.L.R. *Raymond, A.J.C.* after discussing the facts, the revlevant section of the Indian Arbitration Act and making reference to the passages in *Russell* on *Arbitration* thus sums up the situation : 'Now in the present case the incident contained a distinct agreement between the parties to refer disputes of whatever nature arising out of the contract to the arbitration of the two merchants whose decision is agreed to be accepted as final and binding. This is a submission in terms of the Arbitration Act and in pursuance of it, either party appointed his arbitrator. In my opinion the reference to arbitration is complete and it was unnecessary to follow it up with a formal reference to the arbitrators named."

"The learned Judge has clearly held that a submission clause in a contract followed by the nomination of an arbitrator by the parties, to the contract makes a complete reference to the arbitration. To my mind it makes no difference whether each of the parties to a contract nominates

his own arbitrator or whether one party nominates both arbitrators on failure by the other to nominate his arbitrator after having been called upon to do so. In either case the reference is complete when the arbitrators have been nominated in terms of the submission clause." See also *Sadiq* v. *Nazir,* 12 Ind.Cas. 15 (PC.).

436. "If any appointed arbitrator."—In the corresponding section of the repealed Act of 1899 the words used were "If an appointed arbitrator." In interpreting the corresponding expression of the English Act *Russell,* says : "The words 'an appointed arbitrator' in section 5 (*b*) must mean an appointed single arbitrator and not one of two arbitrators. The concluding words of the section seem to make this clear, because it is provided that the arbitrator appointed shall have like power to act in the reference and make an award as if he had been appointed 'by consent of all parties.'" *Russell,* 13th 7dn., p. 117. See also, *Gopalji* v. *Morarji,* 50 Ind.Cas. 441=43 Bom. 809. To avoid that interpretation the world "any" has been substituted for the word "an." It now means that if one of two arbitrators neglects, refuses to act, etc., this clause is applicable.

The nomination or appointment of an arbitrator is complete when a party has communicated it in a clear and unequivocal language in writing to the other or when a third person has communicated it to the parties in the manner intended by the parties to the agreement an authority is *ipso facto* conferred on the arbitrator to arbitrate. *Ramjibhai* v. *Yusuf Ali,* 76 Ind.Cas. 261=A.I.R. 1925 Sind 12 ; see also *Macdonald* v. *Narsindas,* A.I.R. 1927 Sind 126.

437. Section 8(1)(c) and (2)—Notice under S. 8(1)(c).—Section 8(1) (c) postulates at least a factual failure on the part of the arbitrators to appoint an umpire before either of the parties could serve the notice on the other arbitrator. The notice for which S. 8(1) (c) provides is a notice by the party to the arbitrators, who had already failed to appoint an umpire ; to concur in the appointment of an umpire, or to concur in supplying the vacancy in the office of the umpire. Section 8(2) comes into only after the service of the said notice, the notices issued by the party under S. 8(1) (c).

Section 8(2) is only an enabling section. The party whose notice was ignored is enabled by S. 8(2), to apply to the court for the appointment of an umpire. The scheme under S. 8 is that in default of a party to the references or even the default of an arbitrator should not normally result in arbitration agreement itself becoming abortive. Consent of course, is of very essence of arbitration. Reading S. 8(1) (c) and S. 8(2) together it is clear that even where the arbitrators were requested by the parties to appoint an umpire, if the request was complied with and an umpire was appointed and that appointment was accepted by the parties, the validity of the appointment cannot be challenged on the ground that that appointment was made more than 15 days after the parties had asked the arbitrators to appoint an umpire. If the requirements of S. 8(2) are satisfied and an application is made to the court to appoint an umpire, thereafter, of course, when the court is seized of the matter, the arbitrators could not be permitted to appoint an arbitrator. *Union* v. *Mangaldas,* A.I.R. 1958 Mad. 296=(1958) 2 M.L.J. 16=I.L.R. (1958) Mad. 420=71 Mad. L.J. 141.

438. Scope of s. 8(1)(c).—Section 8(1)(c) expressly provides for the case where the parties are required to appoint an umpire. Therefore a failure of the arbitrators to appoint an umpire under cl. 2 is a breach curable by the procedure prescribed by S. 8 of the Act itself and if a

party fails to follow the procedure permitted by the statute to remedy the breach and stand by till the award is made he cannot later on put forward non-appointment of an umpire as a ground for setting aside the award. *United Printing* v. *Kishori Lal*, 97 Cal. L.J. 73=A.I.R. 1956 Cal. 59; 98 C.L.J.73. Where the arbitrators fail to appoint an umpire and the parties do not follow the procedure prescribed by S. 8(1) (c) and section 8(2) but appear before the arbitrators and produce their evidence, they must be deemed to have waived the irregularity and the estopped. *Shambhunath* v. *Hari Sankar*, 1954 A.L.J. 332=A.I.R. 1954 All. 673= 1954 All. W.R. (H.C.) 250.

If the arbitrators do not nominate an umpire under S. 8(1) (c) a party has to serve the arbitrators with a notice in writing and if within 15 days they do not make the appointment, then under S. 8(2) the court has the right to appoint an umpire. The umpire then has to enter on the reference in lieu of the arbitrators and to make the award within two months. *Shambhunath* v. *Hari Sankar*, A.I.R. 1954 All. 673.

In the corresponding clause of section 8 of the Act of 1899 and section 5 of the English Act of 1899 the words used were "where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him." Clause (*c*) of sub-section (1) of section 8 of the 1899 Act did not apply to a reference to more than two arbitrators. The same remark was applicable to clause (*b*) of sub-section (1) of section 5 of the English Arbitration Act of 1889 which corresponded to clause (*c*) of sub-section (1) of section 8 of the Indian Act of 1899. The defect of the English Act was remedied by section 16 of the Administration of Justice Act, 1920. This amendment was made for removing the plot mentioned by *Lindley L.J.* in *In re Smith Service & Sons Ltd.*, (1890) 25 Q.B.D. 545=59 L.J.Q.B. 533. There it was held that "where an agreement to refer disputes to arbitration provides for the reference to three arbitrators, one to be appointed by each of the parties and the third by the two so appointed and one of the parties refuses to appoint an arbitrator the court has no power under or apart from the Arbitration Act, to order him to do so". Now section 16 of the Administration of Justice Act, 1920, has been repealed by the Third Schedule of the Arbitration Act, 1934. But section 4 of that Act enacts:

"4 (1) Where an arbitration agreement provides the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties".

Where the arbitrators have failed to comply with a notice requiring them to appoint an umpire, the court has power to bring the arbitrators before it, for the purpose of ascertaining their views before making the appointment. *Taylor* v. *Denney*, (1912) A.C. 666, cited in the *Yearly Practice of the Supreme Court*, 1921.

439. Umpire.—An umpire is a person who is to make the award if the two arbitrators cannot agree. *Byrne's Law Dictionary*. "The person appointed to adjudicate upon the difference is called an arbitrator. Where two arbitrators are appointed, and the submission provides that, in the event of their disagreement, the matter in dispute shall be referred to the decision of a third person is called an umpire". *Halsbury's Laws of England*, Vol. I, p. 439. The ordinary meaning of the word "umpire" is a person who is to decide upon disagreement. *Louis Dreyfus & Co.* v. *Hemandas*

Hotchand, A.I.R. 1940 Sind 37. Section 10 (1) enacts. "Where an arbitration provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have the effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties". For further notes on the word "umpire", vide notes under section 10(1) (*post*), cf. *British Metal Corporution* v. *Ludlow,* (1938) 1 All. E.R. 135. According to *Russell* "an umpire is a person appointed to take over the reference from the arbitrators who are unable to agree amongst themselves. In general, he is in the same position as a sole arbitrator, must be appointed in the same way, and must possess the same qualifications or absence of disqualifications. An umpire need not be a single person : thus Appeal Committee of Trade Association may be appointed umpires". *Russell,* 15th Edn., p. 120 citing *Re Knightly Maxtead etc.,* (1893) 1 Q.B. 405 ; *Re Varipati* (1914) W.N. 208. Where an agreement for arbitration by an even number of arbitrators provides for any difference between them to be decided by a named person, even if the word "umpire" is not used in connection with that person, he can act only in that capacity. *Bengal Silk* v. *Aisha Ariff,* 231 Ind.Cas. 187=A.I.R. 1947 Cal. 106. If here is disagreement between the arbitrators there is no award and the jurisdiction of the umpire is attracted. *Probodh Kumar* v. *Union of India,* A.I.R. 1953 Cal. 385=56 C.W.N. 436. In the absence of a contrary provision in the arbitration agreement the umpire must adjudicate upon the whole case even if the arbitrators disagree on one point. *Ibid ;* see also *Winteringham* v. *Robertson,* (1859) 27 L.J. Ex. 301.

440. Acceptance of office by umpire.—"Acceptance of the office by the arbitrator appears to be necessary to perfect his appointment. It has been so decided in the case of an umpire, and it would seem to be only reasonable that an appointment should not be considered effective until the person appointed has agreed either expressly or tacitly to exercise the function of the office." *Russell,* 15th Edn., 134 citing *Ringband* v. *Lowndes,* (1863) 15 C.B. N.S.) 173=33 L.J.P.C. 25.

441. Appointment of umpire—Provision in the arbitration agreement.—There is nothing in this section which derogates from the right of the parties to provide in the agreement for the course to be adopted when an umpire does not accept his appointment or when arbitrators fail to nominate another umpire. The power which the section confers upon a court to appoint an umpire can, no doubt be invoked by either party but the mere existence of such power does not exclude the powers conferred by the parties on a person to make an appointment. *Gaurisankar* v. *Biharilal,* A.I.R. 1952 Nag. 314.

442. Appointment of umpire—Acquiescence.—Where the Government was a party to the reference and fully knew all the circumstances in which the umpire had been appointed and took part in the proceedings before the umpire without raising any objection as to any defect in his appointment at the first opportunity and allowed the award to be made without any protest, taking a chance of favourable decision, it must be held that the Government acquiesced in the appointment and waived the object to any defect in the appointment. As such the Government is estopped from raising any objection to such appointment as invalidating subsequent proceedings. *Prince & Co.* v. *G. G. in Council* A.I.R. 1955 Punj. 240.

443. Court's power to appoint umpire.—Under S. 8(2) the court

is not competent to appoint an umpire in the absence of any notice on the arbitrators as required by S. 8(1) (c). *Governor-General* v. *Bilash*, 52 C.W.N. 54.

444. "Neglects to act."—In *Assudomal* v. *Jessmal*, A.I.R. 1933 Sind 115=144 Ind.Cas. 42, the court said : "There is also no substance in the plea that the arbitrator had not refused to act. Gobindram has deposed to such refusal ; and at any rate the neglect of the arbitrator in not acting for nearly three years is in it itself a sufficient ground for appointing another arbitrator in his place". In explanation appended to section 9 (*post*), the Legislature has indicated what would amount to neglect or refusal to act. Explanation to section 9 runs as follows : "The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section." Where an umpire, after completing the enquiries, falls ill and returns the file, but subsequently signs the award and submits it, within the time fixed by the court for the delivery of the award, it was held that he has not refused or neglected to act. The mere fact that an arbitrator declines to sign an award which has been arrived at by the majority of the arbitrators, does not show that he has refused to act as arbitrator. *Ghissa* v. *Bhawani Das*, 1 A.L.J. 683. Where the arbitrator says that he would act no further till his fees are paid in advance, such action amounts to a refusal to act on his part within the meaning of this section and a new arbitrator can be appointed in his place. *Priyabrata* v. *Phani*, A.I.R. 1937 Cal. 523. But when an arbitrator does not attend the meeting the date of which has been fixed by the other he cannot be said to have refused to act. *Gajanand* v. *Phulchand*, A.I.R. 1930 All. 675=1930 A.L.J. 1373. Commenting on the absence of the terms "neglect to act" in the English Act, *Russell*, says: "But at the date of passing of the Arbitration Act, 1889, there was another condition which was usually inserted in Acts of Parliament, viz., where an arbitrator failed or neglected to act. It was doubtful, therefore, prior to the Arbitration Act, 1934, whether a failure or neglect to act was a condition which would be refusal to act. If this was so, it might be possible for an arbitrator, acting collusively with the party who appointed him, to delay infinitely the hearing of the arbitration." To remove this defect section 6(1) of the English Arbitration Act of 1934 enacts: "The Court may, on the application of any party to a reference remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award."

The Indian Legislature under section 9 added the following explanation: "The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect for refusal to act within the meaning of section 8 and this section."

445. Refusal to act, effect of.—In *Shibcharan* v. *Ratiram*, 7 All. 20 at p. 21, *Mahmood J.* observed: "Expression has recently been given by this court to the view, that one of the most essential principles of the law of arbitration is, that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrator to undertake the duties of arbitrating between the contending parties who have agreed to repose confidence in his judgment. Indeed, the finality of such award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the

disputes referred to them. This essential characteristic of the effect of such adjudications is necessarily vitiated if compulsion is employed by the court. 'Though the arbitrator has taken on himself the burden of the reference, and held several meetings, but not closed the case, he may decline to go on any further with the arbitration, and the courts have no jurisdiction over him to compel him to proceed; nor can they order him to make his award according to a particular principle.—(*Russell* on *Arbitration,* p. 196). It seems that, under the Civil law, an arbitrator might be compelled to make an award. But 'it was decided in equity, by *Lord Chancellor Eldon,* that if arbitrators refused to proceed with a suit referred to them, the suit might be prosecuted as if no reference had been made; and, in giving judgment, *Lord Eldon* put it on the same footing as a case where one of the arbitrators had died'.—(*Russell* on *Arbitration,* p. 156)." This principle of equity and not the rule of the Civil law, appears to have been adopted in para 5 of the Second Schedule of the Civil Procedure Code and section 8 of the Arbitration Act. So where certain matters were referred to arbitrators who refused to act. and the court of first instance passed an order directing them to proceed and to make an award, and they, on the passing of such order, made an award, *held* that all proceedings taken by the arbitrators in obedience to the order of the court directing them to arbitrate against their will were null and void. *Shibcharan* v. *Ratiram,* 7 All. 20=(1884) A.W.N. 212. In *Nand Ram* v. *Fakir Chand,* 7 All. 423=(1885) A.W.N. 139, *Oldfield J.* observed: "It is clear that one of the arbitrators refused to act, and the only course open to the court was under section 510 (=para 5 of Schedule II of Civil Procedure Code) to appoint a new arbitrator, or supersede the arbitration, and proceed with the suit. The court could not pass a decree on the award of the *remaining* arbitrators." The case of *Shibcharan* v. *Ratiram,* 7 All. 20=(1884) A.W.N. 212, was followed in *Basdeo Mal* v. *Kanhaiya Lal,* 59 Ind.Cas. 667=43 All. 101=A.I.R. 1921 All 361, and there the Bench consisting of *Sulaiman J.* and *Kanhaiya Lal J.* adopted the principle laid down by *Mahamood J.*

Certain matters in a suit were referred to an arbitrator who during the proceedings sent in his resignation. The court of first instance insisted on his continuing with arbitration and eventually, he filed an award. On objections being taken the trial court set aside the award and passed a preliminary decree. The lower appellate court on appeal set aside this preliminary decree and directed that a decree be passed in accordance with the terms of the award. In holding that proceedings of the arbitrator were null and void and that the case should be remanded under Order XLI, rule 23, the court observed: "On merits the position is this: the arbitrator expressed definitely his unwillingness to act. Thereafter, according to *Shibcharan* v. *Ratiram,* 7 All. 20=(1884) A.W.N. 212, and *Basdeo Mal Gobind Prosad* v. *Kanhaiya Lal Lachmi Narayan,* A.I.R. 1921 All. 361=43 All. 101 (104) the proceedings of the arbitrator were null and void. For the respondents it is urged that after the court had insisted on the arbitrator's acting no objection was taken and that the parties paid some costs to the arbitrators. In view of these circumstances the argument is preferred that there was acquiescence. There may have been acquiescence on the part of the parties to the arbitration, but I am not aware that there was any expressed willingness of the arbitrator to act after he had sent in his resignation. An arbitrator can, no doubt, reconsider his position: vide *Mahadeo* v. *Badri Das,* A.I.R. 1928 All., 741 (at p. 743): *Htranarain* v. *Bhawant Kuar,* 10 All. 137=(1888) A.W.N. 22; and

Keshaw Lal Mohan Lal v. *Bai Laxmi,* A.I.R. 1929 Bom. 50=52 Bom. 568. In thse cases, however, there seems to have been either withdrawal of a resignation or a definite fresh acceptance to act. Here no such fresh acceptance is observed, and it would appear that the arbitrator was compelled to act against his wishes". *Lal Khan* v. *Kashmiri Lal,* A.I.R. 1930 Lah. 125=124 Ind.Cas. 676.

So where two arbitrators are appointed to decide a case and one of them withdraws before the arbitration is completed, the remaining arbitrator cannot proceed with the case and file an award. It is the duty in such a case to appoint another arbitrator in place of the arbitrator who has withdrawn or to supersede the arbitration and decide the case. *Thakur Das* v. *Narain,* 56 Ind.Cas. 644=7 Lah. L.J. 637. See also *Thammirajan* v. *Bapiraja,* 12 Mad. 113. All the above cases were decided either under section 510 of the old Civil Procedure Code of 1882 or under para 5 of the Second Schedule of the new Civil Procedure Code of 1908. In that section the court was given powers to supersede the arbitration. That power the court still possesses in cases of arbitration under Chapter IV (*vide* section 25, *post*). But in other cases of arbitration under the section the court is not competent to exercise that power.

The fact that the person named as arbitrator in the contract between the parties refused to arbitrate is no ground for refusing to enforce the arbitration clause of the contract as section 8(b) provides for the case when an appointed arbitrator refuses to act or is incapable of acting. *McKenzies Ltd.* v. *Sulleman,* A.I.R. 1933 Sind 75=140 Ind.Cas. 626=27 S.L.R. 109. The court has power to appoint a new arbitrator in the place of another, when the other refuses to accept nomination, as refusal to accept nomination clearly signifies refusal to act. *Mirza Sadik* v. *Kaniz Tohra,* (1911) 2 M.W.N. 132=10 M.L.T. 173 (P.C.).

446. What amounts to refusal.—An arbitrator who hesitates to act without the order of the Judge cannot be said to refuse to act. *In re Wilson and Eastern Counties Navigation & Co.* (1892) 1 Q.B. 81=61 L.J.Q.B. 237. In the above case, *Mathew J.* observed : "I am of opinion that the learned Judge had no jurisdiction to make the order which he has made in this case. The question is whether the case comes within the Arbitration Act 1889 (52 & 53 Vict., c. 49). By the original contract Mr. Martiman was appointed standing referee to settle any differences which might arise from time to time between the parties. Certain differences arose, and Mr. Martiman made an award, and gave directions as to what was to be done. He then left this country and went to America. During his absence further differences arose, and the company then obtained from the President of the Institute of Civil Engineers the appointment of Mr. Shelford as arbitrator. Mr. Shelford hesitated to act until the order of a Judge was obtained for his appointment, and accordingly an application was made to *Collins J.*, who made the order which is the subject of this appeal. The question turns on section 5 of the Arbitration Act, 1889. It is contended that Mr. Shelford refused to act within the meaning of sub-section (*b*) of that section. I cannot agree with the view that he refused". Where an arbitrator nominated by the parties fails to signify his acceptance of the office within one month of a request from one of the parties it amounts to refusal to act as an arbitrator. *Venkatanaraya* v. *Lakshmidevamma,* (1947) 2 M.L.J. 520. It is refusal when an appointed arbitrator refuses to accept the office. *Sadiq Hussain* v. *Nazir Begam,* 12 Ind.Cas. 15=33 A. 743 (P.C.). A refusal on the part of an arbitrator to act can be implied from his conduct, *e.g.*, when he

fails to submit the award within the fixed time. *Narendra* v. *Brojeswari,* 23 Ind.Cas. 842. Where the arbitrator says that he would act no further till his fees are paid in advance, such action amounts to a refusal to act on his part, and a new arbitrator can be appointed in his place. *Priyabrata* v. *Phani Bhusan,* A.I.R. 1937 Cal. 523. The mere fact that an arbitrator returns the papers to the court intimating that he was doing so as one of the parties did not wish him to act and also because he had no leisure in future to carry out the task, does not amount to a flat refusal by him to act, especially when subsequently he agrees to carry on the arbitration on a requisition from the court. *Kancheddamad* v. *Ganga Prasad,* (1937) A.L.J. 651 = 171 Ind.Cas. 398 = (1937) A.L.R. 837 = A.I.R. 1937 All. 582.

447. Procedure after refusal.—Court should decide facts whether arbitrator had died or refused to act or it should give chance to parties to appoint a new arbitrator. *Mahadeo Prasad* v. *Badri Dass,* A.I.R. 1928 All. 740 = 50 All. 955 = 26 A.L.J. 1009 = 110 Ind.Cas. 881.

448. Appointment of umpire on his refusal.—Where the Court is empowered to appoint an umpire, in case the arbitrators fail to appoint, appointmtnt of umpire, on the umpire appointed by arbitrators refusing to act is not illegal. *Khillu Ram* v. *Jaichand,* A.I.R. 1927 Lah. 123 = 99 Ind.Cas. 154.

449. Retraction of refusal.—It seems that the arbitrators have full powers to retract the refusal before the court takes action upon such refusal. *Joy Mungal* v. *Mohun Ram,* 23 W.R. 429 (P.C.). It appears, in the above case, that a reference to arbitration was made and there were two arbitrators appointed. The arbitrators made an award but it was signed by the arbitrators on different dates. From the decree that followed the award, an appeal was taken to the High Court. The High Court remanded the case and a direction was given that the arbitrators should come together and sign the award. When the case went back before the District Judge, one of the arbitrators, Mr. Sandays took exception to something and sent in a resignation to the District Judge. The District Judge was very unwilling to accept the resignation and induced Mr. Sandys to withdraw it. Mr. Sandys withdrew it and then the two arbitratrs signed the award before the District Judge. Their Lordships of the Privy Council expressed the opinion that in the circumstances of the case, Mr. Sandys was not *functus officio* and he had "never formally divested himself of his character of arbitrator". See also, *Harnarain Singh* v. *Bhagwant Kunwar,* 10 All. 137 = (1888) A.W.N. 28 ; *Ghissa* v. *Bhawani,* 1 A.L.J. 683 ; *Grant* v. *Bangshee Deo,* 15 W.R. 38. Where an arbitrator nominated by the parties fails to signifv his acceptance of the office within one month of a request from one of the parties if amounts to a refusal to act as arbitrator. It may be open to such an arbitrator to change his mind after he expressed his refusal so to act but his change of mind must be at a time, when he is at liberty and in a position to do so (that is within one month of the request by any party). He cannot purport to act as adjudicator after the expiry of the one month and any award passed by him will be invalid and will be of no effect. *Venkatanarayana* v. *Lakshmidevamma* (1947) 2 M.L.J. 520. Certain arbitrators returned proceedings to court on the ground that the plaintiff appeared before them under protest. The court wrote to them requesting to finish the work and saying that the protest did not matter, it was unjustified and that the court had confidence in them. In holding that the writing did not amount to an order forcing or compelling arbitrators to resume work, the court observed : "The interpretation we put upon

the writing of the learned Judge is, that it is not an order which forces or compels the arbitrators to resume the arbitration against their own wish. It is in the nature of a request made to the arbitrators to reconsider their decision and to resume the arbitration if they were agreeable to do so. Had it been an order compelling the arbitrators against their will to resume the arbitration, the case would fall under the ruling in *Shibcharan* v.*Ratiram*, 7 All. 20=(1884) A.W.N. 212, and the further proceedings in arbitration would be vitiated. But that is not the case here. In our opinion the present case falls under the rulings in *Haranarain Singh* v. *Bhagwant Kunwar*, 10 All. 137=(1888) A.W.N. 28; *Joy Mungal Singh* v. *Mohun Ram*, 23 W.R. 429 (P.C.); and *Basdeo Mal Gobind Prosad* v. *Kanhaiya Lal Lachmi Narayan*, A.I.R. 1921 All. 361=43 All. 101". See also, *Kancheddamal* v. *Ganga Prosad*, (1937) A.L.J. 651=171 Ind.Cas. 398=A.I.R. 1937 All. 582. But where an arbitrator refused to act, and the court, instead of accepting his refusal directed him to proceed and make an award, such award is invalid. *Shib Charan* v. *Ratram*, 7 All. 20; *Lal Khan* v. *Kashmiri Lal*, 124 Ind.Cas. 676=31 P.L.R. 236=A.I.R. 1930 Lah. 125. Where an arbitrator who has tendered his resignation to act as arbitrator taken back the resignation on the application of the parties and request of court and accepts fees and continues proceedings, he does not become *functus officio* and no fresh order of court resubmitting the case to him is necessary. *Kashmiri Lal* v. *Khan*, A.I.R. 1934 Lah. 700=15 Lah. 820=153 Ind.Cas. 385=35 P.L.R. 572; *Joymungal* v. *Mohun Ram*, 23 W.R. 429 (P.C.).

450. Incapable of acting.—"It would appear that the word 'incapable' in section 5 (6) must refer to some incapability arising after the date of the appointment, or not known to the parties at that date. It is submitted that the court is not entitled to treat an arbitrator as incapable when the parties rightly or wrongly have considered him to be capable. The standard of capability must be the standard of the parties who selected the arbitrator, and having selected him, they must take him for better or worse."—*Russell on Arbitration*, p. 119. The court can appoint a new arbitrator where the arbitrator originally appointed by the parties becomes incapable of acting on account of illness or absence from British India. *Bishen* v. *Bhag*, 66 P.R. 1870; *Joseph* v. *Sreekar*, O.C. 359; *Gadadhar* v. *Ganga Prosad*, 4 B.L.R. 89. An arbitrator after recovering from illness can sign the award. *Ghissa* v. *Bhawani Das*, 1 A.L.J. 683. The reference committee constituted under the Acquisition of Land (Assessment of Compensation) Act, 1919, has power by notice to appoint a new official arbitrator in the place of one incapable of continuing the arbitration. *Gross Sherwood & Heald Ltd.* v. *Essex County Council*, 96 L.J.Ch. 21=(1927) 1 Ch. 205=136 L.T. 371=43 T.L.R. 5.

451. Dies.—Award by the remaining arbitrators after the death of one is not valid and final. *Boon Jaed Mathoor* v. *Nathoo Shaboo*, 3 Cal. 375=1 C.L.R. 455. This section envisages cases where the proceedings are pending before the arbitrator and any of them dies or becomes incapable of acting. In the absence of any provision in the agreement of reference, the court has no power to nominate another arbitrator in the place of the one who had died after making the award. *Chalikani* v. *C. U. Rao*, A.I.R. 1958 Andhra Pra. 740. Reference does not become infructuous on death of parties to reference. *Assudomal* v. *Jessmal*, A.I.R. 1933 Sind 115=144 Ind.Cas. 42.

452. Notice signed by agent—Validity.—Before a party can apply under this section for appointment of an arbitrator he must serve the

other party with a written notice to concur in the appointment of an arbitrator. This section does not expressly or by necessary implication and intendment exclude the general common law rule. Under the section the party himself can sign and serve the notice and what the party can do himself he may do so by an agent. The section does not require any signature on the notice, for less the signature of the party. Hence a notice signed by the duly authorised attorney of a party is valid. *Nalini Ranjan* v. *Union of India,* 92 C.L.J. 220=A.I.R. 1954 Cal. 462. Where notice under this section is sent by one party to the other party delivered through the attorney of the latter, the service of notice is in accordance of S. 42 of the Act. *Ibid.*

453. Written notice to concur in appointing.—In the corresponding section of the English Act of 1889, i.e., in section 5(1) of the English Act, the words occur "written notice to appoint an arbitrator." It has been held by *Lord Esher M.R.* in *In re Eyer,* (1892) 1 Q.B. 136 (141), that the words "to appoint" mean to concur in the appointment of. In section 8 of the Indian Act of 1899 that phraseology was adopted. The same phraseology has also been repeated in this section. The term used in para. 5 of the Second Schedule of the Civil Procedure Code is "to appoint". It was held that the meaning of the expression "to appoint" is "to concur in the appointment." *Hasan Banu* v. *Wasi Ali,* 2 O.W.N. 64=86 Ind.Cas. 613=12 O.L.J. 174=A.I.R. 1925 Oudh 361. In the English case of *In re Eyer* (*supra*), a notice was served upon the opposite party stating "that you are hereby required to concur with me in the appointment of a sole arbitrator." Objection was raised by the opposite party that the words used in the section were "to appoint" and as such the notice was invalid. But the court held the notice to be a good notice.

454. How notice is to be served.—For the procedure of serving notice *vide* section 42 (*post*).

455. Appointment by the parties.—An agreement for a reference beween A and B contained the following clauses:—"Every such reference shall be made to two persons, one to be named by each party. If either party, for fourteen days after being requested by the other party to name an arbitrator, fail so to do, then arbitrators may be named by the party making such request." Difference having arisen, A appointed an arbitrator, but B declined to do so on request, whereupon A appointed a second arbitrator and they proceeded to hear and dispose of the matter. The appointment of the arbitrators purported to be made by A and one C (who was said to be an incumbrancer on A's presumed interest made under the agreement) severally, and the notice was also given by A and C. *Held* that the appointments were not vitiated by the introduction of the name of C. *Haddan,* In *re* 9 C.B.N.S. 683. *Held,* also, that it was not necessary in the appointment of the arbitrators to particularise the matters to be arbitrated upon. *Ibid.*

456. No appointment until notice to other party.—Neither party can be said to have chosen an arbitrator until he has given notice of his nomination to the other party, unless such other party has refused to proceed by arbitration. *Thomas* v. *Fredericks,* 10 Q.B. 775=16 L.J.Q.B. 393 (*per Lord Denman, J.*). On an agreement for the sale of crops at a valuation to be made by two persons, one named by each party, and if either fails to name within the fixed time, the other to decide alone, *held* that the nomination of a refree included notice to the other party, and that a nomination within the time was bad, if notice was after the time. *Tew* v. *Harris,* 11 Q.B. 7=17 L.J.Q.B. 1=11 Jur. 947; see also, *Thomas*

v. *Fredericks,* (1847) 10 Q.B. 775; *Drummond* v. *Homer,* (1942) 1 K.B. 352=(1942) 1 All. E.R. 398=111 L.J.K.B. 385. The notice must be in writing but need not be in the precise language of the section. *Russell,* 15 Edn. p. 189.

457. Fifteen clear days.—*Vide* notes under this head under section 9 *infra.*

458. "Court may."—In *In re Eyer corporation of Leister,* (1892) Q.B. 136 at page 143, *Lord Esher M.R.* observed: "I think that in such a case as this 'may' means 'must', and that the court is bound to appoint an arbitrator. I cannot accede to the argument that the court has a discretion in such a case as this because there is a discretion under section 4 in cases where the parties have proceeded quite differently, and, one party having brought his action, the other party applies to the court to stay it. That is the converse of this case. I give no opinion on the question what the power of the court in such a case under section 4 may be. The present case is not under that section. It appears to me that the decision of the court below was right and should be affirmed, except so far as the direction to the master is concerned. I think that he ought not to have power to say whether there is to be an arbitration or not, but only to decide as to the choice of an arbitrator". *Lopes, L.J.,* said: "With regard to the language of the section, I think that in a case like the present, where there is a dispute clearly within the submission and a failure to concur in the appointment of an arbitrator, and the proper notice has been given, the word 'may' is equivalent to 'must.'" *Kay L.J.* said: "I desire, however not to bind myself with regard to the question whether the word 'may' in the section may not in certain cases give a discretion to the court. I conceive that cases might arise where it would be necessary to exercise some discretion. I understand that in this case it is admitted that some of the matters in dispute were clearly such as came within and ought to be referred under the submission. In such a case, I do not think that the court would have a discretion to say that it would not entertain the application, assuming, of course, that all the necessary preliminary steps had been taken—that is to say, that there had been a sufficient notice within the section, and no appointment had been made within seven days. In such a case I do not think the court ought to exercise any discretion, if it has any; its duty under such circumstances really becomes only ministerial. I, therefore, agree that for the purposes of this case the word "may' must be treated as equivalent to 'must'. But I do not wish to hold that in every case 'may' in this section is equivalent to 'must'." See also, *Gopalji* v. *Morarji,* A.I.R. 1919 Bom. 24=50 Ind.Cas. 411=43 Bom. 809; *Delhi and London Bank* v. *Orchard,* 4 I.A. 127 (135)=3 Cal. 47; *In re Baker,* (1890) 44 Ch.D. 262 (270); *Rex* v. *Mitchell,* (1913) 1 K.B. 561=82 L.J.K.B. 152; *Reg* v. *Judge Turner,* (1897) 1 Q.B. 445 (448)=66 L.J.Q.B. 417; *Thakar* v. *Ram,* 88 Ind.Cas. 975.

It seems that the Indian Legislature has accepted the views expressed by *Kay L.J.* in the above case. In cases of arbitration falling under Chapter IV, the power is always discretionary because there the Judge is empowered to supersede the arbitration and proceed with the suit [*vide* proviso to section 25 (*post*)]. It is inconceivable that different interpretation of the word is to be adopted in other cases. *In re Bjornstad* v. *Ouse,* (1924) 2 K.B. 673=93 L.J.K.B. 977 *Banker L.J.* said: "I desire, however not to bind myself with regard to the question whether the word 'may' in the section may not in certain cases give a discretion to

the court, I conceive that cases might arise where it would be necessary to exercise some discretion". The words of clause (2) of "The Court may appoint."—The expression does not mean that the court appoint an arbitrator. The use of the word "may" implies that discretion is given to the court. That discretion has to be exercised properly and not arbitrarily. *Union of India* v. *New India,* A.I.R. 1955 Punj. 172= 57 Punj. L.R. 192. But according to *Khosla J.,* in the above case that discretion can be reviewed in appeal, where discretion has been improperly used. At best the power of the court under s. 8(1)(b) is only discretionary. In the matter of making an appointment in a vacancy created by the failure of the parties to appoint an arbitrator, the court has always a discretion. (1924) 2 K.B. 672 followed. *Bharat Construction* v. *Union of India,* A.I.R. 1954 Cal. 606. It is now well settled that the court has no inherent power to appoint arbitrators and that its powers are expressly specified in the Act. *Ibid ;* see also *In re Smith etc.* (1890) 25 Q.B.D. 545. And unless it is shown that a particular arbitration agreement in any of the contingencies contained in that clause, the section is not applicable, although the arbitration agreement may not exclude an intention to fill up the vacancy, if one should arise. *Ibid.* It is a fundamental principle that unless a contrary intention appears, a power conferred upon a person cannot be exercised from time to time. *Shamji* v. *Septon,* A.I.R. 1954 Punj. 190.

Where the arbitration clause provided that the arbitration shall be by two arbitrators, one to be nominated by the buyer and the other by the seller, and there was no question of one or more arbitrators being appointed by the consent of all the parties ; *held* that the section could have no application to the case and have the failure of a party who appointed his nominee and called upon the other to do so to move the court under sub-section (2), when the other did not nominate his arbitrator was of no significance. *Ramchandra* v. *Howrah Oil Mills,* 62 C.W.N. 773=A.I.R. 1958 Cal. 620.

459. When court can apoint another arbitrator under sub-section (2).—The power of the court to appoint an arbitrator only comes into existence when all the terms of the section are complied with. *Radha Kishen* v. *Daulat Ram,* 38 P.L.R. 1901 ; *Sheoambar* v. *Deodat,* 9 All. 168=(1887) A.W.N. 13 ; *Ram Lagan* v. *Phalangan Lohar,* A.I.R. 1928 All. 674=(1929) A.L.J. 31=111 Ind.Cas. 559. The parties to a suit agreed to refer their dispute to two arbitrators. It was also agreed that in case of difference between the arbitrators, the award of an umpire, agreeing with that made by any one of the arbitrators should be final. One of the arbitrators referred to act as an arbitrator. The defendant applied to the court to order the umpire to proceed with the matter, and the court passed an order to the effect although objected to by the plaintiff. In pursuance of that order the other arbitrator and the umpire proceeded with the enquiry and then the other arbitrator passed an award against the plaintiff and at the foot of that award the umpire made a note that he agreed with the award. The award was accepted by the court and a decree followed: *Held* that it was not open to court to refer the dispute to the other arbitrator when one of the arbitrators had refused to act. It was open to the court to substitute another arbitrator in place of one who refused to act. The umpire could only be called in to act as an umpire when the two arbitrators made awards and not before. *Kishnomal* v. *Waparimal,* A.I.R. 1937 Sind 171=170 Ind.Cas. 487. As regards want of powers of court in such cases under paras 5 and 17 of

schedule 2 of the (P. Code) *vide Vishwas Balwant* v. *Balchandra,* A.I.R. 1931 Bom. 529 (2)=33 Bom L.R. 1022.

Under section 8(2) the court is not competent to appoint an umpire in the absence of any notice on the arbitrators as required under section 8(1)(c). To give jurisdiction to the court to act under this section it is essential that as a condition precedent a notice should be given. *Governor-General* v. *Bilash,* 52 C.W.N. 54.

The Court has power to appoint an arbitrator or umpire only in case if a party takes action under the first clause of the section and service notice on the other party. *Ram Lagan* v. *Phatangan Lohar,* A.I.R. 1928 All. 674=(1929) A.L.J. 31=111 Ind.Cas. 559; *Thakur Das* v. *Ram Das,* 26 P.L.R. 476=7 Lah.L.J. 163=88 Ind.Cas. 975=A.I.R. 1925 Lah. 374; *Hasan Banu* v. *Wasi Ali Khan,* 2 O.W.N. 64=86 Ind.Cas. 613=12 O.L.J. 174=A.I.R. 1925 Oudh 361; *Viswas Balwant* v. *Bhal Chandra,* 134 Ind.Cas. 733=33 Bom.L.R. 1022=A.I.R. 1931 Bom. 529; *Poran Lal* v. *Rup Chand,* (1931) A.L.J. 682=A.I.R. 1931 All. 761; *Durga Prosad* v. *Barati Lal* 146 Ind.Cas. 493=A.I.R. 1933 Oudh 540; *Narain Gir* v. *Ram Lakham,* 151 Ind.Cas. 148=(1934) A.L.J. 711=A.I.R. 1934 All. 368; *Chartaram* v. *Sajan Mal,* 48 Ind.Cas. 395=112 P.R. 1918=139 P.L.R. 1918; *Abdul Ghani* v. *Din Doyal,* 41 All. 578=50 Ind.Cas. 655=17 A.L.J. 643. But an irregularity in the procedure can be cured by the consent of all the parties. *Mahmud Sheikh* v. *Messrs. Kankinarah Co.,* 28 C.W.N. 634=A.I.R. 1924 Cal. 665. The court cannot exercise powers under this section for reasons other than those mentioned in the section. *Abdul Shakur* v. *Mohamad,* 62 Ind.Cas. 426; *Shiam Sunder Lal* v. *Bhairon,* 3 A.L.J. 185=(1906) A.W.N. 51.

Where in a dispute regarding certain land, the parties agree that the dispute should be decided by certain named persons, the court is not entitled to appoint another in the event of one of the arbitrators being unable or unwilling to act. *Rajani Kanta* v. *Panchanan,* 41 C.W.N. 981=(1937) I.L.R. 2 Cal. 434=A.I.R. 1937 Cal. 388. Where an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. Therefore when the arbitrator refuses to accept office as such, the court can appoint another arbitrator. *Sadik Hasan* v. *Kaniz Zeohra,* 12 Ind. Cas. 15=8 A.L.J. 1164=33 All. 743=37 I.A. 181=14 Oudh 289=(1911) 2 M.W.N. 132=15 C.W.N. 1005=13 Bom.L.R. 826.

460. Arbitrators. In view of the rule embodied in S. 13 (2) of the General Clauses Act, the use of the words "an arbitrator or arbitrators" in s. 8 (2), indicates beyond doubt that the court can appoint as manny arbitrators as may have refused to arbitrate regardless of their number. So the court has power to appoint not only a single arbitrator but also more than one arbitrators if the arbitrator appointed by the parties have refused to act. *Kashi Prosad* v. *Gufteswar,* A.I.R. 1956 All. 431=1956 All. W.R. (H.C.) 58.

461. Duty of Court in appointing an arbitrator.—The power of appointing an arbitrator under this section has been vested exclusively in the court and not in any of the parties. *Shamji Mal* v. *Seflon & Co.,* A.I.R. 1954 Punj. 190=56 Punj. L.R. 187. When the court is called upon to appoint an arbitrator it is the duty of the court to select an impartial person for that office. Where the arbitrator chosen by the parties is available, the court will in the absence of special circumstances compel the parties to abide by their contract. But where that is not the case a very strong and special case must be made out for the appointment of an

employee of a party as arbitrator. *Nalini* v. *Union of India,* 92 C.L.J. 220=A.I.R. 1954 Cal. 462.

462. Objection to appointment of arbitrator when to be taken.—Where the court orders that the name of a nominee of a plaintiff be substituted in the order of reference for one of the arbitrators to whom matters in difference are referred, the defendant is entitled to see whom the plaintiff is going to appoint and to decide whether he would agree to submit to an arbitration, to the board of which the nominee is one of the members; but if the defendant adduces evidence and acts as if the nominee is legally appointed and objects to the award only when it has gone against him, he is estopped from questioning the validity of the appointment. *Gajadhar* v. *Chunilal,* 27 A.L.J. 868=117 Ind.Cas. 344=A.I.R. 1929 All. 559. See also, *Harnam Singh* v. *Harnam Singh,* 8 Ind.Cas. 222=27 P.L.R. 1919=144 P.W.R. 1910; *Suroop Ram* v. *Gobind Ram,* 7 W.R. 13.

463. Power of court to appoint arbitrator against the wishes of parties.—An arbitrator is a judge chosen by the parties themselves and a court should not thrust an arbitrator on an unwilling party except under circumstances laid down in the section. During the pendency of a suit the parties agreed to refer their dispute to arbitration of B. An order of reference was accordingly made. B, however, refused to act as arbitrator. The defendant then submitted a list of persons, any one of whom he desired to be appointed an arbitrator in place of B. Plaintiff was not willing to have the case decided by an arbitrator. He has, therefore, prayed that the arbitration be superseded and the case be tried before the court. The court thereupon appointed G to act as arbitrator in place of B on payment of Rs. 100 by the parties half and half. *Held* that it was irregular to make a summary appointment of an arbitrator. Plaintiff could not be legally ordered to pay the cost. *Jagannath Sahu* v. *Chedi Sahu,* 51 All. 501=27 A.L.J. 182=115 Ind.Cas. 611=A.I.R. 1929 All. 144.

464. Refusal to act—when court's power comes to an end.—Where a reference is made to arbitration but the umpire refuses to act and thereupon the court nominated a fresh arbitrator but he also refuses to act, *held* that the proceeding came to an end when the newly appointed arbitrator refused to act and that further proceedings could be continued only after due notice to parties. *Poran Lal* v. *Rup Chand,* (1931) A.L.J. 682=A.I.R. 1931 All. 761.

465. Appointment of an umpire by court.—Court's power to appoint an umpire is not unlimited. His powers are limited by the agreement of the parties. *Barradeo* v. *De Souza,* 7 M.H.C.R. 72. Where the parties had agreed to refer their dispute to two arbitrators and in case of a difference of opinion to abide by the decision of a third person as umpire and one of the two arbitrators refused to act, it was held that the court has no power to appoint the umpire as the sole arbitrator, because the power of the court to appoint an arbitrator in place of one who refuses to act arises, not on refusal, but only on the failure of one of the parties to appoint a new arbitrator after formal notice to do so. *Viswas Balwant* v. *Bhal Chandra,* 134 Ind.Cas. 733=33 Bom.L.R. 1033=A.I.R. 1931 Bom. 529. See also, *Kishon Mal* v. *Wopari Mal,* 170 Ind.Cas. 487=A.I.R. 1937 Sind 171. Under para 4 of schedule 2 of C. P. Code a Court can appoint an umpire, but the umpire should not be at the same time an arbitrator. *Papurchand* v. *Jewarj,* A.I.R. 1932 Cal 491=36 C.W.N. 332=138 Ind.Cas. 651. The power of the court to appoint an umpire is regulated to the provisions of the Arbitration Act. Apart from that court has no inherent power.

When an award of an umpire is erroneous in law and the error appears on the face of the award, the normal rule is to remit the award to the umpire under S. 16(1)(c) of t he Act. *Union of India* v. *Bungo Steel Furniture* A.I.R. 1963 Cal. 70.

466. When court can supersede an arbitration.—Proviso to section 25 enacts : "Provided that the Court may, in any of the circumstances mentioned in sections 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order, superseding the arbitration under section 19, it shall proceed with the suit". Where the arbitrator refuses to act it is the duty of the court either to appoint a new arbitrator or to supersede the reference aud proceed with the suit. *Thakurdas* v. *Narain,* 56 Ind.Cas. 644=2 Lah.L.J. 637. In *Thammiraju* v. *Bapiraju,* 12 Mad. 113 at page 114, the court observed : "I think that it may be gathered from the provisions of section 510 that such was the intention of the legislature, for it is provided that if any one of the arbitrators dies or refuses to act, the court may either appoint a new arbitrator or supersede the arbitration ; in other words, the remaining arbitrators cannot act alone." See also, *Nand Ram* v. *Fakir Chand,* 7 All. 523. But the court has no power to revoke the authority conferred on an arbitrator and to appoint a new one, except in cases falling strictly within the purview of this para. *Halimbhai* v. *Shankar Sai,* 10 Bom. 381. Without superseding the arbitration the court cannot proceed with the suit. *Ganesh Prosad* v. *Damodar,* 10 A.L.J. 23 ; *Jumna* v. *Nasib,* 24 All. 312 ; *Imamdin* v. *Jawabari,* 10 P.R. 1899. It is not open to the court to supersede an arbitration where the arbitrator has not declined to act. *Abdul Hamid* v. *Riyazuddin,* 4 A.L.J. 691=(1907) A.W.N. 273=30 All. 32. Where a suit has been referred to arbitration, the court has no jurisdiction to make an order superseding the arbitration on the ground of the alleged partiality of the arbitrator, as it is not one of the grounds mentioned in this section. *Kothandarama Aiyer* v. *Sivaganga,* 11 M.L.J. 128. Where there is a reference to arbitrators and nothing has been done for five years, it is desirable that the reference to arbitration should be superseded and the case be dealt with bv the court. *Thakur Das* v. *Ram Das,* 26 P.L.R. 476=7 Lah.L.J. 163=88 Ind.Cas. 975=A.I.R. 1925 Lah. 374. All formalities must be observed before supersession. *Thakur Das* v. *Ram Das,* 88 Ind.Cas. 975=7 Lah.L.J. 163.

Where the arbitrator refuses to act the court cannot supersede the reference acting *suo motu. Budh Sen* v. *Nanak Chand,* 129 Ind.Cas 162=7 O.W.N. 1043=A.I.R. 1932 Oudh 151. Apart from this section the court has jurisdiction in a proper case, to grant leave to revoke an arbitration on good cause being shown. *Ahmad Abdulla* v. *Cassum,* 36 Bom.L.R. 827=A.I.R. 1934 Bom. 388. The court can supresede an arbitration when conditions mentioned in the section are fulfilled. *Abdul Hamid* v. *Riyazuddin,* 4 A.L.J. 691=30 All. 32=(1907) A.W.N. 273. See also, *Jumna Kunwar* v. *Nasib Ali,* 24 All. 312 : *Kashmiri Das* v. *Mussamat Puras,* 28 P.R. 1874 : *Kothandarama Aiyer* v. *Sivaganga,* 11 M.L.J. 128. In a suit to recover the plaintiff's share as heirs of a deceased Muhammadan from the other heirs who had taken possession of the whole property. the parties entered into a compromise in which the share of each was defined. By the same compromise two arbitrators wede appointed to effect a division of the properties. One of them having refused to accept office as an arbitrator, the court on the application of the plaintiff who declined to nominate another arbitrator, superseded the arbitration and

effected the division of the properties. *Held,* that the decree of the court was not sustainable as parties who agree to set up a tribunal of arbitration, are not bound to submit the case referred to another tribunal, such as a District or other Judge. *Sadik Husain* v. *Kaniz Zeohra,* 15 C.W.N. 1005=(1911) 2 M.W.N. 132=10 M.L.T. 173=13 Bom.L.R. 326=14 C.L.J. 313=12 Ind.Cas. 15 (P.C.). A court can supersede the reference in a pending suit only. *Sadik Husain* v. *Kaniz Zeohra,* 12 Ind. Cas. 15=33 All. 743=38 I.A. 181 (P.C.). An order of supersession may be passed by implication. *Vide Mangor Sahu* v. *Bhatoo Singh,* 57 Ind. Cas. 473=1 Pat.L.T. 416=5 P.L.J. 673 ; *Kashibat* v. *Ramkrishna,* 1 A.L.J. 72 ; *Narayan* v. *Sabitri,* A.I.R. 1937 Mad. 9=44 M.L.W. 608.

467. Opportunity of being heard.—Where a case is referred to arbitration and the arbitrators returned the papers without submitting their award and the parties also expressed their unwillingness to arbitration, and the court without expressly recording an order of supersession fixed a date for deciding the case and passed final orders, *held* that the procedure followed was irregular. *Mangor Sahu* v. *Bhatoo Singh,* 1 P.L.T. 416=57 Ind.Cas. 473. Opportunity should be given to the parties for being heard. *Vide Mahkud Sheikh* v. *Kakipasah,* 81 Ind.Cas. 574 ; *Budh* v. *Nanak,* 129 Ind.Cas. 162=7 O.W.N. 1043 ; *Coley* v. *Da Costa,* 17 Cal. 200 ; *Sadik* v. *Kaniz Zeohra,* 12 Ind.Cas. 15 (P.C.)=33 All. 743= 14 C.W.N. 1005=38 I.A. 181 (P.C.).

468. Practice.—In England an application for appointment of arbitrators or umpire is made in Chambers by originating summons (Order LIV, rr. 4 F, 12, 12A).—*Russell,* 13th Edn., p. 124. A dispute arose upon a contract of sale which the parties submitted to arbitration. Arbitrators were appointed, who were to appoint an arbitrator under section 5 of the Arbitration Act, 1889. The purchasers under the contract served a notice on the arbitrators to appoint an umpire, but the arbitrators failed to do so. The purchaser then applied to the court to appoint an umpire. The arbitrators were made respondents, but the vendors under the contract were not respondents as they were residents outside the jurisdiction. The vendors' arbitrator contended that he was not a proper party to the summons, and that the vendors ought to be made parties. The Master and the Judge in Chambers made orders appointing an umpire, with liberty to the vendors to apply to discharge the order, costs to be costs in the arbitration. In holding that the objection as to the form of the summons was not a valid objection and that the arbitrators were properly brought before the court, *Lord Haldane L.C.* in the House of Lords observed: "Now upon that Act (English Arbitration Act, 1889) the question which has arisen is, what is the proper practice. I think the Act was intended to create a statutory jurisdiction of its own of the most drastic kind. It was meant to enable the court to get before it any body whom it might be proper to bring before it ; and for that purpose it is provided in section 5, in the words which I have read, that notice may be given to the arbitrators if it is thought right to do so. This obviously refers to the fact that when a submission has been completely entered into and the arbitrators appointed, the arbitrators may be the only persons to appoint the umpire ; the parties may have nothing whatever to do with the appointment of the umpire. In such a case it would seem right that the court, which is to take the place of the arbitrators who cannot agree, should have at least the opportunity of bringing the arbitrators before it and ascertaining their views before making the appointment.....

"I think the Act was intended to give power to the court to get the necessary parties before it. It may be that that may be done by mere notice; it may be that it is proper in certain cases where there is difficulty, as there was in this case, if one of the parties being abroad, to do it by summons. In any case great care should be taken as to the costs of arbitration". *Taylor* v. *Denney,* (1912) A.C. 666=82 L.J.K.B. 203=107 L.T. 69 (H.L.). An appeal from the Master's decision lies to a judge in chambers, and from the latter to the Court of Appeal. *Russell,* 13th Edn., 191 citing *Simboo Trading* v. *Posograph Corporation,* (1929) 2 K.B. 266; *Miller, Gibb* v. *Smith,* (1916) 1 K.B. 419.

469. Only parties to the arbitration agreement can apply.— "The scheme and object of the section shows that the application under this section can be made by person by or against whom the arbitration agreement is mutually enforceable. A submission is a mutual promise to perform an award. *Purslaw* v. *Bailey,* (1694-1732) 2 Raym. 1099, *Winter* v. *White,* (1819) 3 Moore 674. The party who invokes section 8 must not only be entitled to enforce the award but must also be bound to perform it. The award must be mutually binding. An application by the receiver invoking this section cannot be said to be an application by the owner of the claim who as a party to the arbitration agreement can invoke the machinery of this section. The receiver himself also cannot be said to be a party within the meaning of this section." He is entitled to enforce the claim arising out of the contracts containing the arbitration clause, but he is not bound to carry out the obligations under the contract. *Probodh* v. *Union of India,* A.I.R. 1953 Cal. 385. "Only persons" says *Russell,* "who are parties to the arbitration agreement concerned can make applications for appointment by the court." *Russell,* 15th Edn., p. 191. By the terms of a partnership deed, each of the original partners could, by will or codicil, nominate a person to succeed him in the partnership, subject to the consent of the other partners, and the deed provided that a partner or his specified nominee, could, where such consent had been unreasonably withheld require the matter to be referred to arbition. By a clause of the deed, differences arising, either during the continuance of the partnership or afterwards, between the partners or their representatives, were to be referred to a sole arbitrator, pursuant to the Arbitration Act, 1889. One of the partners nominated his son to succeed him, and died. The other partners refused to admit the son to partnership, and he applied under section 5 of the Act of 1889, for the appointment of an arbitrator. *Held* that the son was not a party to the submission contained in the deed, and so could not make the application. *Franklin and Swaythling's Arbitration, In re,* 98 L.J.Ch. 101=(1929) 1 Ch. 238=140 L.T. 403. Agent contracting on behalf of his principal is not a party. *Miller, Gibb & Co., In re,* (1916) 11 K.B. 419.

According to the literal or ordinary meaning, a "party" would refer to contracting party and whatever doubts may exist as to the expression "party" having been used in sections 8 and 9 in an extended or wider sense so as to include parties and persons claiming through or under them, so as to include their legal representatives, the official receiver or the trustees in bankruptcy does not come within the purview of this extended meaning. *Official Receiver* v. *Kerosondas,* A.I.R. 1929 Sind 209=19 S.L.R. 24=95 Ind.Cas. 750, *Probodh* v. *Union of India,* A.I.R. 1953 Cal 385.

470. Rights of an assignee of a party to arbitration agreement.— An assignee of a party to a contract is bound by an arbitration in the

contract where the subject-matter of the reference is capable of assignment. *McKenzies, Ltd.* v. *Sulleman & Co.,* A.I.R. 1933 Sind 75=140 Ind.Cas. 626=27 S.L.R. 169. In the above case the court observed: "The respondents relying on *Thomas & Co., Ltd.* v. *Portsea Steamship Co., Ltd.,* (1912) A.C. 1=L.J.P. 17, *Chatturbhuj Chandummull* v. *Basdeodas Daga,* A.I.R. 1921 Cal. 767=60 Ind.Cas. 909=47 799, and *J. Lenz* v. *Lalchand Kewalram,* 6 S.L.R. 278=19 Ind.Cas. 925, and *Banerjee* on *Arbitration,* p. 443, contend that the submission clause in the contract between the petitioners and *Noor Mohammad* was not incorporated in the contract between the petitioners and themselves. I am unable to concur in this view. It is a principle recognised by the courts in England that an assignee of a party to a contract is bound by an arbitration clause in the contract where the subject-matter of the reference is capable of assignment: See *Halsbury's Laws of England,* Vol. I, p. 443, para 944. The law in India is the same: *See Rustomjee* on *Arbitration,* p. 60 and the Indian Arbitration Act, Schedule I, para 8. A submission clause can also be incorporated into a contract by reference. Thus, in *Louis Dreyfus & Co.* v. *Arunachala Ayya,* A.I.R. 1931 P.C. 289=134 Ind.Cas. 1080=58 I.A. 381=55 Mad. 93 (P.C.), their Lordships of the Privy Council incorporated a submission clause contained in an original contract between the parties into a subsequent contract which contained the following terms: 'conditions as per agreement with you'. Similarly, in *Khemchand Ramdas* v. *Udhavdas Varandmal,* A.I.R. 1928 Sind 97=106 Ind.Cas. 565=22 S.L.R. 286, *Dr. De Souza, A.J.C.* incorporated a submission clause which formed part of a printed agreement to which a reference was made in the contract note signed by the opponent.

"In his letter dated 23rd October, the opponent agreed to perform, fulfil and observe all the stipulations and acceptances of *Noor Mohammad* contained in the sub-contract dated 3rd July and to be responsible for the due and satisfactory completion of the said sub-contract in terms of the aforesaid sub-contract and subsequent undertaking and acceptances. Since the subject-matter of the contract between the petitioners and *Noor Mohammad* was assignable I am of opinion that all the terms of the contract including the submission clause became binding on the respondents.

"The present case is distinguishable from *Thomas & Co., Ltd.* v. *Portsea Steamship Co., Ltd.,* (1912) A.C. 1=81 L.J.P. 177=105 L.T. 257, and from *Chatturbhuj Chandunmull* v. *Basdeodas Daga,* A.I.R. 1921 Cal. 767=60 Ind.Cas. 909=47 Cal. 799. *Lord Esher M.R.* observed in *Thomas & Co.* v. *Portsea Steamship Co., Ltd.* (*supra*), that where in a bill of lading there was such a condition as all other conditions as per charter-party the conditions of the charter-party must be read verbatim into the bill of lading as though they were there *in extenso.* Then if it was that any one of the conditions of the charter-party on being so read was inconsistent with the bill of lading they were insensible and must be disregarded. The arbitration clause referred to disputes arising not under the bill of lading but under the charter-party. The condition was, therefore, insensible and had to be disregarded. In *Chatturbhuj Chundummull* v. *Basdeodas Daga,* (*supra*) *Mookerjee J.* distinguishing the facts from *Temperley Steamshipping & Co.* v. *Smyth & Co.,* (1905) 2 K.B. 791=74 L.J.K.B. 876, which was cited in reply, pointed out the first contract in the case before him was between the defendant and the importers and the second contract between the defendant and his purchasers. The clause sought to be incorporated clearly referred to a

dispute or claim under this contract', that is, the contract between the defendant and the importers and if that clause were incorporated into the contract between the plaintiffs and the defendant, the result would be that, to use the language of *Lord Esher,* the contract would be insensible.

"These arguments will not avail respondents in the present case for the agreement between petitioners and respondents was not merely that certain terms in the contract between petitioners and *Noor Mohammad* were to be incorporated in the contract between petitioners and respondents but respondents on 23rd October, 1928, as we have seen, agreed to perform, fulfil and observe all stipulations and acceptances on the part of Noor Mohammad contained in the contract between petitioner and *Noor Mohammad* and they also agreed that their name should be substituted in place of the name of *Noor Mohammad.*"

471. "Sole arbitrator".—"Unless otherwise expressly provided, the reference shall be to a sole arbitrator."—*Vide Art.* 1 of First Schedule. See also A.I.R. 1953 Cal. 488=57 C.W.N. 500.

472. Powers of an umpire.—Where there is a plea of compromise between the parties, regarding the matter which has been submitted to umpire for making award, it is for the umpire to decide if there is a compromise or a withdrawal which cannot be retracted and whether he should make an award confirming the report of one of the arbitrators. He has the power to allow the party applying for withdrawal to abandon his application and to proceed with the reference. Even if there is a compromise the umpire may make an award in accordance with the compromise. In fact, the umpire ought to embody the admitted claim or compromise in the award unless the parties invite him not to do so. *Probodh Kumar* v. *Union of India,* A.I.R. 1953 Cal. 385 ; see also *bames Lamont* v. *Hayland,* (1950) 1 All. E.R. 341=(1950) 1 K.B. 585 ; *Gobordhan Das* v. *Jai Kissen,* 22 All. 224 ; *Hutchison* v. *Shepperton,* (1849) 13 Q.B. 955 ; *Hari Kumar* v. *Lakshmi,* A.I.R. 1916 All. 113=33 All. 380 ; *Harakh Ram* v. *Lakshmi Ram,* A.I.R. 1921 All. 384=43 All. 108.

473. Appointment of arbitrator with consent of parties.—The foundation of proceedings by arbitration is the consent of the parties to a decision by a extra-judicial tribunal, and where there is such a consent, the omission to move the court under paragraph 5(2) of schedule II to the Civil Procedure Code, would not render the award a nullity. *Mahmud* v. *Kakinarah,* 81 Ind.Cas. 574=28 C.W.N. 634=A.I.R. 1924 Cal. 665. So where the parties having consented to the co-option of the third arbitrator, the omission to follow the procedure laid down in paragraph 5(2) of schedule II of the C. P. Code did not vitiate the award. *Ibid.* The Arbitration Act does not limit in any way the number of arbitrators, nor does it prevent the parties if they choose to do so as a matter of business by common consent, altering the number or the constitution of the tribunal so constituted. *Abdus S. Lakur* v. *Mohammad,* 62 Ind.Cas. 426=19 A.L.J. 348=43 A. 456. In the above case the court observed: "After the arbitrators and umpire had entered upon their duties, the present respondent, who objects now to the filing of award gave his evidence.....he is absolutely estopped by the well-known principle of equity from raising the question now that the matter has been decided against him." In that case the court has also held that where the original appointment of the arbitrators and the umpire was in writing according to the strict principles of law, a variation of it could not be

enforced against either party against the will of the other without some writing by common consent.

474. Death of an umpire.—Where an umpire dies without making an award and the reference is pending it cannot be said that it is unnecessary to appoint another umpire. *Probodh* v. *Union of India,* A.I.R. 1953 Cal. 385.

Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator.

9. Where *an arbitration agreement* provides that *a* reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is is expressed *in the agreement*,—

(*a*) if either of the appointed arbitrators *neglects* or *refuses* to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place ;

(*b*) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for *fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice,* the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court may set aside any appointment *as sole arbitrator* made *under clause* (*b*) *and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.*

Explanation.—The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section.

475. N.B.—This section is based on section 9 of the old Indian Arbitration Act of 1899, which again was based on section 6 of the English Arbitration Act, 1889. This section corresponds to S. 7 of the English Arbitration Act of 1950.

476. Reason of change.—Section 9 of the present Act amends section 9 of the old Act of 1899 in the following directions : "Provision is made to suit mofussil conditions by making it clear that the defaulting party's time for appointing of an arbitrator runs only from the receipt of notice, and the proviso is elaborated (*a*) to make it clear that it is only in the arbitrator's capacity as sole arbitrator (and not as the arbitrator of the party appointing him) that the court may set aside the appointment. and (*b*) to permit the court, on sufficient cause being shown, to allow further time to the defaulting party, or in any event to make such alternative order as it thinks fit."—*Notes on Clauses to* L. A. Bill No. 34 of 1939. *Vide Gazette of India,* Part V, dated 22nd July, 1939, page 142.

477. Report of the Select Committee.—"We have omitted the

words 'or is removed' from clause 8(1) (*b*) and also from clause 9(*a*) to remove the inconsistency which would otherwise exist between these clauses and clause 12, which gives to the court and not to the parties power to appoint arbitrators in place of arbitrators removed by the court.—*Report of the Select Committee. Vide Gazettee of India, Part* V, page 35 "*Clause* 9.—The first change made in sub-clause (*a*) brings the clause into accord with the wording of clause 2(1) (*b*). The second change has been explained in our remarks on clause 8. In clause 9(*b*) we have extended the time there given from seven days to fifteen days and have provided that it shall date from service of notice and not receipt of notice in order to relate it to a definite ascertainable point of time by the help of the provisions of clause 42 of the Bill. We have also added an Explanation, applicable to both section 8 and this section, of the expression 'neglects or refuses to act."—*Report of the Select Committee. Vide Ibid.*

478. When a party can exercise his power to appoint a new arbitrator.—The following conditions must be fulfilled before a party can appoint a new arbitrator :—

(1) The existence of a valid arbitration agreement ;
(2) the agreement must provide that a reference shall be to two arbitrators ;
(3) that the said two arbitrators are to be appointed one by each party ;
(4) the arbitration agreement must not express an intention that the power is not to be exercised ;
(5) the party wishing to exercise the power must have appointed his arbitrator ; and
(6) such arbitrator must have refused to act, or be incapable of acting, or have died.

479. When a party can appoint his arbitrator to act as a sole arbitrator.—The following conditions must be fulfilled before a party may be allowed to appoint his arbitrator to act as sole arbitrator :—

(1) The existence of a valid arbitration agreement ;
(2) the agreement must provide that the reference shall be to two arbitrotors ;
(3) that the said two arbitrators to be appointed one by each party.
(4) the arbitration agreement must not express an intention that the the power is not to be exercised ;
(5) the party wishing to exercise the power must have appointed his arbitrator before service of notice ;
(6) there must have been a failure on the part of the other party to appoint an arbitrator, either originally or by way of substitution ;
(7) fifteen clear days must have elapsed after service of notice in writing asking to make the appointment ; and
(8) failure on the part of the other party to make the required appointment.

But such appointment is subject to the proviso that the court may set aside such appointment and allow the defaulting party further time to appoint an arbitrator or pass such other order as the court thinks fit.

480. Scope of the Section.—The procedure laid down by this section has no application to an arbitration agreement which provides for a reference to appointed arbitrators as distinguished from arbitrators to be appointed. *Hariram* v. *Gobindram*, A.I.R. 1949 Sind 24. This section does not apply where the reference is to three arbitrators—one to be

appointed by each of the parties, and the third to be chosen by the two so appointed (*Smith and Nelson, In re,* 59 L.J.Q.B. 533=25 Q.B.D. 545=63= L.T. 475. See also, *Gumm* v. *Hallet,* 41 L.J.Ch. 514=L.R. 14 Eq. 555=26 L.T. 468, but see *S. S. Den of Airlie & Co.* v. *Mitsui,* 106 L.T. 451=17 Com. Cas. 116)—or where the reference is to five *panchayatdars* (*Kunthi Ammal* v. *Sarangapani Chetti,* 54 Mad. 198=130 Ind.Cas. 668=33 L.W. 60=A.I.R. 1931 Mad. 170=60 M.L.J. 498 following, *In re, Baboldas Khem Chand,* 57 Ind.Cas. 997=45 Bom. 1). Where two arbitrators have been mutually agreed upon and they have been appointed as such by the parties, this section has no application because the language used herein has reference to a case where the submission is to two arbitrators, one to be appointed by each party. *General Electric Co.* v. *Siemens, Ltd.,* 56 Cal. 848=116 Ind.Cas. 625=A.I.R. 1929 Cal. 177=33 C.W.N. 418=49 C.L.J. 19. See also, *Uttamchand Brijlal* v. *Balmokand,* A.I.R. 1929 Sind 55=107 Ind.Cas. 890; *Yeates* v. *Carutu,* (1895) 2 Ir.R. 146 [a case decided on section 15 of the Common Law Procedure Amendment Act (Ireland), 1856, which corresponds to section 5 of the English Arbitration Act, 1889]. This section is intended to supplement and not to override the special contract of the parties. *Shaw Wallace* v. *Subbier,* 52 Ind.Cas. 205=44 Mad. 406=A.I.R. 1921 Mad. 58; see also *Sasoon & Co.* v. *Ram Dutt,* 50 Cal. 1=49 I.A. 366 (P.C.)=A.I.R. 1922 P.C. 374.

In *Gopalji Kuverji* v. *Morarji Jerm,* 50 Ind.Cas. 411=21 Bom.L.R. 308=43 Bom. 809, *Scott, C.J.* observed: "Section 8(1)(*b*) does not apply to the case of independent appointments of two arbitrators. In such case when a vacancy occurs, it would ordinarily be filled by the original appointer, as contemplated in section 9." *Haywar, J.* observed: "The Indian Arbitration Act applies to the appointment of a single arbitrator and in certain cases to the appointment of two arbitrators. Does is apply in any case to the appointment of three arbitrators ?.....It is not, in my opinion, open to us to extend this special jurisdiction to special contracts not clearly contemplated and expressly mentioned in by the act. Thus it is not open to us to interfere where the reference is to two arbitrators to be appointed not one by each party but the two jointly by the two parties." Now in such a case interference by court under the amended section 8 is proper if all the procedure laid down in that section has been followed.

Section 8 refers to the power of court to appoint arbitrator or umpire in cases of neglect, refusal to act, incapacity of acting and death of appointed arbitrator or where the parties do not concur in the appointment of an arbitrator or arbitrators. But this section empowers a party to appoint his arbitrator as the sole arbitrator. *Balmokund* v. *Uttamchand,* A.I.R. 1927 Sind 177=100 Ind.Cas. 890. In *Shaw Wallace & Co.* v. *Subbier & Sons,* 44 Mad. 406=40 M.L.J. 166=(1921) M.W.N. 148 =29 M.L.T. 249=14 L.W. 42=62 Ind.Cas. 205, *Wallis, C.J.* observed: The parties to a contract are at liberty to make any agreement they like as to the appointment of arbitrators and as to what is to be done if one of the parties omits to appoint an arbitrator as provided in the contract. Because, however, contracts may fail to provide what is to be done in such an event, section 9 of the Indian Arbitration Act, which substantially reproduces a section of the Common Law Procedure Act of 1854, and of the English Arbitration Act, enacts that 'where a submission provides that a reference shall be to two arbitrators, one to be appointed by each party.....unless a different intention is expressed therein,' then [clause (*b*)] 'if one party fails to appoint an arbitrator.....for

seven clear days after the other party.....in the reference'. This section, in my opinion, has no application where, as in the present case, the parties by their contract have provided that a different course should be adopted in the event of one of the parties failing to nominate, because the section is not to apply where a different intention is expressed in the contract. In the present case the contract provides: 'Should either party omit to nominate an arbitrator within seven days of the receipt of a notice calling on him to do so, the other party shall be at liberty to nominate both arbitrators', in other words, in the event of a dispute arising either party to the contract is to at liberty in the first instance to call upon the other party to nominate an arbitrator within seven days of the receipt of a notice calling on him to do so, and if the other party fails to do so then to nominate both arbitrators himself. Not only is he to appoint both arbitrators, but the nomination of both is to be after the failure of the other party to appoint. There is, therefore, no room for the application of the section which provides that 'unless a different intention is expressed,' a party desiring arbitration is first to appoint his own arbitrator, then to give notice to the other party to appoint an arbitrator and on his failing do so, appoint the arbitrator he had himself appointed to be the sole arbitrator. That is an entirely different procedure which is excluded by the terms of the contract, *with the result that section* 9, *which was intended to supplement and not to override the contract of the parties,* has no application to the present case. Where the contract provides otherwise, an appointment cannot be made under section 9, clause (*b*), and it also follows that the proviso enabling the court 'to set aside any appointment made in pursuance of clause (*b*)' has no application. Similarly, in *Gumm* v. *Hallett,* 14 Eq. 555=41 L.J.Ch. 514=26 I.T. 468, it was held, with reference to the corresponding section 13 of the Common Law Procedure Act, 1854, that it had no application to a contract, which provided that either party should appoint one arbitrator and a third to be chosen by the two so appointed. The learned Judge appears to have been influenced by the proviso in clause 12 of the contract that the arbitration is to be conducted in accordance with the provision of the Indian Arbitration Act, but this is not to be read as varying the express provision of the contract as to the appointment of arbitrators, especially under the Act itself the provisions of clause (*b*) of section 9 do not apply where a different intention is expressed in the contract." [But see *S. S. Den of Airlie* v. *Mitsui & Co.,* (1912) 106 L.T. 45].

In the same case *Ramesam, J.* observed: "But it is contended that the last sentence attracts the provision of the Indian Arbitration Act, section 9(*b*), which required that the party serving notice on the other calling upon him to nominate should previously have 'appointed an arbitrator'. The appellant, in reply, relies on the words in section 9, 'unless a differernt intention is expressed therein'. It is conceded by *Mr. V. V. Srinivasa Iyengar,* the learned vakil for the respondent, that so far as two arbitrators are contemplated by clause 12, in the place of the sole arbitrator referred to in section 9(*b*), a 'different intention' is expressed, but not in so far as section 9(*b*) required the 'previous appointment of his arbitrator', by the party calling on the other to make his appointment. I am unable to agree with this contention. The words 'shall be at liberty to nominate both the arbitrators,' do, in my opinion, express a different intention and are inconsistent with any obligation on the party of the nominating party to appoint an arbitrator before calling

on the other party to do so. In this view it is unnecessary to consider the cases of *Thomas* v. *Fredricks,* (1847) 10 Q.B. 775=16 L.J.Q.B. 393, and *Tuo* v. *Harris,* (1947) 11 Q.B. 7=17 L.J.Q.B. 1, relied on by the respondent. I, therefore, hold that the arbitrators were validly appointed."

So also where a contract contained an arbitration clause, namely, "It is further agreed that if within 20 clear days.....after being requested by letter addressed to his or their usual place of business either party fail to appoint an arbitrator or surveyor ready and willing to act, the decision of the arbitrator or surveyor appointed by the other party shall be in like manner binding on other parties," it was held that the clause covered the case of appointment of a fresh arbitrator when the arbitrator already appointed had declined to act and so the party whose arbitrator had refused to act should have given a chance to appoint a fresh arbitrator. *Shanker* v. *Phulchand,* 126 Ind.Cas. 10=(1930) A.L.J. 1147=A.I.R. 1930 All. 584. In the above case *Mukherji, J.* observed: "Now we have to take up the second point and this is whether Mr. Dina Nath was entitled to act as the sole arbitrator. The matter would not have been very easy to determine, but we have fortunately a guide in a decision of their Lordships of the Privy Council in *E. D. Sassoon & Co.* v. *Ramdutt Ramkissen Das.* A.I.R. 1922 P.C. 374=50 Cal. 1=49 I.A. 366 (P.C.)=70 Ind.Cas. 777=37 C.L.J. 336=27 C.W.N. 660=(1923) M.W.N. 372=18 L.W. 537=44 M.L.J. 758. Para. 15 of the contract [to be found at p. 30 (page of 50 Cal.)] reads as follows:—'It is further agreed, etc..... both parties.....' (i.e., as given above). "This rule, as it stands, contemplates and one appointment and one appointment alone, that it to say, if both the parties have once, each, appointed one arbitrator, the rule does not take into consideration what was going to happen if one of the arbitrators died or declined to proceed with the arbitration. Both the arbitrators may have been, when they were appointed, 'ready and willing to act' within the meaning of the contract. No party could possibly know that the arbitrator appointed by him might, later on, change his mind and decline to proceed with the arbitration. The contract cannot be read as meaning that the arbitrator appointed must be one who should not, under any circumstances, decline to act, later on. Reading a similar contract as to arbitration, their Lordships of the Privy Council said that in their opinion the clause covered the case of appointment of a fresh arbitrator when the arbitrator already appointed had declined to act. The language of the two arbitration clauses is not identical, but the effect of them is similar. Their Lordships say in page 10 of the report: 'The effect of these provisions is that on a failure by either party to appoint an arbitrator which includes (in their Lordships' opinion) a failure to appoint a subsituted arbitrator on the death or retirement of an arbitrator originally appointed—the appointment is to be made.....'

"The clause, therefore, which deals with the initial appointment of an arbitrator may clearly be said as also dealing with the appointment of a fresh arbitrator, on the retirement of a former one.

"Reading, therefore, the arbitration clause at p. 30 in the light of the decision of their Lordships of the Privy Council, we are of opinion that the plaintiffs should have been given a chance to appoint a fresh arbitrator in place of Mr. Janki Nath. They were declined an opportunity to make their appointment. although under clause 15 they had 20 days within which to do it. It is not proper that section 9 of the Indian Arbitration Act (IX of 1899), should be imported into the contract

which was entered by the parties themselves. The words 'unless a different intention is expressed therein' in section 9 clearly support this view. The plaintiffs, therefore, had 20 days' time within which to appoint an arbitrator. Mr. Janki Nath having declined to act on the 14th of October, 1925, at the earliest, the decision was given by Mr. Dina Nath within the 20 days' time within which the plaintiffs could make a fresh appointment. We are, therefore, of opinion that Mr. Dina Nath had not the authority to make an award."

In the Privy Council case of *E. D. Sassoon & Co.* v. *Ramdutt Ramkissen Das* (*supra*), their Lordships observed: "Turning now to the substance of the case, the main question is whether the submission to arbitration contained an expression of a 'different intention' which had the effect of excluding the operations of s. 9(*b*) of the Arbitration Act. In their Lordships' opinion, this question must be answered in the affirmative. Each of the contracts provides that any dispute shall be referred to arbitration 'in accordance with the rules and by-laws endorsed on this contract', and that such rules and by-laws shall form part of the contract; and by-law 15 is to the effect that, where one of the parties to a dispute fails to appoint an arbitrator within the time limited, the Chairman of the Association shall appoint an arbitrator whose appointment shall be as lawful and binding upon the defaulting party as though he himself had appointed such arbitrator.' The contract further provides that both arbitrators and umpire must be persons engaged in the Baled Jute Trade and that their award shall be final subject only to a right of appeal to the Committee of Association. The effect of these provisions is that on a failure by either party to appoint an arbitrator—which includes (in their Lordships' opinion) a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator originally appointed—the appointment is to be made by the Chairman on behalf of the defaulting party, so that in every such case there are to be two arbitrators, one appointed by one of the parties, and the other by the Chairman on behalf of the other party.....; and this agreement appears to their Lordships to be quite inconsistent with section 9(*b*) of the Act, under which, if it comes into operation, the decision will be made by a single arbitrator chosen by one party only."

When both the arbitrators to whom a dispute has been referred refuse to act, each party has a right to appoint an arbitrator in the place of the arbitrator previously appointed by that party, and it one party so appoints and the other party refuses to appoint an arbitrator in place of his previous arbitrator, the provisions of sub-section (*b*) of this section would come into force and the party so appointing would be entitled, after giving notice to the other party, to appoint his own arbitrator as sole arbitrator. *Vallabhdas* v. *Cawasji Framji*, 88 Ind.Cas. 90=A.I.R. 1925 Bom. 469=49 Bom. 706=27 Bom.L.R. 568. See also, *Balmokand* v. *Uttamchand*, A.I.R. 1927 Sind 177=100 Ind.Cas. 890.

This section provides for appointment by way of substitution in a case when each party is entitled to appoint an arbitrator. It does not provide for the case when one party is entitled in certain circumstances to appoint two arbitrators. *Forbes Forbes* v. *Gul Mahomed*, 152 Ind. Cas. 706=A.I.R. 1933 Sind 6.

Where the arbitration clause provided that in case of dispute there was to be a reference to two arbitrators and that if the buyers failed to appoint an arbitrator the sellers would have power to appoint an arbitrator on behalf of the buyers but no such powers was conferred on

the buyers in the event of the sellers failing to appoint an arbitrator, it was held that the buyers in such an eventuality had their rights under this section. There the court observed: "No such power was conferred on the buyers in the event of the sellers failing to appoint an arbitrator. It followed, therefore, that the buyers in such an eventuality had their right under section 9, Arbitration Act; See *Kewalram* v. *Donald Graham & Co.*, 5 S.L.R. 61=10 Ind Cas. 211. See also, the judgment of *Repchand, A.J.C. in Uttamchand Brijlal* v. *Balmikand,* A.I.R. 1929 Sind 55 at p. 57. Assuming the conditions laid down in the arbitration clause had arisen, and this fact is not admitted, the buyers had a right under section 2, Arbitration Act, to nominate the arbitrator, when they had appointed, to be the sole arbitrator in the reference. Instead of doing so they purported to appoint another arbitrator in addition to the arbitrator whom they had appointed. This appointment was clearly invalid.....Reliance has been placed on behalf of respondents No. 1 on *Kewolram* v. *Donald Graham & Co.*, S.L.R. 61=10 Ind.Cas. 211, where it was observed that section 9, Arbitration Act, gives a corresponding right to the other party. It must not however be inferred from the words 'corresponding right' that the other party can also appoint another arbitrator. Section 9 is clear on the point. The right of the other party in such circumstances is to appoint the arbitrator whom he has nominated as also arbitrator." *Ramchand* v. *Brooker Dore & Co.*, 27 S.L.R. 186=A.I.R. 1933 Sind 328=149 Ind.Cas. 691.

The Arbitration Act does not limit in any way the number of arbitrators, nor does it prevent the parties, if they choose to do so as a matter of business by common consent altering the number or the constitution the tribunal so constituted. *Abdus Shakur* v. *Mohammad Yusuf,* 52 Ind.Cas 426=A.I.R. 1921 All. 64=43 All. 456=19 A.L.J. 34. A submission in writing contained a reference to two arbitrators and an umpire. Subsequently, four additional men were appointed as arbitrators and neither side objected to the tribunal as ultimately constituted. The seven arbitrators proceeded to make an unanimous award, and on an application, under section 11 of the Arbitration Act, 1899, by the party in whose favour the award was made, to file the award, the opposite party objected that although he had submitted to arbitration and had been a party throughout the proceedings and had consented to the award being made, there was in fact no legal reference . *Held* that no objection having been made at any stage before the additional four arbitrators entered upon their duties, and the objector having co-operated at acquiesced in the altered state of things, he was absolutely estopped by the well-known principle of equity from arising the question now that the matter had been decided against him. *Ibid.*

A dispute having arisen between M. & Co. and the plaintiffs, M. & Co. gave notice that they demanded an arbitration under a clause in a charter-party, made between M. & Co. and the plaintiffs, which provided for arbitration "by arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third", and formally required the plaintiffs within seven clear days to appoint their arbitrator. The plaintiffs did not appoint an arbitrator and M. & Co. after the expiry of the seven days gave notice of the appointment of a gentleman to act as sole arbitrator. The plaintiffs thereupon took out a summons for further directions, asking (*inter alia*) for an injunction to restrain M. & Co. from proceeding with the arbitration, alternately that leave may be given to the plaintiffs to revoke the sub-

mission. *Held* by *Bray, J.* that the case came within section 6 of the English Arbitration Act of 1889 and as such there was no jurisdiction in the court to grant the injunction asked for *Den of Airlie Co., Ltd.* v. *Mitsui & Co.*, 105 L.T. 823=12 Asp.M.C. 97. This case was affirmed by the Court of Appeal in 106 L.T. 451=17 Com.Cas. 116.

The intention of the parties is to be the sole guide for determining the mode of working out the submission and reaching a final decision. The law of arbitration is based upon the principle of withdrawing the dispute from the ordinary courts and enabling the parties to substitute a domestic tribunal. Once that tribunal reaches a final decision as contemplated or agreed upon by the parties, then the Arbitration Act steps to help the parties to enforce the said decision. *Fazally* v. *Khimji*, 36 Bom.L.R. 1005=A.I.R. 1934 Bom. 476.

A policy of insurance contained conditions that, if any differences should arise as to the amount of any loss or damage, such differences should, independently of all other questions, be referred to the decision of an arbitrator to be appointed in writing by the parties, or if they could not agree upon a single arbitrator to the decision of two disinterested persons as arbitrators with the further condition as to appointing an umpire but it contained no provision to meet the contingency of one arbitrator after appointment refusing to act. In pursuance of this, one party nominated his arbitrator and called upon the other party to nominate his arbitrator. The other party did so and the two arbitrators appointed an umpire. Subsequently, the arbitrator appointed by the other party refused to act. The first party then called upon the other party to nominate another arbitrator but the other party did not do it. Thereupon the first party appointed their arbitrator as sole arbitrator and notified the same to the other party. This arbitrator pronounced his award. *Held* that section 6 of the English Arbitration Act was inapplicable to the case and the award was invalid. *South British Insurance* v. *Gauchi Bros.* 110 Ind.Cas. 290 (P.C.).

Where a submission clause empowers each party to the contract to nominate an arbitrator on behalf of his opponent in the event of default but was silent as to the order in which each party was required to perform the reciprocal promise of nominating an arbitrator on his own default it was held that each party should himself nominate an arbitrator before calling upon his opponent to nominate an arbitrator. *Shaw Wallace* v. *Gur Bux*, 109 Ind.Cas. 262.

481. Para. 2 of the First Schedule.—"If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments."—*Vide* para. 2 of the First Schedule.

482. Valid agreement.—"Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. In order that there may be a valid agreement to refer a dispute to arbitration under the Arbitration Act, it is necessary that the agreement should be in writing and that such writing should embody all the terms of the agreement either directly or by implication. It is not necessary that such written document should be executed by both the parties. All that is required is that both the parties should accept a written document as containing the agreed terms; it might be in the form of a document signed by both parties containing the terms, or a document signed by one party containing the terms and a plain acceptance either signed or orally by the other party; or an

unsigned document containing the terms agreed to orally by both parties. *Keshoram Mill* v. *Kanhyalal,* 44 C.W.N. 607 ; *Sugar Dealers* v. *Sitaram,* 1958 A.L.J. 521=1958 All. W.R. (H.C.) 629 ; *Ramchandra* v. *Howrah Mills,* 62 C.W.N. 773=A.I.R. 1958 Cal. 620 ; A.I.R. (1955) S.C. 812= 1956 S.C.J. 64 ; *Radhakanta* v. *Baerlin Bros. Ltd.,* 56 Cal. 118=32 C.W.N. 1101=A.I.R. 1929 Cal. 97 ; *Jubilee Chamber* v. *Lala Amrit Shah,* A.I.R. 1940 Lah. 180=42 P.L.R. 48 ; *Mulchand* v. *Radha Kissen,* 90 Ind.Cas. 932 ; *Shankerlal Lachmi Narain* v. *Jainey Brothers,* 53 All. 384 ; *Fleming* v. *Doig,* (1921) 38 R.P.C. 57. In *Hickman* v. *Kent or Romney Marsh,* 84 L.J.Ch. 688=(1915) 1 Ch. 881=113 L.T. 159, *Ashbury, J.* after reviewing various cases observed : *"The result of these decisions is, I think, that if the submission is in writing, and is binding on both parties as their agreement, or as the equivalent in law to an agreement between them the statute is satisfied."*

The case of *Hickman* v. *Kent, etc.,* (1915) 1 Ch. 881=84 L.J.Ch. 688, was followed in the case of *Lyon Lord & Co., Ltd.* v. *Firm of Chapsi Umersi,* 49 Ind.Cas. 135=12 S.L.R. 55. See also *Brindaban Chandra Dutta* v. *Bisheswar Lal,* I.L.R. (1937) 1 Cal. 606 ; *Rambaksh* v. *Bombay Cotton,* 128 Ind.Cas. 881=32 Bom.L.R. 1451=A.I.R. 1931 Bom. 81. The terms of a "written agreement" may be collected from a series of documents, and a "written agreement" does not mean that each party has to sign a document containing the terms. The plain acceptance of a document containing all the terms is sufficient. All that is required by section 2(*a*) is that both parties accept a written document as containing the agreed terms : it might be in the form of a signed document by both the parties containing all the terms, or a signed document by one party containing the terms and a plain acceptance either signed or orally accepted by the other party, or, in the third case, an unsigned document containing the terms of the submission to arbitration agreed orally by both parties. A written contract does not mean a contract which is proved by documentary evidence, but one in which the terms are expressed in writing in the act of making it. *Shankerlal* v. *Jainey,* 53 All. 384=A.I.R. 1931 All. 136=132 Ind.Cas. 324=(1931) A.L.J. 20.

In *Radhakanta Dass* v. *Baerlein Bros. Ltd.,* A.I.R. 1929 Cal. 97=56 Cal. 118=117 Ind.Cas. 540, *Rankin, C.J.* observed : "Upon that point the case-law at one time was in some confusion. The first case was the case of *In re, E. D. Lewis, Ex parte Munro,* (1876) 1 Q.B.D. 724=45 L.J.Q.B. 816, which was followed apparently in *Caerleon Tinplate Co., Ltd.* v. *Hughes.* (1891) 60 I.J.Q.B. 640=65 L.T. 18. So far authority was in favour of the view that it was necessary that the agreement should be signed by both parties. Apparently in the case of *Ram Narain* v. *Liladhur Lowjee,* 33 Cal. 1237=10 C.W.N. 814 *Woodroffe,* J. assumed that to be the law though I do not gather that the exact point was relevant to the case before him. In the case of *Sukhamal Bunsidhar* v. *Babu Lal Kedia & Co.,* 42 All. 525=59 Ind.Cas. 75=18 A.L.J. 652, that also was assumed to be the law in the judgment of *Walsh, J.* where he said : "We agree with the view taken by *Woodroffe, J.* in *Ram Narain* v. *Liladhur Lowjee* (*supra*), and with the majority of the English cases on this point, particularly *Caerleon Tinplate Co.* v. *Hughes* (*supra*), that provision involves a submission signed by both parties or their agents."

Later in India the same has been laid down by my learned brother *Page, J.* in *John Bette & Co. (London) Ltd.* v. *Kanoolal & Co.,* A.I.R. 1926 Cal. 938=53 Cal. 65. *Page, J.* has noticed certain other English cases. He has noticed the case of *Baker* v. *Yorkshire Fire and Life*

Assurance Co., (1892) 1 Q.B. 144=61 L.J.Q.B. 838=66 L.T. 161, the case of *Hickman* v. *Kent or Romney Mash Sheep-Breeders' Association*, (1915) 1 Ch. 88=84 L.J.Ch. 688=59 S.J. 478=113 L.T. 159, and the case of *Anglo-Newfoundland Development Co.* v. *Regina*, (1920)2 K.B. 214=98 L.J.K.B. 570=84 J.P. 121=122 L.T. 731. He says, however, that these cases are to be distinguished on the ground that the plaintiff was estopped from asserting that he had not assented to the arbitration clause.

"In my judgment the law is the other way. The Arbitration Act of 1889 and the Indian Arbitration Act (of 1899) for the best of good reasons have not required that the agreement to submit should be signed by both parties. What has been required is a written agreement to submit and *Baker's case*, *Hickman's case* and the case of *Anglo-Newfoundland Development Co.* show that it is illegitimate to import into the statute the requirement of a signature by both parties." See also, *James Finlay & Co., Ltd.* v. *Gurdayal Pahlajraj*, 76 Ind.Cas. 600=17 S.L.R. 93=A.I.R. 1924 Sind 91. Where parties agree to do business on certain terms, one of which is an agreement to refer to arbitration the disputes between the parties, the assent to those terms by conduct by a party constitutes a written agreement within the meaning of section 4 and amount to submission. *Rambaksh* v. *Bombay Cotton*, 128 Ind.Cas. 881=32 Bom.L.R. 1451=A.I.R. 1931 Bom. 81; *Baker* v. *Yorkshire*, (1892) 1 Q.B. 144; *Morgan* v. *William*, (1907) 2 Ch. 137.

483. Oral arbitration agreement—Validity.—An arbitration agreement is not by law required to be in writing. The Arbitration Act does not, for purposes of that Act recognise an arbitration agreement unless it is in writing. But for purpose other than the purposes of the Arbitration Act, an arbitration agreement which is not in writing, is still recognised. In this view a subsequent oral agreement to rescind or abrogate a prior arbitration agreement in writing for purposes other than those of the Arbitration Act, is not barred. *Rungta Sons* v. *Jugomulal*, 63 C.W.N. 527 =A.I.R. 1959 Cal. 423.

484. Mutuality in agreement.—It is of very essence of an arbitration that the submission should be mutual and that the award should be mutual and binding. *Official Receiver* v. *Kerson Das*, A.I.R. 1926 Sind 209=95 Ind.Cas. 750=19 S.L.R. 24. See also, *Burjor* v. *Ellerman City Lines, Ltd.*, A.I.R. 1925 Bom. 449=49 Bom. 845. But see *Chetoomal* v. *Shankerdas*, A.I.R. 1929 Sind 83=118 Ind.Cas. 220.

485. Legality of agreement.—Term of business providing that disputes should be referred to arbitration of certain number of directors has been held legal. *Jubilee Chamber* v. *Amrit shah*, A.I.R. 1940 Lah. 180=42 P.L.R. 48.

486. Arbitration agreement where minor is a party.—It is not open to a party who is a major to have an award which was made at his instance set aside, merely on the ground that one of the parties to it was a minor. An arbitration to which a minor is a party, is not in itself void but is voidable at the instance of the minor. *Kodali Ramakoleswara* v. *Kodali Suryanarayana*, A.I.R. 1940 Mad. 905=(1940) M.W.N. 808=(1940) 2 M.L.J. 356=52 M.L.W. 373: *James Finley* v. *Gurdayal*, 76 Ind. Cas. 460=A.I.R. 1924 Sind 91=17 S.L.R. 93. The reference to arbitration by the guardian of the minor of a dispute between the parties one of whom is a minor is not illegal but is valid. *Ramautar* v. *Langat Singh*. 130. Ind.Cas. 810=A.I.R. 1931 Pat. 92 (19 Cal. 334 relied on). Where a Burmese mother referred a dispute to arbitration on behalf of herself and her minor sons but it appeared that she was never appointed guar-

dian, *held* that the reference and the award were invalid and not binding on the minors. *V. K. Chettiyar Firm* v. *Ma Thung Shwe,* 142 Ind.Cas. 189. See also, *Shanti Lal* v. *Munshi Lal,* 139 Ind.Cas. 820=34 Bom.L.R. 862=A.I.R. 1932 Bom. 498. The agreement signed by a minor is absolutely void. But if it is signed on behalf of the minor by his guardian, legal or natural it stands on a different footing. But if the person representing that minor is not the *facto* or *de jure* guardian of the minor and has an adverse interest against him, the agreement would not bind the minor, and any award made on the basis of such agreement, much less where the arbitrators did not decide the matter upon their own judgment but decided it upon the terms of a compromise reached by the parties at which stage again the interest of the minor had not been looked into by the proper guardian the award would be vitiated. *Satyanarain* v. *Jugal,* (1958) A.L.J. 622=A.I.R. 1958 All. 512. For dissolution of partnership, the minor members are necessary parties. *Ibid.*

487. Reference by Court of Wards on behalf of a minor.—The Court of Wards has power to refer to arbitration a dispute affecting the rights of a minor who is under its superintendence; provided the reference to arbitration is for his benefit. The question of the right to repudiation on the ground that the reference was not for the benefit of the minors or entered into in good faith will be one for the minors to consider on their attaining majority. *Isribai* v. *Pervibai,* 121 Ind.Cas. 164=A.I.R. 1930 Sind 195.

488. Matter relating to personal rights between parties—reference.—There is no bar to refer to arbitration a suit which relates to personal rights between the parties, for example, a question of marriage which is cognisable by Civil Court. *Isribai* v. *Pervibai,* 121 Ind.Cas. 164=A.I.R. 1930 Sind 195. See also, *Faiz Ali* v. *Ashraf Khatun,* 30 P.L.R. 600=118 Ind.Cas. 464=A.I.R. 1929 Lah. 177. But the question of restitution of conjugal rights cannot be referred to arbitration as the matter must be decided by the court itself. *Malkha* v. *Sardar,* 30 P.L.R. 122=11 Lah.L.J. 89=116 Ind.Cas. 215=A.I.R. 1929 Lah. 39.

489. The agreement must provide that the reference shall be to two arbitrators.—In *James Finlay & Co., Ltd.* v. *Gurdayal Pahlajraj,* 76 Ind.Cas. 660=17 S.L.R. 93=A.I.R. 1924 Sind 91, *Raymond,* A.J.C. observed: "Now by section 4 of Act IX of 1899, submission is defined as a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not. The submission is, therefore, the first step in an arbitration and it should be in writing in order to satisfy the Act.....In *Dhanpatmal* v. *Kishenlal,* 35 Ind.Cas. 536=(1916) 10 S.L.R. 1, *Mr. Crouch,* A.J.C. remarked that the definition of submission in section 4 covers both what is ordinarily termed an arbitration clause and also what is commonly called a reference. The former is a contract to refer, the latter is a delegation of authority to a named arbitrator and an agreement to be bound by the award.....*Mr. Crouch* would appear to be right in his opinion that 'submission' comprises both what is known as the arbitration clause and what is known as the reference. Sections 7, 8 and 9 of the Indian Arbitration Act do use the word 'reference' but in my opinion this does not necessarily involve a formal reference to arbitration on stamped paper, for by section 8, when the power of the court is invoked for the appointment of an arbitrator and the court appoints one, no formal reference need be drawn up and a perusal of these three sections clearly shows that the word 'reference' is used as relating to the appointment of the arbitrators by

virtue of the submission, which is the pivot of all references to arbitration. Now, in the present case the indent contains a distinct agreement between the parties to refer disputes of whatever nature arising out of the contract to the arbitration of two merchants whose decision is agreed to be accepted as final and binding. That is a submission in terms of the Arbitration Act and in pursance of it, either party appointed his arbitrator. In my opinion, the reference to arbitration is complete and it was unnecessary to follow it up with a formal reference to the arbitrators named."

490. Reference.—An agreement between the parties to refer the matter to a person and abide by his decision amounts to a reference to arbitration. *Swaminathan* v. *Moona,* A.I.R. 1933 Rang. 407. [*Vide* S. 2(e) *supra.*]

491. Two arbitrators—one should be appointed a convenor.—This section is only applicable when the reference is to two arbitrators. When more than one arbitrator is appointed it is absolutely necessary to appoint a convenor in view of the possibility that the arbitrators may not agree as to the time and date of sitting, or one of them may refuse to attend on the date fixed by the other without refusing to act as an arbitrator in which case alone he is to be deemed as having vacated his place giving rise to the necessity of another arbitrator being appointed. If one of them has the power to convene the meeting of arbitrators so as to make it compulsory on the other to attend, and the latter refuses to attend, his conduct could, under certain circumstances be construed as amounting to refusal to act as an arbitrator, in which case the party nominating him would be called upon to appoint another arbitrator: and if he fails to do so within a certain time, only one arbitrator would suffice, under section 9(*b*). *Gajanand Sitaram* v. *Phulchand Fatechand,* A.I.R. 1930 All. 675=(1930) A.L.J. 1373=131 Ind.Cas. 552.

492. Duty of joint arbitrators.—In *Re Beck and Jackson* (1857) 1 C.B.N.S. 695, *Cresswell, J.* observed: "I find the rules thus stated in *Russell on Arbitration,* p. 209—speaking of the duty of joint arbitrators—'As they must all act, so *must they all act together.* They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all: for the parties are entitled to have recourse to the argument, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving together at a just decision. *Re Plews and Middleton,* (1845) 6 Q.B. 845; *Little* v. *Newton,* (1841) 9 D.P.C. 437=2 Man. & G. 351: *Stalworth* v. *Inns,* (1844) 13 M. & W. 466=9 Jur. 285'." In *Lord* v. *Lord,* 5 El. & Bl. 404, *Coleridge, J.* observed: "It is now clearly established that every judicial act, to be done by two or more, must be completed in the presence of all who did it: for those who are to be affected by it have a right to the united judgment of all up to the very last moment." See also, *Morgan* v. *Boult,* 11 W.R. (Eng.) 265=7 L.T. 671. *British Metal Corporation* v. *Ludlow,* (1938) 1 All. E.R. 135=54 T.L.R. 867. In *Re Plews and Middleton (supra), Coleridge, J.* observed: "To uphold this award would be to authorise a proceeding contrary to the first principles of justice. The arbitrators here carried on examinations apart from each other, and from the parties to the reference: whereas it ought to have been conducted by the arbitrators and umpire jointly, and in the presence of all the parties." See also, *Nand Ram* v. *Fakir Chand,* 7 All. 523=(1885) A.W.N. 139: *Thammiraju* v. *Babiraju,* 12 Mad. 113; *Ma Sin* v. *Ma Pu,* A.I.R. 1930 Rang. 136=121 Ind.Cas. 801=

7 Rang. 715 ; *Fazally Jivaji* v. *Khimji Poonja,* 36 Bom.L.R. 1005=A.I.R. 1934 Bom. 476 ; *Bagaya* v. *U. Paduma,* 12 Rang. 128=149 Ind.Cas. 1983=A.I.R. 1934 Rang. 24 ; *Tara Prasad* v. *Raja,* 152 Ind.Cas. 929 ; *Lakshmamma* v. *Appadu,* (1931) M.W.N. 961=34 L.W. 725=61 M.L.J. 761 ; *Lekha Singh* v. *Bodil Singh,* 30 Ind.Cas. 384. One arbitrator cannot delegate his powers of decision to another arbitrator. *Ma That* v. *Ma Saw,* (1902-1903) U.B.R. Vol. II, *Arbitration,* p. 1. Where an act judicial in its character is to be performed, the arbitrators are bound by the same rules as bind the courts. But when an act done is not of a judicial character but merely ministerial in nature it is competent to one of the arbitrators or all the arbitrators to have the act performed in the absence of one or more parties. *In the Matter of Arbitration Act,* 17 L.W. 648.

But the absence of an arbitrator cannot be deemed to amount to misconduct where it is clear that no business of a disputed character was gone into during the absence of the arbitrator and where the decision of the arbitrators is that of all the arbitrators. *Brojendra* v. *Purna,* 58 Cal. 269=129 Ind.Cas. 428=34 C.W.N. 689=A.I.R. 1931 Cal. 53. See also, *Nadir Chand* v. *Gobinda Chunder,* 2 C.L.J. 61 ; *Varanarhi* v. *Killamsetti,* 2 L.W. 505.

493. Unless a different intention is expressed in the agreement. —This section is not applicable where different intention is expressed in the agreement. *Shaw Wallace* v. *Subbier and Sons,* 62 Ind.Cas. 205= 44 Mad. 406=40 M.L.J. 116=(1921) M.W.N. 148=29 M.L.T. 249=14 L.W. 42 ; *Shanker* v. *Phulchand,* 126 Ind.Cas. 10=(1930) A.L.J. 1197= A.I.R. 1930 All. 584 : *E. D. Sassoon & Co.* v. *Ramdutt Ramkissen Das,* A.I.R. 1922 P.C. 374=50 Cal. 1=49 I.A. 366 (P.C.)=70 Ind.Cas. 777=37 C.L.J. 336=27 C.W.N. 660=(1923) M.W.N. 372=18 L.W. 537=44 M.L.J. 758 ; *Shaw Wallace* v. *Gurbux Singh,* 109 Ind.Cas. 262=A.I.R. 1929 Sind 58 ; *Ramchand* v. *Broker Dore &Co.,* A.I.R. 1933 Sind 328= 27 S.L.R. 186 ; *Kewal Ram* v. *Donald Graham,* 5 S.L.R. 61=10 Ind.Cas. 211. This section is applicable only to cases where a different intention is not expressed in the arbitration agreement. *Sawyer* v. *Louis Dreyfus,* 7 S.L.R. 1=20 Ind.Cas. 504. For further details *vide* the *Topic "Scope of the Section", supra.*

CLAUSE (*a*).

494. Clause (a)—Scope of.—By the rules of the Kanpur Sugar Mills Association the Secretary of the Association is empowered to appoint arbitrators from the panel of members. In the under-mentioned case the Secretary of the Association nominated one Man Singh as an arbitrator but on the date of the award he ceased to be a member of the Association. Now the question is whether the award is valid. "Section 9 provides for the parties in certain eventualities to appoint fresh arbitrators. These provisions are specific. They provide for certain contingencies, for example ; if the arbitrator neglects or refuses to act, or is incapable of acting or dies the party which appoints him may appoint a new arbitrator in his place. None of these contingencies arise in this case and, therefore it cannot be said that the intimation given by the Secretary of the Association that Man Singh (the arbitrator appointed) had ceased to be an arbitrator, was proper." *Per Sankar Saran, J.* in *Jai Dayal* v. *Chunnilal,* A.I.R. 1951 All. 359. In the same case *Bind Basini Prosad, J.* said: "The second point is whether Charan Das could as sole arbitrator.....The applicant appointed Man Singh and

the opposite party appointed Charan Das. The applicant maintained throughout that Man Singh should be a party to the decision of the case, but the Secretary of the Association thought otherwise. He was of the view that as Man Singh had ceased to be a representative of a member of the Association, he had no authority to act as an arbitrator..... The arbitration proceedings started by virtue of the parties being members of the Association which provided that the dispute among the members shall be decided by arbitration. The bye-laws do not provide in express terms that an arbitrator shall cease to have authority as such by ceasing to be the representative of a member of the Association. Then section 9 of the Act provides that another person can be appointed in place of a duly appointed arbitrator only in certain specified circumstances, namely neglect or refusal by the arbitrator to act, his incapacity of acting or his death. There is nothing on the record to show that Man Singh even neglected or refused to act as an arbitrator, that he became incapable. Needless to say that he is alive. None of the contingencies contemplated by S. 9 exists in the present case. Man Singh was eligible to be appointed as an arbitrator on the date on which the applicant appointed him as such. His subsequent disqualification has not the effect of taking away from him the authority of an arbitrator because the Arbitration Act makes no such provision."

495. "Either."—The word "either" is used in clause (*a*), because it may happen that one or both of the arbitrators may refuse to act. *Vallabhadas* v. *Cowasjee,* 88 Ind.Cas. 90=A.I.R. 1925 Bom. 469=49 Bom. 406=27 Bom.L.R. 568.

496. Neglect to act.—By section 6 (1) of the English Arbitration Act of 1934, the court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. But neither in section 6 of the English Arbitration Act of 1889 nor in section 9 of the Indian Arbitration Act 1899 there was any provision as to what is to happen if he should fail or neglect to act as arbitrator. Following the English Act of 1934, the Legislature has made provision in this Act for the negligence on the part of an arbitrator by explanation of this section one month's delay after request would constitute neglect. See also, *Willoughby.* v. *Willoughby,* (1847) 16 L.J.Q.B. 251.

497. Dies.—*Vide* notes under section 20 *infra* under the heading *Death or refusal of arbitrator.*

498. Refusal to act—what amounts to.—The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of this section. *Vide* Explanation. Where reference to two arbitrators, one to be appointed by each party is made, each party has right to appoint another in place of an arbitrator refusing to act. One party refusing to appoint, the other can appoint sole arbitrator. *Vallabhdas* v. *Cowasji Framji & Co.,* 88 Ind.Cas. 90=A.I.R. 1925 Bom. 469=49 Bom. 706=27 Bom.L.R. 568. A railway company and the owners of lands which were required by the company, appointed, under the Lands Clause Consolidation Act, arbitrators, who appointed an umpire. The arbitrators and umpire met on the 4th of November, and adjourned to the following day. On that day, Mr. M'dermott the company's arbitrator could not attend. On that day, early in the morning, the solicitor for the company received a letter

from Mr. M'Dermott, their arbitrator, saying that he was prevented from attending the reference on that day by urgent business, but suggested that the arbitration should be proceeded with, and that he should be furnished with notes of the proceedings in the reference. The company's solicitor went to the place of meeting, and communicated the contents of the letter to the solicitor of the other party and to the other arbitrator and the umpire. The question was whether he (Mr. M'Dermott) refused to act In answering the question in the negative *Vice-Chancellor Knight Bruce* observed : "The absence of M'Dermott, on that day, may have been possibly an act not of strict propriety on his part ; but that did not enable the other arbitrator and the umpire, or either of them, to proceed without him on that day, if there were not a 'refusal', as I think there was not" *Re Hawley,* (1848) 2 DeDex. & S. 33. Where an arbitrator who has tendered his resignation to act as arbitrator takes back the resignation on the application of the parties and request of court and accepts fees and continues proceedings, he does not become *functus officio* and no fresh orders of court resubmitting the case to him is necessary. *Kashmiri Lal* v. *Lal Khan,* A.I.R. 1934 Lah. 704 = 35 P.L.R. 572 = A.I.R. 1934 Lah 632; *Joymungal Singh* v. *Mohan Ram,* 23 W.R. 429 (P.C.). See also, *Gajanand Sitaram* v. *Phulchand Fatechand,* A.I.R. 1930 All. 675 = (1930) A.L.J. 1373 = 131 Ind.Cas. 552. One of the arbitrators intimated that he wanted to resign. The court should follow the provisions of this section. *Bhailal* v. *Amaratial* A.I.R. 1963 Guj. 141.

CLAUSE (*b*).

499. Clause (b)—scope of.—Section 9(*b*) applies only in the absence of contract providing otherwise. *Shaw Wallace* v. *Subbier and Sons,* 62 Ind.Cas. 205 = 44 Mad. 406 = 40 M.L.J. 116 = (1921) M.W.N. 148 = M.L.T. 249 = 14 L.W. 42 ; *Shanker* v. *Phulchand,* 126 Ind.Cas. 10 = (1930) A.L.J. 1197 = A.I.R. 1930 All. 584 ; *E. D. Sassoon & Co.* v. *Ramdutt Ramkissen Das,* AI.R. 1922 P.C. 374 = 50 Cal. 1 49 I.A. 366 (P.C.) = 70 Ind.Cas. 777 = 37 C.L.J. 366 = 27 C.W.N. 660 = (1923) M.W.N. 372 = 18 L.W. 537 = 44 M.L.J. 758. Where an arbitrator appointed by one party is made sole arbitrator under section 9, the other party having refused to appoint his own, but he afterwards refuses to act, the procedure to be followed is not that laid down in section 8 (1) (*b*) ; but that in section 9 will be repeated and the party, who appointed the arbitrator, who became the sole arbitrator, may appoint a fresh arbitrator after giving notice to the other side. *Uttam Chand* v. *Balmokand,* A.I.R. 1929 Sind 55 = 107 Ind.Cas. 435. In the above case *Rupchand, A.C.J.* said : "It, therefore, falls clearly within the purview of section 9 of the Indian Arbitration Act, which supplements the requisite machinery for enforcement of an agreement to submit disputes to arbitration of that nature. I can find nothing in section 9 to suggest that the same machinery may not be invoked over again and the whole procedure gone through from the beginning to the end if on account of any unforeseen circumstance the nominee of one of the parties who is appointed as the sole arbitrator under the provisions of clause (*b*) of the section refuses or neglects to act. The repetition of the procedure laid down by the section, on a refusal or neglect of the sold arbitrator so appointed, affords a fresh opportunity to the party who has made default in the first instance to reconsider his position and to appoint if he so wishes his own nominee when he is called upon to do so again. Now, if clauses (*a*) and (*b*) of section 8 of the Indian Arbitra-

tion Act are carefully analysed they clearly show that neither of them applies to a submission which provides for the appointment of two arbitrators one by each party."

In *Drummond* v. *Hamner,* (1942) 1 K.B. 382=(1942) 1 All. E.R. 398=111 L.J.K.B. 385, which was a proceeding between landlord and tenant the landlord served a notice on the tenant in which he gave the tenant the name of the arbitrator R. G. W. and required the tenant to name his arbitrator within seven days. The notice concluded "failing which the said disputes and differences will stand referred to the said R. G. W. alone as sole arbitrator." A copy of the notice was at the same time sent to R. G. W. No appointment was made by tenant within seven days and R. G. W. sat as sole arbitrator and made the award. *Held,* that there had been no valid appointment of R. G. W. as sole arbitrator under section 6 (*b*) of the Arbitration Act, 1889, and that even if the words quoted did constitute a valid appointment, it was made before the expiration of seven days after the service of notice, and therefore that award must be set aside. *Atkinson, J.* said : "There is a further difficulty in the way of landlord: he never did appoint Mr. Woolley as sole arbitrator. The terms of section 6 (*b*) of the Arbitration Act, 1889, are clear, and under it the party who desire his arbitrator to act as sole arbitrator is required so to appoint him, and he can only do this after the other party has failed to appoint his arbitrator for seven clear days after the service of the notice upon him requiring him to do so. These two points are emphasized in *Russell* on *Arbitration,* 13th Edn., p. 127." See now pp. 175, 179 of the 15th Edn.

The power to a party to appoint a sole arbitrator has been conferred by section 9 (*b*) and the pre-requisite condition for exercise of that power is that the other party fails to appoint an arbitrator for fifteen clear days after the service of a notice in writing to make the appointment. The appointment of a sole arbitrator before this time is bad, and an award by him invalid. *Dominion of India* v. *Kalyan Kumar,* 53 C.W.N. 180. The appointment of an arbitrator by a party is not considered complete until it has been notified to the other side. *Ibid.*

K and M entered into a contract of sale of certain goods on terms and conditions of the importing office of the goods. The contract between the parties contained an arbitration clause which provided that all disputes of whatsoever nature, unless amicably settled, should be referred to two arbitrators, one to be nominated by each under the provisions of the Arbitration Act. Upon a dispute having arisen K nominated one arbitrator on his behalf and called upon M to nominate one for him within three days. On failure of M to do so K himself appointed an arbitrator on behalf of M. This was in accordance with arbitration clause contained in the contract between K and the importing office. *Held,* that the arbitrators acted without jurisdiction because whatever terms and conditions of the importing office were to be incorporated in the contract between K and M, the arbitration clause in the contract of the office could not be incorporated by implication because the contract between K and M actually contained a separate arbitration clause and hence the appointment of another arbitrator by K on behalf of M was in contravention of the provisions of section 9, Arbitration Act, and hence illegal. *Kishanchand Santram* v. *Rochaldas,* 180 Ind.Cas. 143=A.I.R. 1939 Sind 24. Under this section unless there is a formal appointment in the words of clause (*b*) the arbitrator appointed by one party cannot arrogate to himself the functions of a sole arbitrator on the refusal of the other

party to appoint an arbitrator. *Harichand* v. *Lachman,* 50 P.L.R. 57 = A.I.R. 1948 East. Punj. 11 = 2 D.L.R. 956.

In the above case *Teja Singh, J.* observed : "As regards appointment of the arbitrator, it is conceded that each party was to nominate its own arbitrator and notices were given to other two firms by the counsel of the firm *Hari Chand Sat Pal* that had appointed separate arbitrators to settle the disputes. It is also conceded that the other side were given fifteen days' time to appoint their arbitrators but they failed in this. The procedure that is to be followed in cases of this kind is laid down in S. 9, Arbitration Act..... It will be seen from clause (b) that after the other side had refused to appoint their arbitrator within 15 days of the service of the notice upon them, it was open to the appellants' counsel to appoint their own *arbitrators as sole arbitrators* in the reference, but they did nothing of the kind. The appellants' learned counsel argued that there was no necessity of a formal appointment of the arbitrator previously aoppointed as sole arbitrator but I do not find it possible to agree with him. The words of clause (*b*) appear to me be very clear and as I read them, my opinion is that unless there is a formal appointment in the words of the clause the arbitrator appointed by one party cannot abrogate to himself the functions of a sole arbitrator and has no jurisdiction to proceed with the reference. The words of the proviso to the section strengthen this conclusion. It lays down that after an arbitrator appointed by one of the parties has been appointed as the sole arbitrator under clause (*b*) a special right accrues to the other party to have that appointment cancelled by the court and to apply for being granted further time for appointing his own arbitrator, and to hold that no formal appointment need be made, would be to deprive the other party of that right."

500. Notice to be sent by whom.—Where the dispute is between the members of an association, the Secretary of the Association is agent of all the members and therefore notice sent by him should be regarded as a notice from a party for purposes of S. 9 (b). *Jai Doyal* v. *Chunni Lal,* A.I.R. 1951 All. 359 = 1950 A.L.J. 698.

501. Reference at the option of a party—application of section 9 (b).—Parties to a suit had entered into a contract whereby the plaintiffs had sold and defendants had bought a quantity of sugar. The contract contained, among others, an arbitration clause in the following words: —"Any dispute to be settled by arbitrations under the rules of the Bengal Chamber of Commerce, or at the option of the sellers by the sellers by the arbitration of two European sugar importers of Calcutta, one to be appointed by the sellers and one by the buyers." Dispute arose and the plaintiffs elected to have the arbitration of two European importers and declined to go to the Bengal Chamber of Commerce. They did not however nominate an arbitrator whereupon the matter having been referred to the arbitration of the Chamber by the defendants, an *ex parte* award was made. It was held that the plaintiffs-sellers having elected to go to the arbitration of two European importers it was not open to the defendents-buyers to have the dispute arbitrated by the tribunal in question, as in the case of failures of the plaintiffs to appoint an arbitrator within the time fixed, in the absence of a different intention expressed in the submission, the procedure laid down in section 9, sub-section (*b*), of the Arbitration Act should have been followed. *Sundermal* v. *Tribhuban,* 82 Ind.Cas. 769 = 51 Cal. 657 = A.I.R. 1924 Cal. 828 (*per Buckland, J.*). But where in a similar case, the seller has never exercised his opinion,

an award by the Chamber of Commerce is a valid award. *Bhowani Das* v. *Harsukh Das,* 80 Ind.Cas. 501=27 C.W.N. 933=A.I.R. 1924 Cal. 524. This case was decided in the court of first instance by *Mr. Justice Buckland.* The Court of Appeal consisting *Mookerjee* and *Rankin, JJ.* observed : "The sellers thereupon instituted the present suit to have the award set aside, on the ground, amongst others, that it had been made without jurisdiction. *Mr. Justice Buckland* overruled this contention, investigated the other objections against the award, and dismissed the suit in view of the terms of Clause 17 of the contract. We agree with *Mr. Justice Buckland* that the sellers had the option to make a reference to the arbitration of two European sugar importers of Calcutta, but they never exercised that right. Consequently, the objection to arbitration by the Bengal Chamber of Commerce is futile and the award must be regarded as made with jurisdiction."

502. Such other party having appointed his arbitrator.—The party calling upon the other to nominate an arbitrator must himself at the same time or have previously nominated, an arbitrator, or the notice will be bad. *Russell,* 15th Edn., page 178 citing *Vulcan* v. *Mowinckels* (1938) 2 All. E.R. 152 (157). Party desiring to enforce submission clause must specify nature of dispute and nominate his arbitrator first. *Shaw Wallace* v. *Gurbux,* A.I.R. 1929 Sind 58=109 Ind.Cas. 262. In the course of judgment the court observed : "Now section 52 of the Indian Contract Act provides that when the order in which reciprocal promises are to be performed is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires ; and there can be no doubt that where a party intends to enforce a submission clause, he should in the first instance perform his own part of the contract for the proper and expeditious disposal of the arbitration proceedings. He should, therefore, not only specify the nature of the disputes which are to be referred, but also intimate to the opposite party the name of the arbitrator selected by him so as to enable the opponent to choose another person as his nominee. That this is the procedure is evident from the provisions of section 9 of the Indian Arbitration Act which deals *inter alia,* with submissions which provide for appointment in the first instance of two arbitrators, one to be nominated by each party but contain no provision empowering one of them to nominate an arbitrator on behalf of his opponent in the event of default."

503. Notice in writing.—"When the party" says *Russell* "giving the notice refuses to inform the other party as to the alleged dispute, the notice is bad and subsequent proceedings based thereon are void." *Russell,* 15th Edn., page 178. "It is also to be expected" says *Sarkar* in his *T.L.L.* on *Arbitration* "that the law will require not merely informing the other side that an appointment has been made but also as to the subject-matter and nature of the dispute. Consequently when the appointing party refused to give information to the other side what the dispute was, it was held that the other party would be justified in treating the notice given to him as defective and improper. *Farrar* v. *Cooper,* (1890) 44 Ch.D. 323 and *May* v. *Mills,* (1914) 30 T.L.R. 287", *Sarkar,* p. 117.

504. For fifteen clear days.—This section provides a statutory period of fifteen days' time for the appointment of an arbitrator and the other party had the statutory right of appointing an arbitrator within fifteen days after having been served with a notice to do so. So the appointment of an arbitrator as the sole arbitrator within fifteen days from the service of notice on the other party is illegal and the mere

embodying of the appointment in a reference on a later does not cure the invalidity of the appointment. Vide *Kishanchand* v. *Rochaldas,* A.I.R. 1939 Sind 24=180 Ind.Cas. 143. See also *Shanker Lal* v. *Phulchand,* A.I.R. 1930 All. 584=(1930) A.L.J. 1147=126 Ind.Cas. 10; *Sukhamal* v. *Babu Lal,* A.I.R. 1920 All. 258=59 Ind.Cas. 75=42 All. 525. In *Louis Drefus & Co.* v. *Meher Chand Fateh Chand,* 6 Ind.Cas. 886=3 S.L.R. 237, the court observed: "Since the cases of *William* v. *Burgers,* (1840) L.J., 10 Q.B. 14=P. & D. 348=12 A. & E. 635, and of *Robinson* v. *Waddington,* (1894) L.J. 18 Q.B. 250=13 Q.B. 753, it has been recognised as the law that "'within so many days after an act' means so many clear days after it. A day is generally speaking a period from midnight to midnight and the 'law admits not of fractions in time but in case of necessity'." See also *Sukhmal* v. *Babu Lal,* 59 Ind.Cas. 75=42 All. 525=A.I.R. 1920 All. 258. In the last-named case it was held that in spite of an earlier repudiation by one of the parties the arbitrator appointed by the other party was bound to wait for the stipulated period making an award. So it is clear that where one of the parties can appoint an arbitrator in case the other party refuses to do so within a certain time, but the latter flatly refuses before the expiry of the time to have anything to do with the arbitrator, the former cannot appoint the arbitrator before the expiry of such period. *Echholz* v. *Amar Nath,* A.I.R. 1935 Lah. 76=157 Ind.Cas. 796, reversing *Amar Nath* v. *Echholz,* 137 Ind.Cas. 846=33 P.L.R. 365=A.I.R. 1932 Lah. 378. Under the present clause (*b*) of section 9, fifteen clear days must expire after the service of written notice on the party who is required to make the appointment and not after the date of positing the notice. *Shaw Wallace* v. *Gurbux Singh,* A.I.R. 1920 Sind 58=109 Ind.Cas. 262; see also *Drummond* v. *Hamnner,* (1942) 1 All. E.R. 398.

In *McDonald & Co.* v. *Naraindas Pakerdas,* A.I.R. 1927 Sind. 126=99 Ind.Cas. 554, *Lobo, A.J.C.* observed: "In *Louis Dreyfus & Co.* v. *Mehr Chand Fateh Chand,* 3 S.L.R. 237=6 IndCas. 886, *Crouch, A.J.C.* held that 6 days referred to in a submission clause contained in the indent meant 6 clear days commencing from midnight to midnight. The same proposition was laid down by *Crouch A.J.C.* in the case of *Sawyer* v. *Louis Dreyfus & Co.,* 7 S.L.R. 1=20 Ind.Cas. 504, the period in this case being 7 days". The failure to give the requisite number of clear days for the appointment is fatal to the appointment and jurisdiction of the arbitrator to act as sole arbitrator. *Sukhmal* v. *Babu Lal,* 59 Ind. Cas. 75=18 A.L.J. 652=42 All. 525. It is not filing of the application but the appointment of an arbitrator by the court that is subject to the condition of seven clear days after the service of the notice. The filing of the application before the expiration of 7 days might be treated as premature if it is for an immediate appointment of an arbitrator but it cannot be treated as a fatal irregularity where the application has been admitted and the court is not called upon to make the order of appointment until long after the seven days have expired. *Sanday* v. *Mayamal,* 4 S.L.R. 10=7 Ind.Cas. 588.

505. Appointment is not complete till notified.—The appointment of an arbitrator by a party is not considered complete until it has been notified to the other side [*Tew* v. *Harris,* (1848) 11 Q.B. 7=17 L.J.Q.B. 1; *Thomas* v. *Fredericks,* (1847) 10 Q.B. 775=16 L.J.Q.B. 393], and therefore it would seem that the party who receives notice to appoint an arbitrator must not only make the appointment but also give notice of it to the other pary within 15 clear days in order to avoid the appointment by the other party of his arbitrator to act as sole arbitrator in the

reference.—*Russell,* 15th Edn., p. 175 ; *Sarkar's Law of Arbitration,* p. 116. Nomination implies notice. *Thomas* v. *Fredricks,* supra ; *Drummond* v. *Hamnner,* (1942) 1 K.B. 352=111 L.J.K.B. 385=(1942) 1 All. E.R. 398.

506. Whether official receiver or trustee in bankruptcy is not a party under section 9.—According to the literal and ordinary meaning a "party" would refer to the contracting party, and whatever doubts may exist as to the expression "party" having been used in this section in an extended or wider sense so as to include parties and persons claiming through or under them, so as to include their legal representatives ; the official receiver or the trustee in bankruptcy does not come within the purview of this extended meaning. The official receiver claims adversely to the bankrupt by operation of the statute. He cannot be compelled to be a party to the submission in a case where the bankrupt's estate is the debtor and not the creditor. Even where there is a reference to a named arbitrator, the trustee in bankruptcy is not as a general rule bound by the submission. It is of the very essence of an arbitration that the submission should be mutual and that the award should be mutual and binding. If the subsequent insolvency of one party destroys this mutuality and prevents the opposite party from enforcing the submission against the official receiver, the official receiver may not in his turn enforce the submission clause, if the insolvent's estate is the claimant instead of being the debtor. *Official Receiver* v. *Kersondas,* A.I.R. 1926 Sind 209=95 Ind.Cas 750=19 S.L.R. 24. This case was decided under Act IX of 1899. But this judgment has been affected by enactment of section 7 of the present Act (Act X of 1940). Sub-section (1) of that section enacts: "Where it is provided by a term in a contract to which an insolvent is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences."

507. Sole arbitrator.—Where all the conditions laid down in sub-section (*b*) are fulfilled the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator. *Vallabhdas Meghji* v. *Cowasji Framjji,* 49 Bom. 706=88 Ind.Cas. 90=27 Bom.L.R. 568=A.I.R. 1925 Bom. 409. Under clause (*b*), fifteen clear days are allowed to the other party to appoint his arbitrator, and in case of default the first party may appoint a sole arbitrator. *Sukhmal* v. *Babulal,* 59 Ind.Cas. 75=18 A.L.J. 650=42 All. 525. An arbitrator should give the parties opportunity of putting their case before him. *Re Arbitration between Crompton & Co., Ltd. and Mohan Lal,* 25 Ind.Cas. 391=41 Cal. 313. In *Udaichand Pannalal* v. *Debibux Jewanram,* 60 Ind.Cas. 987=47 Cal. 951, the second point raised for impeaching the award was that the arbitrator could not have proceeded *ex parte* without express notice giving of his intention to do so. In delivering the judgment in the above case, *Mookerjee, J.,* said: "As regards the second point, reliance has been placed by the appellant upon the decision of *Gladwin* v. *Chilcote,* (1841) 9 Dowl.P.C. 550=5 Jur. 749=61 R.R. 825. That case is an authority for the proposition that in general the arbitrator is not justified in proceeding *ex parte* without giving the party absenting due notice. It is advisable to give the notice in writing to each of the parties of their solicitors, and the notice should express the arbitrator's intention clearly, otherwise the award may be set aside: *Waller* v. *King,* 9 Madd. 63=88 E.R. 317 ; *Wood* v. *Leake,* (1806) 2 Ves. (Jun.) 412=33 E.R. 156

and *Hall* v. *Anderson,* (1840) 8 Dowl.P.C. 326. There is no statutory rule, however, that if an arbitrator proceeds *ex parte* without giving notice of his intention to proceed in that manner, the award made by him must be set aside. In the absence of such an inflexible statutory provision, the procedure commenced in *Gladwin* v. *Chilcote* (*supra*), and the other cases mentioned can be regarded only as a rule of prudence and convenience. As *Lord Denman, C.J.,* put it in *Scott* v. *Van Sandu,* (1844) 6 Q.B. 237=8 Jud. 1114, the law is that, if either party, after the arbitrator has given him sufficient notice and proper opportunities of attending will not appear, the arbitrator may proceed in his absence. There is obvious good sense in the view that notice that the arbitrator will proceed with the reference on a certain day is notice that he will then proceed *ex parte,* if one of the parties absents himself without sufficient reason. But, let us assume that when an award has been made *ex parte,* the absent party may *prima facie* be deemed to have been prejudicially affected thereby ; surely, it is open to his adversary to rebut the presumption. If, for instance, it is made fairly clear that notwithstanding the service of notice upon him, that in his absence the arbitration would proceed *ex parte,* he would not have entered appearance, it cannot reasonably be urged that the omission to serve such notice has invalidated the award. The appellant has contended that it is not open to the Court to take into account the subsequent conduct of the appellant, to determine, whether, at the time of the arbitration proceedings, he had or had not made up his mind not to join in them. His argument, in substance, is that this could not have affected the judgment of the arbitrator, that we must limit ourselves to the facts and circumstances known to the arbitrator when he proceeded *ex parte,* and hold that his omission to intimate to the absent party that the arbitration would proceed *ex parte* is by itself sufficient to invalidate the award. We are clearly of opinion that this is not the proper test to be applied to determine the validity of the award in a case of this description. The true test is, has the complainant, who takes exception to the validity of the award, been in fact prejudiced by the omission of the arbitrator to serve the special notice on him. If it is established that, notwithstanding such warning, he would not have appeared before the arbitrator, he has really no grievance and cannot invite the court to set aside the award on account of the alleged defect in procedure."

508. Arbitrator not appointed by other party—Failure to proceed with arbitration by sole arbitrator—Effect.—A dispute having arisen between the buyer and seller regarding the liability of the buyer to pay the balance of price under the sold note, the buyer appointed an arbitrator under the arbitration clause and called upon the seller to appoint the other arbitrator. Before the expiry of 15 days therefrom the seller filed a suit for recovery of the claim. That suit was pending excepting for a short period after the original Court returned the plaint for presentation to the proper Court and the plaint was so field. *Held,* that under these circumstances it was impossible for the buyer to proceed with the arbitration with the arbitrator appointed by him as the sole arbitrator under S 9 (*b*). In view of the pendency of the suit, even if he had taken steps to proceed with the arbitration, all the proceedings taken before the arbitrator would have been invalid under S. 35, unless a stay was obtained under S. 34. Therefore the buyer's failure would not deprive him of the right to take steps to proceed with the arbitration agreement. *Ramchandra* v. *Howrah Oil Mills,* A.I.R. 1958 Cal. 620=62 C.W.N. 773. This section will not be applicable where no notice was

given to a proper person. Vide *Sirmur Chemical* v. *Union of India,* A.I.R. 1958 Him.Pra. 20. As regards the application of this section where Bengal Chamber of Commerce have been appointed arbitrators, vide *Arbr. Satyanaran* v. *Harakchand,* A.I.R. 1955 Cal. 225=94 C.L.J. 224.

509. Proviso.—In *Chetoomal Bulchand* v. *Shankerdas,* A.I.R. 1929 Sind 83=118 Ind.Cas. 220, an application was made by Messrs Shankerdas Girdharilal and others to set aside an appointment under proviso to section 9 (*b*) of the Arbitration Act, 1899. The facts of the case are as follows : On the 15th September, 1928, Messrs. Srikishan Das & Co., the pleaders of Messrs. Chetoomal Bulchand appointed Bhai Thakurdas Mulchand as their arbitrator and calling on respondent No. 2 Messrs. Shankerdas Girdharilal and others to nominate an arbitrator within 7 days. On 22nd September, Messrs. N. G. Dalal & Co., a firm of Bombay solicitors wrote in reply that it was not a question which required to be settled by arbitration and their clients were not bound to do so. On the 4th October, Messrs. Srikishan Das & Co.wrote that their clients appointed their arbitrator as the sole arbitrator. On the 19th October, 1928, Mr. Chatar Beharilal, advocate of respondent No. 2 sent a telegram addressed to Chetoomal Bulchand stating that his clients appointed Dwarkadas of Kodhromal Jathanand as their arbitrator. This was three days before the first hearing and four days before the award, and no application was made under the proviso to section 9 (*b*) to set aside the appointment of the sole arbitrator until 14th January, 1929, nearly three months after the award. In dismissing the application the court observed : "An application is now made on his behalf that the court will under the power conferred by the proviso to section 9 (*b*),Arbitration Act, set aside the appointment. It seems to me doubtful whether the proviso to section 9 (*b*) has any application. The sole arbitrator was not appointed in pursuance of clause (*b*),as required by the proviso ; he was appointed in the exercise of a power created in the agreement. In other words, he was appointed in the exercise of an express power agreed to by the parties, and not in the exercise of a power implied by statute. But even if the court has power the present does not appear to be a fit case in which to exercise it." This section is intended to supplement and not to override the contract of parties and as such where a different procedure is laid down in the contract of the parties this section has no application. Where the contract provides otherwise, an appointment cannot be made under section 9, clause (*b*),and it also follows that the proviso enabling the court to "set aside any appointment made in pursuance of clause (*b*) has no application." *Shaw Wallace & Co.* v. *Subbier & Sons,* 62 Ind.Cas. 205= 44 Mad. 406=A.I.R. 1921 Mad. 58=40 M.L.J. 166=(1921) M.W.N. 148= 29 M.L.J. 245=14 L.W. 42. See also, *Gumm* v. *Hallet,* 14 Eq. 555=41 L.J:Ch. 514=26 L.T. 468.

Where for the determination of controversy, two competent tribunals are available, the court and arbitrators, and one of the parties chooses the latter but in fact has recourse to the former, it is not open to his opponent to enforce specific performance of the contract, or to plead the contract as a conclusive bar to the suit : but he may apply to the court to stay the suit in the exercise of its judicial discretion, so as to leave the plaintiff in the suit no other remedy than to proceed by arbitration, and the burden of showing that some sufficient reason exists, why the matter should not be referred to arbitration is upon the person opposing the application, and not upon the applicant to show that no such reason exists. *Jokiram* v. *Ghanshamdas,* 61 Ind.Cas. 380=25 C.W.N. 62=47 Cal. 849.

10. (*1*) *Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.*

Provisions as to appointment of three or more arbitrators.

(*2*) *Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section* (*1*), *the award of the majority shall, unless the arbitration agreement otherwise provides, prevail*

(*3*) *Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.*

510. N.B.—This section is new. This section makes provision for cases in which more than two arbitrators are appointed. The first two sub-clauses follow closely section 4 of the 1934 Act of Parliament.—*Notes on Clauses.* See also section 8(1) (*b*) and (*c*) of the Indian Arbitration Act of 1899. This section corresponds to S. 9 of the English Arbitration Act of 1950. Sub-ection (3) is new.

511. History of the section.—Examining ss. 8 and 9 of Act IX of 1899, it was held by *Haywood, J.* that it was not open to the court to appoint an arbitrator or arbitrators in a case where the reference is to more than two arbitrators and the parties fail to nominate the arbitrator or the arbitrators fail to proceed with the arbitration. *Gopalj* v. *Morari,* 50 Ind.Cas. 411=45 Bom. 411=43 Bom. 809=21 Bom.L.R. 308. See also *Per Lord Justice Lindley* and *Lord Justice, A. L. Smith* in *In re, Smith & Service and Nelson & Sons,* 25 Q.B.D. 545 and *Manchester Ship Canal Company* v. *S. Pearson & Sons Ltd.* (1900) 2 Q.B. 606=69 L.J.Q.B. 852.

In the first named case *Lord Lindley* said: "The other sections, namely sections 4, 5 and 6 do not touch this point. *It certainly looks like a blot in the Act,* that by reason of there being no provision as to three arbitrators, as distinguished from two arbitrators and an umpire, sections 4, 5 and 6 do not apply; but we cannot help that." In *Manchester Ship Canal Company* v. *Person & Sons Ltd.,* (1900) 2 Q.B. 606=69 L.J.Q.B. 852, where the facts were similar in all essentials to those in *In re, Smith & Service and Nelson & Sons* (*supra*), except that legal proceedings had been started, *A. L. Smith, L.J.,* observed. "The case did not come within the power given by the statute to the court to appoint an arbitrator, because that is confined to the cases where the arbitrator is single or there are but two arbitrators. *Lindley, L.J.,* said very truly that this was a blot in the Act, and now we are asked to make what, in my opinion, would be another blot. This is not an application to order the appointment of an arbitrator, but to stay the action.....There was, therefore, jurisdiction to make the order appealed from, and the appeal must be dismissed." See also, *Gumm* v. *Hallet,* 14 Eq. 555 (*Per Bacon, V.C.*).

This so-called blot in the English Act was cured in England by the enactment of the Administration of Justices Act of 1920, 10 & 11 Geo. V, c. 81. In the Report of the Committee on the Law of Arbitration presided over by Mr. Justice Mackinon on the basis of which the English Arbitration Act, 1934, was framed, it is said : "The difficulty that arose in *Smith* v. *Nelson* (25 Q.B.D. 545), has been remedied by section 16 of the Administration of Justices Act 1920. The case of *United Kingdom* v. *Houston,* (1896) 1 Q.B. 567, illustrates another difficulty that may arise in the case of a reference to three arbitrators, where the submission omits to say that decision of two of them shall be binding. Having regard to a later passage in our Report we think there should be a provision that where a submission provides for the appointing of an arbitrator by each of the parties, and a third arbitrator by the two so appointed, the third arbitrator should be deemed to be and have the power of an umpire. But it might be well to add that in the case of a reference to three arbitrators appointed otherwise than as above the submission shall be deemed to include a provision that the award of any two of them shall be binding." In accordance with the recommendation made in the Report section 4 of the English Arbitration Act of 1934 was enacted and the blot mentioned in the English cases was removed.

In *Kunthi* v. *Sarangapani,* A.I.R. 1931 Mad. 170=33 M.L.W. 60=54 Mad. 198=130 Ind.Cas. 668=60 M.L.J. 498, the reference was to five *panchayatdars* and one of them refused to act. In holding that no relief can be given by the court under section 8 or section 9 of the Act of 1899, the court observed : "I am prepared to accept the reasoning of the learned Judges in *Gopalji Kuverji* v. *Morarji Jairam,* 43 Bom. 809=50 Ind.Cas. 411, in which the question is discussed elaborately.... ....The appellants argue that this decision is wrong and rely on *Genral Electric Trading C.* v. *Siemens (India) Ltd.,* A.I.R. 1929 Cal. 177=116 Ind.Cas. 625=56 Cal. 848. Sections 8 and 9 of the Indian Act corresponed to clauses 12 and 13 of the Common Law Procedure Act of 1854. So far as I can see, though there is some variation in the wording of section 5 and 6 of the English Arbitration Act from the wording of the corresponding section of the Common Law Procedure Act, the purport of the sections remains exactly the same. In my view there is no support for the view of *Ghose, J.,* that the wording of sections 5 and 6, English Arbitration Act, would make them applicable to cases of three arbitrators, cases to which admittedly sections 12 and 13, Common Law Procedure Act, would not apply.....This so-called blot in English Act was cured in England by the enactment of the Administration of Justice Act, 1920, 10 & 11 Geo. C, c. 81. This would show that the Legislature thought that the interpretation of sections 5 and 6, English Act, adopted by the learned Judges in *In re Smith & Service and Nelson & Sons Ltd.,* 25 Q.B.D. 545, was correct. The blot in the Indian enactment has not been cured by the Indian Legislature as was done by the English Legislature with reference to the English Act. Having regard to these considerations it seems to me that the interpretation of the learned Judges in *Gopalji Kuverji* v. *Morarji Jairam,* 43 Bom. 809=50 Ind.Cas. 411, of sections 8 and 9. Arbitration Act, is amply supported by the English authorities."

512. Scope of the section.—"The scheme of this section is quite simple. The first two sub-sections deal with the case of arbitration by three arbitrators, this being subdivided in two classes, namely, firstly, where the agreement provides for an arbitrator appointed by each party and the third by the two appointed arbitrators, and secondly, where arbitrators are

to be appointed in some different way. These two sub-sections have been taken from the English Arbitration Act of 1934, but the provision of the third sub-section dealing with the case of more than three arbitrators is absent from the English Act"—*Sarkar's,* T.L.L. p. 122. Where the dispute which the parties have agreed to refer under the arbitration clause involve the construction of the terms of the contract it will be for the parties to nomainate such arbitrators who are competent and experienced to decide such questions. *Andhra Co-operative* v. *Srinivasam,* (1958) 2 An. W.R. 437=A.I.R. 1958 Andh. Pra. 158.

513. Scope of sub-section (1).—This sub-section has been taken verbatim from sub-section (1) of section 4 of the English Arbitration Act of 1934. So cases falling under this sub-section is governed by section 8 of the Act in all respects. (Vide notes to section 8 *ante.*) "This provision is of course of limited application: it would be easy enough to provide for reference to three arbitrators if the parties wished to do so; while the case where there is power for the two arbitrators to appoint a third but are not compelled to do so is not covered. *British Metal Corporation* v. *Ludlow Bros. Ltd.* (1938) 1 All. E.R. 135" *Russell,* 15th Edn., p. 179. All the arbitrators need not sign the award but must be present at the time of hearing. *British Metal Corpn.* v. *Ludlow Bros., supra; Russell* p. 125.

514. Umpire.—The ordinary meaning of the word "umpire" is a person who is to decide upon the disagreement. *Louis Dreyfus* v. *Hemandas,* A.I.R. 1940 Sind 37. See also, *Lord* v. *Lord,* 26 L.J.Q.B. 34=5 E. & B. 404. An umpire need not necessarily be a single person, but may be a body or committee, such as a trade association. *Russell,* 13th Edn., p. 319, citing *Re Vuripati;* (1914) W.N. 208, and *Keighley Maxtead & Co., etc., In re;* (1839) 1 Q.B. 405; *Fazalally* v. *Khimji,* 36 Bom.L.R. 1005=A.I.R. 1934 Bom. 476. The word "umpire" is a term of art and has a special meaning in the law relating to arbitration. An umpire may be appointed by the selected arbitrators or the appoint ment may be made by contending parties. The umpire only acts where there is a difference between the arbitrators themselves. He may sit with the arbitrators and watch the proceedings, hear the evidence and look into the papers, but he is not supposed to confer with the arbitrators so as to mould their decision. If the umpire acts and takes part in the determination before any difference arises between them and moulds their decision it constitutes an illegality. A *Sar panch* is a *panch* but has a position akin to chairman. *Chouthmal* v. *Ramchandra,* I.L.R. (1955) Nag. 100=A.I.R. 1955 Nag. 126.

"An umpire" says Russell "is a person appointed to take over the reference from arbitrators who are unable to agree amongst themselves. In general, he is in the same position as a sole arbitrator, must be appointed by the same way, and must possess the same qualifications or absence of disqualifications". *Russell* 15*th Edn.,* p. 125. An umpire need not be a single person; thus appeal committees of trade union may be appointed as umpire. *Ibid.* p. 126 citing *Re Keighley* (1893) 1 Q.B. 405; *Re Varilate* (1914) W.N. 208.

515. When and how an umpire should be appointed.—Clause 2 of the First Schedule says that "if the reference to be an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments". Sub-section (1) of section 10 also provides for cases when a third arbitrator appointed by the two appointed arbitrators would be considered as an

umpire. In *Smith* v. *Ludha Ghela*, 17 Bom. 129; the contract in dispute provided that disputes between the parties were to be referred to the arbitration of two merchants, and that should the arbitrators be unable to agree they should appoint an umpire. The plaintiffs and defendants referred their disputes to two arbitrators. These arbitrators disagreed in their report, and referred the case to the Bombay Chamber of Commerce for the appointment of an umpire. The Chamber of Commerce appointed an umpire who made his award. In holding that the appointment of the umpire was invalid *Bayley, C. J.*, observed: "The arbitrators were themselves to exercise the authority thus conferred upon them, and could not delegate such power to anyone else. Consequently, the appointment of an umpire in a manner totally different from that which the parties had agreed for, was, in my opinion, an invalid appointment. The case of *Re Hoobere*, (1867) L.R. 2 Q.B. 367, relied upon by Mr. Scott for the plaintiffs in argument before us, is no authority in support of the validity of the appointment of Mr. Symons by the Chamber of Commerce. In that case two arbitrators, not being able to agree in the appointment of an umpire, cast lots as to which of the two persons nominated by them should be appointed umpire. There was, therefore, as *Cockburn, C.J.*, said in his judgment (page 375) a concurrent judgment as to the fitness of the person who was finally appointed, and when the arbitrators have come to such a concurrence, and the only difference between them is as to which of the two they shall appoint, and the appointment is settled by lots, such a case falls directly within the decision of *Neal* v. *Ledger*, 16 East 51, a case upheld by the Court of Common Pleas in *European and American Steam Navigation* v. *Crorkey*, 8 C.B.N.S. 397". Therefore the appointment of the umpire must be by the arbitrators themselves and the powers of such appointment cannot be delegated. *Jumna* v. *Nasib*, 24 All. 312. But an arbitrator can delegate the performance of a ministerial act to a third person. *Buta* v. *Municipal Committee*, 29 Cal. 854=29 I.A. 168=87 P.R. 1902= 7 C.W.N. 82=4 Bom.L.R. 673 (P.C.).

The expression "shall appoint" in para 2 of the First Schedule means "shall concur in appointing". *In re Efre and Corporation of Leister*, (1892) 1 Q.B. at p. 141. In the Act there is no mention of any particular method of appointing. It seems, therefore, that parol appointment is valid in absence of any provision in the arbitration agreement or in the statute under which the appointment is made. *Oliver* v. *Collings* (1809) 11 East 367. Where there is a special method provided in the arbitration agreement as regards the appointment of an umpire that method is to be strictly followed. *Bates* v. *Townley*, (1847) 1 Exch. 572. In the above case a declaration stated that certain matters in dispute were referred to J. H. and J.M. "and to such third persons as should be chosen and agreed upon by the said J. H. and J. M. and appointed by writing under their hands to be indorsed in the agreement of submission before proceeding on the said reference, to arbitrate, etc., jointly with them of and concerning the matters in difference, so as the said arbitrators, or any two of them, should make their award on or before at certain day, and that the costs of the reference and award, including a reasonable compensation to the said arbitrators for their trouble, should be in the discretion of the said arbitrators. J. H. and J. M. before proceeding with the reference, chose and agreed upon, and by writing under their hands nominated and appointed another J.M. to be third arbitrator together with them. It was held that the appointment was bad

inasmuch as it was not shown that the appointment of Miller was endorsed on the agreement of submission. See also, *Everard* v. *Paterson*, 6 Taunt. 623=16 R.R. 701 ; *Lord* v. *Lord* (1855) 26 L.J.Q.B. 34=5 E. & B. 404.

In the last-named case by deed all matters in difference were submitted to the award of A and B or such third person as they should appoint an umpire, by writing under their hands to be endorsed on the submission. It appears that A and B did not sign the memorandum appointing C at the same time, or in each other's presence. In holding that the appointment of C is not a valid appointment *Coleridge, J.*, observed: "Upon this ground it was urged that he was not well appointed, and consequently that there was no good award. It is now clearly established that every judicial act, to be done by two or more, must be completed in the presence of all who do it ; for those who are to be affected by it have a right to the united judgment of all up to the very last moment. In *Stalworth* v. *Inns.*, 13 M. & W. 466=2 Dowl. & L. 428=67 R.R. 680, where it was sought to set aside an award on the ground that the two arbitrators had executed it at different times and places, the Court of Exchequer refused to do so, because, if they did, there could be no appeal against their decision ; but they intimated that they would grant no attachment, nor make any order for payment of the sum awarded. They left the party to bring his action, expressing a hope that, the strong opinion of the court being known, arbitrators would in future take care that their execution was joint. It appears to us that what is true of the execution of the award by arbitrators is equally true of their appointment of an umpire: this is a judicial act of the last importance to the parties who entrust them with the absolute power of constituting the judge who is to decide the controversy between them ; about whose appointment the arbitrators may differ up to the last moment, and about which the parties have a right to the exercise of their joint judgment up to its entire completion". But in *Hopper, In re*, 8 B. & S. 100=36 L.J.Q.B. 97=2 L.R.Q.B. 367=15 L.T. 566, it has been held that the signing the appointment of an umpire is not a judicial act, and, therefore, need not be done by the arbitrators at the same time or together. See also *Russell*, 15th Edn., 180.

516. Appointment by Association.—Under the Arbitration Rules of the Delhi Piece Goods Association, which governed the contract for sale and purchase of piece-goods between the parties, where there is a rupture between the arbitrators appointed by the parties, either party to the arbitration becomes then and there entitled to apply to the Delhi Piece Goods Association to appoint an umpire. *Shanker Lal* v. *Jainey*, A.I.R. 1931 All. 136=53 All. 384=132 Ind.Cas.=1931 A.L.J. 20.

517. Non-appointment of an umpire.—In a case arbitrators disagreed on the matters referred to them, and the necessity for umpire became established, it may well be that the omission of the arbitrators to appoint an umpire before they entered upon the submission would proceedings. But, when no disagreement between the arbitrators occurred, the omission to make the appointment of umpire is not a defect amounting to legal misconduct on the part of the arbitrators. *Louis Drefus* v. *Hemandas*, A.I.R. 1940 Sind 37. The Rules of the Arbitration Tribunal of Bengal Chamber of Commerce were considered to contemplate the appointment of the umpire before the arbitrators entered upon the reference and not on their disagreement. If the terms

of a reference provide that the umpire is to be appointed before the arbitrators enter upon the reference, the same cannot go on until umpire is appointed. *Chooni Lal* v. *Madhoram,* 13 C.W.N. 297=36 Cal. 88=1 Ind. Cas. 391. The power of appointing an umpire cannot be delegated by the arbitrator to a third person. *Smith* v. *Ludha,* 17 Bom. 129; *Surabjit* v. *Gouree,* 7 W.R. 269.

518. Written appointment of an umpire whether requires Stamp. —The appointment of an umpire made in writing by two arbitrators requires no stamp. *Routledge* v. *Thornton,* 4 Taunt. 704=13 R.R. 734; *Oliver* v. *Collins,* (1809) 11 East 367; *Russell,* 15th Edn., p. 175.

519. Appointment by lot.—An appointment of an umpire by lot is bad. *Re. Cassel,* (1829) 9 B. & C. 624. In the above case *Tenterden, C.J.,* said: "The appointment of the third person must be the act of the will and judgment of the two, must be the matter of choice and not of chance unless the parties consent to or acquiesce in some other mode." See also *Hewith* v. *Penny,* (1753) Saver 99. An appointment by both umpire by a lot from persons each of whom is acknowledged by both arbitrators to be fit, is valid. *In re Hopper,* S. B. & S. 100=36 L.J.O.B. 97=2 L.R.Q.B. 367=15 L.T. 566: *Morgan* v. *Boalt,* 7 L.T. 671. But where two arbitrators are empowered to appoint an umpire, such appointment must be the act and will and judgment of the two and must not be the result of chance or lot. *European and American Steam Shipping Co.* v. *Croskey,* 8 C.N.B.S. 397=29 L.J.C.P. 155=6 Jur. N.S. 896. So where a cause is referred to two arbitrators, and their umpire, In case of dispute, and it is afterwards agreed to appoint an umpire, such appointment must in no case be decided by chance. *Ford* v. *Jones,* 3 B. & Ad. 248=1 L.J.K.B. 104: *In re Cassel,* 9 B & C. 624=7 L.J. (O.S.) K.B. 329; *Young* v. *Miller,* 3 B. C. 407. Where in an action for dissolution of partnership the matters in difference were referred to arbitration, and two arbitrators were appointed, and the two arbitrators met at an hotel to appoint an umpire, and each man nominated a man unknown to the other, and put the two names into a hat, and directed the waiter to draw one out, and the lot fell upon Brown, the person nominated by the plaintiff's umpire, on motion on behalf of the defendant, *held* that the arbitrators not knowing whether the persons respectively nominated by each other were fit to act as umpire, the appointment was bad. An arbitrator entrusted with the duty of appointing an umpire has no right to evade his judicial duty by leaving the appointment to chance. *Pescod* v. *Pescod,* 58 I.T.76. See also. *Harris* v. *Mitchell,* 2 Vern. 485: *Hewitt* v. *Penny.* Saver. 99. But where arbitrators, after tossing up for choice, abandoned the choice made, and afterwards one of them, by consent of the other, appointed the umpire, it was held that the appointment was good. *Venicome, In re,* 10 L.J.Q.B. 128.

An umpire may be appointed by lot, if the parties to the reference assented to such a mode of election. *Taylor* v. *Backhouse,* 2 L.M. & P. 70=20 L.J.Q.B. 233; *Tunno, In re,* 2 N. & M. 328=5 B. & Ald. 488: *Greenwood, In re,* 1 P. & D. 463=9 A. & E. 699: *Jamieson, In re,* 4 A. & E. 945=5 L.J.K.B. 187: *James* v. *Attwood,* (1938) 7 Scott 843; but see *Ford* v. *Jones,* (1832) 3 B. & Ad. 248. An appointment of an umpire, by lot, consented to by the attorneys' clerk, but not by the attorneys themselves, or their clients, is bad, although the parties, in ignorance of the mode of appointment, had attended the arbitration. *Hudson, In re,* 2 Jur. 1088. Where two arbitrators are empowered to appoint

an umpire, by lot, and the agent and solicitor of A, a party to the reference, upon being told who had been appointed, and the mode of appointment, raised no objection, and approved of the person appointed, who made his award, *held*, that he was not entitled to have the award set aside upon the ground that the umpire had been irregularly appointed. *Blythe and Tyne Ry., In re*, 11 W.R. 705; *Blackhouse* v. *Taylor*, 20 L.J.Q.B. 233. Parties' approval is not necessary where an umpire has been duly appointed by the arbitrator. *Oliver* v. *Collings*, (1809) 11 East, 367. But acquiescence, in order to preclude a party from objecting to the mode of appointment, must be with full knowledge of all the relevant facts.—*Russell*, 13th Edn., p. 318; *In re Jamieson and Binus*, 4 A. & 945; *In re Greenwood and Tetterings*, 9 A. & E. 699.

520. Time for appointing an umpire.—Under Clause 2 of the First Schedule an umpire is to be appointed not later than one month from the last date of the arbitrators' appointments. Arbitrators having power to appoint an umpire may elect one before they enter upon the matter referred to them *Roe d. Wood* v. *Doe*, 2 Term.Rep. 644; *Bates* v. *Cooke*, 9 B. & C. 407. On a submission to two persons with power to them, if they should not agree, to appoint a third person to be umpire in or concur and join with them in considering and determining all or any of the matters referred, there is power to appoint such third person before any difference has arisen, and before any proceedings have been taken on the reference; and that is the proper course to pursue. *Winteringham* v. *Robertson*, 27 L.J.Ex. 301. So also, where a submission provides that the two arbitrators shall appoint an umpire before they commence proceedings, the appointment of an umpire is a condition precedent to taking any proceedings to enforce the submission. *Bright* v. *Durnell*, 4 D.P.C. 756. In a case where the arbitrators disagreed on the matters referred to them, and the necessity for umpire became established, it may well be that the omission of the arbitrators to appoint an umpire before they entered upon the submission would be fatal to the whole proceedings. But when, no disagreement between the arbitrators occurred, the omission to make the appointment of umpire is not a defect amounting to legal misconduct on the part of the arbitrators and sufficient to vitiate the award made. *Louis Dreyfus* v. *Himandas*, A.I.R. 1940 Sind 37=187 Ind.Cas. 262; *Bombay Co., Ltd.* v. *National Jute Mills*, 39 Cal. 669=16 I.C. 163.

521. Proof of appointment.—To prove that an umpire was appointed by the arbitrators according to the terms of the submission, it is not sufficient to prove that he acted with them, and put the award executed by all three, though the appointment of the umpire is recited in the award. *Still* v. *Halford*, 4 Camp. 17. The appointment of an umpire is not effected unless he accepts the office. *Ringland* v. *Lowndes*, (1863) 15 C.B.N.S. 173 (196).

522. Refusal of umpire to act.—If the umpire elected refuses to act the persons who elected him may elect another in his place [*Com. Dig. Tit.* "Arbitration" (F)].—*Russell*, 13th Edn., p. 312. See also, section 2(1) (*b*); *Trippet* v. *Eyre*, (1684) Lev. 263. But if the arbitrators do not fill the vacancy even after service of notice by one of the parties to the reference, the court may appoint an umpire after the period prescribed in sub-section (2) of section 8 (vide notes to section 8 *ante*).

523. By appointment of umpire power is exhausted.—An appointment of umpire which has become effectual by acceptance of the office exhausts the power of appointment, and the appointers have no power

to revoke the appointment made or to make a fresh appointment in place of it.—*Russell,* 13th Edn., p. 317. In *Oliver* v. *Collings,* 11 East 367, arbitrators after having appointed one umpire who refused to act, appointed another umpire who accepted the authority. The defendant having objected to the appointment, because of partiality, the arbitrators acceded to the objection, and each proposed another, but could not agree on the person to be substituted, and did not in fact substitute any other, though the respective attorneys agreed on a third person. The umpire objected to was then called on by the plaintiff's attorney to proceed, and made his award within time. In holding that the award was good *Lord Ellenborough, C.J.,* observed: "We have lately held that if an authority be once executed, it cannot be executed again (vide *Irvine* v. *Eleron,* 8 East 54). Here the arbitrators had executed their authority by an effectual appointment of an umpire, who accepted and acted upon the authority so conferred on him; the consent or dissent of the parties themselves afterwards to such an appointment signifies nothing."

524. Appointment of umpire in pending suit.—Under repealed para 4 of the Second Schedule of the Civil Procedure Code where two or more arbitrators were to be appointed, the Court was bound to provide in its order of reference, for difference of opinion among the arbitrators, in the manner specified in that paragraph, that is, (*a*) by the appointment of an umpire, or (*b*) by declaring that. if the majority of the arbitrators agree, the decision of the majority shall prevail, or (*c*) by empowering the arbitrators to appoint an umpire, or (*d*) otherwise as may be agreed between the parties or, if they cannot agree, as the court may determine. So when once the matter is referred to arbitration it can never again be dealt with by the court unless the reference is fruitless, in which case the suit may be brought back to the file of the court without any reference to the arbitration proceedings. *Haradhan* v. *Radha Nath,* 10 W.R. 399. Where a dispute was referred to three arbitrators and one of them was appointed *sarpanch* but no provision was made for difference between them, unanimous decision was necessary for valid award. *Lachmi Lal* v. *Khairati Miyan,* (1934) A.L.J. 66 = 147 Ind.Cas. 623 = A.I.R. 1934 All. 109. But now such arbitration is governed by this Act as such cases like are governed by sub-sections (2) and (3) of section 10. But the appointment of the same person as arbitrator as well as umpire is not allowed. *Kapurchand Fulchand* v. *Jewaraj Chunilal,* 138 Ind.Cas. 651 = 36 C.W.N. 332 = A.I.R. 1932 Cal. 491.

525. Power of Court to appoint an umpire.—Where in a deed of reference to arbitration the parties have agreed that in case of difference between the arbitrators, the Court itself decide the case, the Court, in case of difference between the arbitrators, has no jurisdiction to appoint another person as umpire. *Ramzani* v. *Nur Ahmadi,* A.I.R. 1940 Lah. 276 = 42 P.L.R. 124 = 189 Ind.Cas. 466.

526. When umpire may arbitrate in lieu of arbitrators.—Under the repealed para. 9 of the Second Schedule of the Civil Procedure Code of 1908, where an umpire had been appointed, he might enter on the reference in the place of the arbitrators,—if they had allowed the appointed time to expire without making an award, or (*b*) if they had allowed the appointed time to expire without making an award, or (*b*) if they have delivered to the court or to the umpire a notice in writing stating that they cannot agree. See also *Niaz Ahmad* v. *Abdul Hamid,* 1 A.L.J. 29 = (1904) A.W.N. 49. This paragraph as well as the rest of the Second

Schedule has been repealed by the Arbitration Act (X of 1940). By para. 4 of the First Schedule of this Act, the arbitrators are given 4 months' time to make the award. Para. 4 enacts : "If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators". This para, corresponds to para. (4) of the First Schedule of the Arbitration Act of 1899 and clause (*d*) of the First Schedule of the English Arbitration Act of 1889, which again is based on section 15 of the English Common Law Procedure Act, 1854.

527. If the arbitrators allowed the appointed time to expire.— In a reference to arbitration one of the arbitrators absented himself After the expiry of the time for the award the umpire approached the court for direction. The court directed him to proceed under clause (a) of para. 9 of the Second Schedule of the Civil Procedure Code. *Ram Lagan Tewari* v. *Phatangan Lohar,* A.I.R. 1928 All. 674=111 Ind.Cas. 559=(1929) A.L.J. 31. In delivering the judgment in the above case *Dalal, J.,* observed : "The question is what is a court to do under such circumstances. The learned counsel for the applicant was considerably enamoured of the provisions of para. 5. He, however, missed the point that his client was not equilly in love with that paragraph and did not take any action as directed, therein. Under para. 5 the court is empowered to appoint an arbitrator or umpire, or make an order superseding the arbitration, only in case a party takes action under the first clause of the paragraph and serves notice on the other party. In the present case neither party took any step to fill the place of the arbitrator who was sulking.....The arbitrator who sulked was possibly a friend of his and the plaintiff expected that he could bring the arbitration to a standstill by inducing one arbitrator not to take part in arriving at a decision. The provisions as regards arbitration have, however, been now more carefully devised than before under the Civil Procedure Code of 1908, and attempt has been made to fill up all holes through which a party may wriggle out of the arbitration. Where an umpire is appointed, para. 9 gives him the power to enter on the reference without the arbitrators. In this way the law has prevented the arbitration failing by a device of a party inducing one of the arbitrators to absent himself." Where no time is prescribed by the submission itself it is governed by para. 3 of the First Schedule of the present Act. Now para. 3 of the First Schedule enacts : "The arbitrators shall make their award within four months after entering on the reference or after having called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow". In calculating the period of three months the day from which the period begins to run should, it seems, be excluded [*Re Higham and Jessop,* 9 *Dowl.* 203 ; *Kerr* v. *Jeston,* (1842) 1 Dowl. (N.S.) 714 (723).—*Halsbury,* Vol. I, p. 462. The word "month" here means month reckoned according to British calendar. Vide section 3 (33) of the General Clauses Act. See also, *South British Fire* v. *Brojonath,* 13 C.W.N. 425. An arbitrator "enters on" the reference when he hears the case ; neither acceptance of the office of arbitrator nor giving notice of his intention to proceed amount to entering on the reference. *Baker* v. *Stephs,* (1867) L.R. 2 Q.B. 523 ; *Cudliff* v. *Walters,* (1839) 2 Mood & R. 232. The provisions "entering on the reference" and "having been called upon to act by notice" are alternative in this sense, that where no reference has been entered upon at all, then the time runs

from the notice calling upon the arbitrators to act. *Firm of Sardar Mal Hardat Rai* v. *Sho Baksh,* 44 All. 432=66 Ind.Cas. 907=20 A.L.J. 272= L.R. 3 All. 227.

Para. 4 enacts : "If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators"—Vide Schedule First, para. 4.

528. Commencement of authority of umpire.—An express admission of the arbitrators that they cannot agree is not necessary to give umpire jurisdiction to make an award. *Hill* v. *Marshall,* 5 L.J. (O.S.) C.P. 161. If one of the arbitrators insists upon producing further evidence, and the other refuses to allow it to be done, this is a sufficient disagreement between the arbitrators to authorise the interference of the umpire. *Cudliff* v. *Walters,* 2 M. & Rob. 232. It is sufficient to enable an umpire to make an award upon all the matters referred, that at the conclusion of the evidence the arbitrators arrive at different opinions in some of the matters referred ; and he need not, if the time of making the award expired, wait to see if they ever agree. *Winteringham* v. *Robertson,* 27 L.J.Ex. 301. See also, *Tunno and Bird, In re,* 3 & Ad. 488=3 L.J.K.B. 1. There may be circumstances in which an umpire may join in an inquiry with the arbitrators before the time of his acting arrives. *Elliot and South Devon Ry., In re,* 2 De G. & Sur. 17=12 Jur. 445. Where arbitrators were to make their award on or before a day certain, and an umpire, if they should differ, before a subsequent day, and the umpire made his award before the time given to the arbitrators had expired *held* that the award need not state that the arbitrators had disagreed. *Springens* v. *Nash,* 5 M. & S. 193. See also, *Smailes* v. *Wright,* 3 M. & S. 559 ; *In re Yeadon Local Board and Yeadon Waterworks Co.,* 41 Ch.D. 52. As to the meaning of the word "disagreement" in a similar context, see *Iossifoglu* v. *Commantaros,* (1941) 1 K.B. 396=110 L.J.K.B. 54.

529. Upon what matters umpire to decide.—Where the provisions of para. 4 of the First Schedule are included in the arbitration agreement, and the umpire enters "on the reference in lieu of the arbitrators," all the matters referred fall to be decided by him, and not merely the matters in respect of which the arbitrators have disagreed. Where the provisions of para. 4 are not included, it depends upon the terms of the arbitration agreement whether all the matters, or only the matters upon which the arbitrators are not agreed, are referred to the umpire.—*Russell* on *Arbitration,* 13th Edn., p. 321. If "all or any of the matters in difference between the parties" are referred to arbitrators, who disagree, but only as to costs, yet the umpire adjudicate on the whole question. *Wicks* v. *Cox,* 11 Jur. 542. Where arbitrators determined on five points in dispute, and referred a sixth to an umpire, whom they are authorised to choose, the award made by the arbitrators and the umpire was bad, the arbitrators not being authorised by the terms of the submission to make the award upon some points in dispute, and refer the others to the umpire. *Tollit* v. *Saunders,* 9 Price 612=23 R.R. 732 : *Westminster and Brymbo Canal and Coke Co.* v. *Clayton,* 11 L.T. 366=13 W.R. 134 ; *Winteringham* v. *Robertson,* 27 L.J.Ex. 301 ; *Morgan* v. *Bolt,* 7 L.T. 671=11 W.R. 265. But the arbitration agreement may provide otherwise. *Lang* v. *Brown,* 25 L.T. (O.S.) 297. See *Russell* 14th Edn., p. 130.

530. Umpire sitting with arbitrators.—Where arbitrators have power, if they should not agree, to appoint a third person to be umpire

in or to concur and join with them in considering and determining all or any of the matters referred, such third person, when so appointed, is not a third arbitrator, but an umpire, and the effect of his appointment is, that he is to sit with the arbitrators, and hear and consider the matters referred, and if they do not agree in an award, to make an award upon all matters referred, and not merely upon those in which they do not agree. *Winteringham* v. *Robertson,* 27 L.J.Ex. 301. But where the power to appoint an umpire was in the same terms, it was held that an award made by the umpire alone was not binding. *Beddall* v. *Page,* 5 L.J. (O.S.) K.B. 101. But neither section 10 nor para. 4 of the First Schedule of the Arbitration Act contemplates the joint sitting of the arbitrators and umpire. Under para. 4 the umpire cannot function unless arbitrators' authority determines by efflux of time or they have given notice in writing stating that they cannot agree. But where a matter in difference is referred to two, one to be named by each of the parties, with a proviso that if they disagree they shall name an umpire, and that he shall make the award, and the two disagree and appoint an umpire, it is no ground of objection to the award that all three have sat and heard the evidence together, and then the umpire has made the award. *Flaglane Chapel* v. *Sunderland Corporation,* 5 Jur. N.S. 894; *Potter* v. *Newman,* 4 Dowl. 504=5 L.J.N.S. Ex. 93 (*n*); *Ellison* v. *Ackroyd,* 20 L.J.Q.B. 193.

531. Duties of umpire.—The duties of an umpire are identical with those of an arbitrator. Therefore the parties are entitled to a hearing before an umpire no less than before the arbitrator and it is incumbent on the umpire on appointment, to fix a day of hearing and apprise parties of it. *Firm of Dhana Singh* v. *Firm of Ram Chand,* A.I.R. 1924 Sind 27. It is the duty of umpire to hear evidence, if so required by the parties. *E. Miller* v. *Firm of Dhanasingh Ramlal,* 63 Ind.Cas. 141. See also *Firm Sitaram* v. *Firm Sushil,* 64 Ind.Cas. 706=34 P.L.R. 60A. An umpire must record evidence in the presence of both the parties. *Mohammad* v. *Abdul,* A.I.R. 1925 Lah. 570. If he proceeds to hear evidence or receive written evidence without intimating the opposite party it is legal misconduct. *Louis Dreyfus* v. *Rajagopala,* A.I.R. 1923 Mad. 222. The objection to the umpire proceeding without rehearing the witness may be waived by the conduct of the parties, but the waiver must be clearly made out, or the award will be set aside. *Salkeld and Slater, In re,* 12 A. & E. 767; *Jenkins In re,* 1 Dowl. N.S 276. Where a party knew that a case had gone before the umpire, and that he had been furnished by the arbitrators with the notes of the evidence, the Court refused to set aside the award of the umpire because it was the duty of the party, if it had thought it necessary, to have called on the umpire to hear evidence; and as he had not done so, but had taken the chance of the award, he could not raise the objection. *Tunno and Bird, In re,* 5 B. & Ad. 488; *Hall* v. *Lawrence,* 4 T.R. 589 *Russell,* p. 185.

532. Duty of impartiality.—An umpire like arbitrator must be impartial and must not hear one party in the absence of the other. The umpire should not receive any statement as to the case from one of the arbitrators except in the presence of the other, and should hear such statements equally from both or from neither. *Russell* 15th Edn., p. 128.

533. Decision of umpire.—In *Jumma* v. *Mubarik Khan,* 30 Ind.Cas. 87=55 P.R. 1915=167 P.W.R. 1915, the court observed: "We must hold that as the arbitrators disagreed, the umpire was entitled to settle the matter in any way he thought proper. The learned Judge has

gone on to misapply the ruling (*Karim Baksh* v. *Subhan Ali*, 6 P.R. 189) upon which he has relied in support of his view that the umpire was wrong in not conferring with the arbitrators. The effect of the ruling quoted is the precise opposite and the umpire is here under no obligation to do more than arrive at what he considered the just decision, without conferring with arbitrators". But this rule is not applicable where by agreement the umpire is empowered to agree with one set of arbitrators or the other. *Jinmat Bibi* v. *Abdul Aziz*, (1887) 7 A.W.N. 197. Decision by umpire by drawing lots does not amount to misconduct. *Purna Chand* v. *Ram Nath*, 84 Ind.Cas. 490=A.I.R. 1925 Oudh 227=11 O.L.J. 685=10 O. & A.I.R. 807. Where there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision is ultimately with court and not with the umpire. *Attorney-General* v. *Kelley*, 31 M.L.T. 238 (P.C.)=(1922) 1 A.C. 268=91 L.J.P.C. 101=126 L.T. 711. The umpire is entitled to form his own opinion in respect of all matters submitted from his own knowledge, inspection or examination or from such other source as he may deem proper. *Ibid.*

534. Parties agreeing in case of difference between arbitrators, court is to decide.—Where in a deed of reference to arbitration the parties have agreed that in case of difference between the arbitrators, the court should itself decide the case, the court, in case of difference between the arbitrators, has no jurisdiction to appoint another person as umpire. *Ramzani* v. *Nur Ahmadi*, A.I.R. 1940 Lah. 276=42 P.L.R. 216.

535. Umpire—refusal to act—appointment by court of another.—Where the parties clearly empowered the court to appoint an umpire, if the arbitrators failed to appoint one, the court can appoint another umpire when the umpire selected refuses to act. The appointment of a person who refuses to be umpire is certainly a failure to appoint an umpire. *Khillu Rau* v. *Jaichand*, 99 Ind.Cas. 654=A.I.R. 1927 Lah. 123.

536. Umpire's jurisdiction if ousted by collateral proceeding in Civil Court.—The jurisdiction of the umpire to proceed with the arbitration is not ousted merely because of the pendency of some collateral proceeding in the Civil Court. *Arunachala* v. *Louis Dreyfus & Co.*, 39 M.L.T. 563.

537. Sub-section (2).—This sub-section has been taken verbatim from sub-section (2) of section 4 of the English Arbitration Act of 1934. Cases falling under this sub-section is also governed by the section 8 of the Act because that section provides for agreement "that the reference shall be to one or more arbitrators to be appointed by consent of parties, etc., etc." The corresponding section of the English Act was enacted to override the decision in *The United Kingdom Mutual Steamship* v. *Houstom*, (1896) 1 Q.B. 567. In that case *Mathew J.*, observed: "The arbitrators met, heard the evidence, and discussed the matters. The two appointed by the parties differed. The third, having heard all that either side had to say, drew up an award in favour of the association, which award was signed by himself and the arbitrator appointed by the association. The other arbitrator refused to concur in it. Then the association brought this action upon the award for the costs of the reference. I think the action cannot be maintained. For a reference to three arbitrators means that all three must concur in the making of the award.....They must agree." Under this sub-section the award of the majority shall, unless the arbitration agreement otherwise provides, prevail. (Vide notes under sub-section 3 *infra*). Upto the last moment

the award of joint arbitrators should be the joint act of all the arbitrators. *Stalworth* v. *Inns.*, (1844) 13 M. & W. 466 ; *Little* v. *Newton,* (1841) 2 M. & G. 351=9 Dowl. 437. So each one of the joint arbitrators must so act as if he were the sole arbitrator. In *Haradhan* v. *Radhanath,* 10 W.R. 398, it has been held that the order of reference should provide that in case of difference of opinion that of the majority should prevail. If the order or reference does not provide for the appointment of an umpire in case of difference of opinion among the arbitrators, the award in order to be a good award in law must be the award of all the arbitrators without difference ; the award of the majority is bad. *Per. Mathew J.* in *United Kingdom* v. *Houston* (1896) 1 Q.B. 567 ; see also *Cameron* v. *Cuddy* (1914) A.C. 651=83 L.J.P.C. 70=110 L.T. 89 (H.L.) ; *Hardhyan* v. *Meher Chand,* (1879) 57 P.R. ; *Lala* v. *Abdus,* 17 Ind.Cas. 320 ; *Babu* v. *Badri,* 49 Ind.Cas. 522 ; *Rumnuaya* v. *Repayya,* 51 M.L.J. 440=A.I.R. 1926 Mad. 1183. So if one of the arbitrators refuses or omits to act, the others cannot make a valid award. So "unless a contrary intention is expressed," says *Russell* "whenever the arbitration agreement requires that there shall be three arbitrators (as distinct from merely permitting the appointment of three arbitrators*) the award of any two is then binding." *Russell* 15th Edn., p. 124 ; see also *Amarnath* v. *Uggar Sen,* A..IR. 1949 All. 399.

538. Sub-section (3).—This sub-section is new and is an admitted improvement on the English Act. The Indian Arbitration Act of 1899 was framed for the benefit of mercantile community. Sometimes reference is made to a fluctuating body of persons [*vide In re Kingly Maxtead & Co.*, (1893) 1 Q.B. 405 ; *Ganges Manufacturing* v. *Indra Chand,* 33 Cal. 1169 ; *Chaitram* v. *Bridichand,* 42 Cal. 1140 ; *Heeralal* v. *Joakin.* A.I.R. 1927 Cal. 647]. There the number of arbitrators are ordinarily more than three. To make provision for these and other cases this sub-section has been enacted. In cases of odd number or arbitrators the award of the majority is to prevail. In cases of even number of arbitrators, the arbitrators are to appoint an umpire not later than one month from the latest date of their respective appointments. (*Vide* para. 2 of the First Schedule.) In cases of vacancy, refusal, etc., the cases falling under this sub-section are governed by section 8. The award by only 4 of 5 arbitrators is not invalid on that account when the parties had agreed to be bound by the award of the majority and other arbitrator had refused to act. *Pitambar* v. *Chhabi Narain,* (1952) A.L.J. (Rev.) 178=1952 R.D. 324=(1952) A.W.R. (Rev.) 126. See also *Amar Nath* v. *Uggar Sen,* A.I.R. 1949 All. 399 ; *Ramsundar* v. *Kulwante,* 20 A.L.J. 392=A.I.R. 1922 All. 233 ; *Syeed* v. *Tinoo,* 6 W.R. 95 ; *Raghubir* v. *Kuleswar,* 23 Pat. 719=218 Ind.Cas. 275=A.I.R. 1945 Pat. 140. Where a dispute is referred to more than three arbitrators. the reference by sub-section (3) mut be regarded as one expressly containing a proviso that the award of the majority shall prevail. Hence where a dispute is referred to 15 arbitrators and the award is signed by 14 arbitrators the award is valid and binding inasmuch as it is signed by a majority of the arbitrators. *Y. L. Paul* v. *G. C. Joseph.* 61 L.W. 394= 1948 M.W.N. 476=A.I.R. 1948. 512=(1948) 1 M.L.J. 375. see also *Ram Narain* v. *Pati Ram.* A.I.R. 1916 Pat. 156=34 Ind.Cas. 105=1 Pat.L.J. 90 : *Kazee* v. *Tinoo,* 6 W.R. 95 : *Sri Sharan* v. *Makhan Lal,* 51 Ind.Cas. 378=A.I.R. 1919 Cal. 42 : *Abinash* v. *Parushuram,* 44 C.W.N. 866 :

*Cf. *British Metal Corporation Ltd.* v. *Ludlow Brothers,* (1938) 1 All.E.R. 135.

Ramsundar v. *Kulwanthi,* A.I.R. 1922 All. 233=44 All. 642=66 Ind.Cas. 499 ; *Dandekar* v. *Dandekar,* 6 Bom. 663.

539. Para. 4 of the Second Schedule of the Civil Procedure Code.—The repealed para. 4 of the Second Schedule of the Civil Procedure Code ran as follows:—

"(1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

(*a*) by the appointment of an umpire ; or

(*b*) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail ; or

(*c*) by empowering the arbitrators to appoint an umpire ; or

(*d*) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

"(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act". This Schedule has been repealed by the present Act but all these purposes are served by section 10 read with paras. 2 to 4 of the First Schedule of this Act.

540. Award by majority.—An award to be binding and enforceable must be signed by all the arbitrators concurring. *Ayyasami Mudaliar* v. *Appandai Nynam,* 54 Ind.Cas. 912=38 M.L.J. 145. In the above case the court observed: "As to the second point, an award must be signed by all the arbitrators (see *Russell* on *Arbitration and Award,* 9 Edn., Part II, Chapter IV, section 3, note 4 at page 168). Mr. Anant Krishna Iyer has drawn our attention to the opinion of *Beaman J.* in *Mahomedali Adamji* v. *Secretary of State,* 41 Ind.Cas. 264=42 Bom. 668=19 Bom.L.R. 618, that parties must be assumed to contract that a majority award shall bind them when an uneven number of arbitrators are appointed. But that was a case of valuers and it is not clear that it would be the same in the case of arbitrators. The learned Judge himself at page 673 quotes the ruling of *Mathew, J.,* in *The United Kingdom Mutual Steamship Assurance Association* v. *Houston & Co.,* (1896) 1 Q.B. 567=65 L.J.Q.B. 484, that in every case of arbitration unless all the arbitrators concurred in the award, there would be no arbitration award at all. In this state of things we cannot follow the opinion of *Beaman, J.,* in the present case and it is clear the award in suit is unenforceable in law." See also *Babua Lal* v. *Badri Lal,* 49 Ind. Cas. 522 ; *Lala* v. *Abdus,* 17 Ind.Cas. 320=16 Oudh Cas. 94 ; *Nem Roy* v. *Bharat,* 22 W.R. 129 ; *Fateh* v. *Gango,* 4 W.R. 4 ; *Sat Kumar* v. *Atmaram,* (1885) A.W.N. 60 ; *Lachmi* v. *Khairati,* (1934) A.L.J. 66=147 Ind.Cas. 623=A.I.R. 1934 All. 109 ; *Cameron* v. *Caddy,* (1914) A.C. 651=83 L.J.P.C. 70 ; but see *Haridas* v. *Baidyanath,* 40 Ind.Cas. 646=21 C.W.N. 895. On a reference to arbitration by court an award by majority of arbitrators is valid if so agreed upon. *Dharmun Singh* v. *Surat Singh,* A.I.R. 1925 Oudh 712=88 Ind.Cas. 547. See also, *Kamta Prosad* v. *Jodda Singh,* 7 Ind.Cas. 99=7 A.L.J. 890 ; *Ananta* v. *Jnanda,* 50 C.L.J. 323 ; *Polipillai* v. *Ammanna,* 114 Ind.Cas. 367=A.I.R. 1929 Mad. 144. If, however, in the application for reference under the repealed para. 4 of the Second Schedule of the Civil Procedure Code which provided that the opinion of the majority should prevail, the fact that the order of reference did not refer it would not invalidate the award by the majority of the arbitrators. *Narendra Dey* v. *Brojeswari Dasi,* (1914) 23 Ind.Cas. 842 ; *Haridas* v. *Baidyanath,* 40 Ind.Cas. 646=21

C.W.N. 895. Now all these questions have been set at rest by the enactment of this sub-section. But where a dispute was referred to five arbitrators, it being agreed that the opinion of the majority should prevail and two of the arbitrators did not act, it was held that the award was null and void. *Atchayya* v. *Dhooli Peddenti,* A.I.R. 1928 Mad. 983=112 Ind.Cas. 669. See also, *Thamiraju* v. *Bapiraju,* 12 Mad. 113; *Abdulla v. M. V. R. S. Firm,* A.I.R. 1924 Rang. 153; *M. Appayya* v. *Venkataswami,* 8 M.L.W. 171=47 Ind.Cas. 597=(1918) M.W.N. 477; *Samjeevappa* v. *Venkatavarappa,* A.I.R. 1927 Mad. 436; *Sheikh Abdulla* v. *M. V. R. S. Firm,* 2 Bur.L.J. 229; *Lachman* v. *Prannath,* A.I.R. 1922 Oudh 108=65 Ind.Cas. 339. On a reference to several arbitrators together where there is no clause provided for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator; for as the office is joint, if one refuses or omits to act, the others can make no award. *Kishore* v. *Kishore,* 10 O.L.J. 28=74 Ind.Cas. 299 A.I.R. 1923 Oudh 181=9 O. & A.I.R. 545.

541. Explanation—To enter on or proceed with the reference.— In *Bajranglal* v. *Ganesh Commercial,* A.I.R. 1951 Cal. 78=55 C.W.N. 147 *Chatterjee, J.,* observed: "In my view certain amount of confusion has been created by the following passage in *Russell* on *Arbitration and Award, Edn.,* 12, page 351: 'Arbitrators do not enter on the reference by mere acceptance of the appointment, or by giving a peremptory notice for a meeting or until they began judicially to enquire into the case [*Baker* v. *Steppens* (1867) 2 Q.B. 523=36 L.J.Q.B. 236; *Varipati & Olympia Oil Etc., Company, In re,* (1914) W.N. 208]. It is to be observed that in the latest edition of *Russell* on *Arbitration,* this para has been omitted. The law has been changed in England.

"I agree with the learned Chief Justice that *Baker* v. *Steppens,* (1867) 2 Q.B. 523=36 L.J.Q.B. 236, would not be considered as good law in England in view of the judgment of the Court. of Appeal in *Iossifoglu* v. *Commentaros,* (1947) 1 K.B. 396=110 L.J.K.B. 54=164 L.T. 203. In the latter case six learned Judges including *Viscount Caldecote C.J. & Scott, L.J.,* rejected the argument advanced on behalf of the appellants that entering upon reference does not take place till the arbitrators actually meet and discuss matters. In my view, the arbitrators enter upon reference when they take upon themselves the offices of arbitrators and exercise some functions as arbitrators. If they meet and determine the date of hearing and issue directions as to pleadings they exercise the functions of arbitrators and therefore, they should be treated as having entered on the reference." An arbitrator, however, cannot be said to enter upon the reference the moment he is appointed an arbitrator. Arbitrators enter upon reference when they actually begin to discharge the functions of arbitrators and that does not connote that both the parties must be before the arbitrators or that there must be some previous peremptory order compelling the arbitrators to conclude the hearing *ex-parte.* Issuing mandatory direction for pleadings, or for particulars or for interogatory or fixing peremptory dates for hearing can only be done by the arbitrators when they had begun their work as such and take upon themselves the functions of arbitrators. *Ibid.* In *Issifoglu* v. *Commentaros,* (1941) 1 K.B. 926=110 L.J.K.B. 54. *Scott* L.J. said: "The question raised by the appeal really resolved itself into this: When can arbitrators be said to enter upon a reference? In my view, they enter

upon it as soon as they have accepted their appointment and communicated with each other about the reference."

Power to Court to remove arbitrators or umpire in certain circumstances.

11. *(1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.*

(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of services.

(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

542. N.B.—This section empowers the court to remove a dilatory arbitrator or umpire or one who misconducts himself or the proceedings. Section 16 of the 1899 and sections 6 and 15 of the 1934 Act of Parliament have been drawn on.—*Notes on Clauses.* Section 16 of the 1899 Act is based on section 11 of the English Arbitration Act of 1899. See also sections 13(3) and 23(1) of English Arbitration Act of 1950. Sub-section (1) corresponds to section 13(3) and sub-section (2) corresponds to section 23 (1). Sub-section (3) and (4) correspond to section 13(3) of the same Act.

543. Sub-section (1).—This sub-section is taken verbatim from section 6 of the English Arbitration Act of 1934. This sub-section makes provision for removal of dialatory arbitrator. Para. 3 of the First Schedule enacts : "The arbitrators shall make their within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow". Para. 4 enacts: "If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators". Para. 5 runs as follows : "The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow". The court may remove an arbitrator or an umpire who fails to use all reasonable despatch in entering on and proceeding with the reference and making an award.

544. General Principle.—In *Keshalal Ramdayal* v. *Laxman Rao*, A.I.R. 1940 Nag. 386 = (1940) N.L.J. 393, the court observed : "Unreasonable delay on the part of the arbitrator amounts to legal misconduct. is laid down in *Coley* v. *Dacosta*, 17 Cal. 200, and *Bhogilal* v. *Chimanlal*, A.I.R. 1928 Bom. 49 = 107 Ind.Cas. 707 = 52 Bom. 116 = 30 Bom.L.R. 92. In 17 Cal. 200 the delay was not for more than a year and there it was held that it was such a delay as entitled a party making the submission to the arbitration to revoke the reference and withdraw the proceedings

from the arbitrator. In 52 Bom. 116 the delay was about five years but the length of the delay was not the criterion for the decision of the case..... What is necessary in such a case of arbitration is that once an arbitrator is appointed the parties to the arbitration are entitled to insist that the arbitration should be proceeded with reasonable speed and if there be an unreasonable delay which is unexplained and not justified by the circumsances of the case the parties to arbitration will be justified in revoking the reference and if an award is given after long delay they will be entitled to ask the court not to file the award." See also, *Pestonjee Nusserwanjee* v. *Manockjee & Co.*, 12 M.I.A. 112=10 W.R. 51 (P.C.). But now the time is fixed by paras. (3) and (5) of Schedule I of this Act.

545. Who fails to use all reasonable dispatch—old law.—A claimant in a reference to arbitration is the person on whom, *coeteris paribus*, it is incumbent to promote the conduct of the proceedings; and when, therefore, there is a long and unreasonable delay unexplained by any act of the other party either producing to it or consenting to it or waiving it, the latter is, *prima facie*, entitled to decline to fo on with the reference and to revoke the agreement for submission. *O. R. Coley* v. *V. A. Dacosta*, 17 Cal. 200. See also, *Bhogilal* v. *Chimanlal*, A.I.R. 1928 Bom. 49=53 Bom. 116; *Biswas* v. *Balwant*, 33 Bom.L.R. 1022; *Ram Commar* v. *Kalachand*, 21 W.R. 395; *Ram Kumar* v. *Jagan Mohan*, 9 Ind.Cas. 80=8 A.L.J. 66=33, All. 315, *Atma Rai* v. *Sheobaran Rai* (1882) A.W.N. 58; *Tahal* v. *Bishehar*, 8 *All.* 57; *Adhibai* v. *Cursandas*, 11 Bom. 199. But now under para. 3 of the First Schedule the arbitrators are bound to make their award with four months from the date of reference after having been called upon to act by notice in writing from any part to the arbitration agreement or within such extended time as the court may allow. If they fail to do so the court may remove them.

546. Rule of English Courts before the passing of the English Arbitration Act of 1934.—"Prior to the Arbitration Act, 1934, in cases in which the provisions of the First Schedule to the principal Act were excluded, if the submission limited no time within which the arbitrator was to make his award, his authority to make it would continue for his life, unless it was revoked. There was no necessity to resort to any implication that the award was to be made within a reasonable time; and if after such request, the arbitrator neglected to do so, such neglect on his part would be good ground for revoking his authority. [*Saltere* v. *Yeates*, (1837) 5 Dowl. 291=6 L.J.N.S.Ex. 67=2 M. & W. 67; *Curtis* v. *Potts*, (1845) 3 M. & S. 145; *Macdongall* v. *Robertson*, (1827) 2 Y. & J. 11] "—*Russell*, 13th Edn., p. 60.

547. Para. 3 of the First Schedule.—Para. 3 runs as follows: "The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow." This paragraph corresponds to para. 3 of the First Schedule of the Arbitration Act of 1899 and clause (*c*) of the First Schedule of the English Arbitration Act of 1889—the only change which has been effected is that "four months" have been substituted for "three months". The English Arbitration Act of 1934, section 6(3) enacts: 'Subject to the provisions of sub-section (2) of section 10 of the principal Act and to anything to the contrary in the arbitration agreement, an arbitrator or umpire shall have power to make an award at any time." Section 10(2) of the English Arbitration Act enacts: "When an award is remitted, the arbitrators or umpire shall, unless the order otherwise

directs, make an award within three months after the date of the order." sub-section (1) of section 6 of the English Arbitration Act enacts : "The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award." The clause (*c*) of the First Schedule of the English Arbitration Act, 1889, having been repealed by the English Arbitration Act, 1934, the combined effect of sub-section (1) and (3) of section 6 of the said Act is that there is no time limit in which the award is made. So under the English Act court is given power to remove an arbitrator when he fails to use all reasonable dispatch in entering on the proceedings or in proceeding with the reference and making his award. But under para. 3 of the First Schedule of the Indian Arbitration Act 1940, the rule is otherwise. Under the 1899 Act the arbitrators or umpires could themselves enlarge their time for making the award, though it seems that they must do so before the actual expiry of time. Under the Civil Procedure Code only the court could exercise this power. By section 28 of this Act such powers in all cases rest in the court only, who may extend the time whether the time has expired or not or whether the award has expired or not or whether the award has actually been made or not. *Vide* section 28(1) (*post*). But sub-section (2) of that section allows of provisions being made in an arbitration agreement for enlargement of time for making the award where all the parties consent to such enlargement. (*See Nusserwanjee* v. *Meer Mynoodeen*, 6 M.I.A. 134). This rule is applicable where there is no provision in the agreement as regards the time limit.

The period of four months is to begin only from the time—(*i*) when the arbitrator enters on the reference, or (*ii*) after having been called upon to act by notice in writing from any party to the arbitration agreement.

Explanation to section 9 of the Act says : "The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section".

548. Interpretation of para. 3.—In calculating the period of four months for making the award, the first day is to be excluded but the last day is to be included. *Russell,* 12 th Edn. p. 351. In *Sardarmal Hardat Rai* v. *Sheo Baksh Rai Sri Narain,* 66 Ind.Cas. 907=20 A.I.R. 272=A.I.R. 1922 All. 106=44 All. 432, the court observed : "We are of opinion that the provisions 'entering on the reference' and 'having been called upon to act by notice in writing' are alternative in this sense, that where no reference is entered upon at all, then the time runs from the notice calling upon the arbitrators to act. But, on the other hand, even although the arbitrators may be called upon to act by entering upon the reference, if they enter upon the reference, they have three months (under this Act four months) from that moment for making their award .....To hold otherwise would seem to strike out from clause (3) the words 'within three months after entering on the reference' in a case where one of the parties happened to called upon the arbitrators to act before they began the reference.

"This clause was considered by the English Court of Appeal in *Baring Gould* v. *Sharpengton Combined Pick and Shoral Syndicate,* (1899) 2 Ch.D. 80=68 L.J.Ch. 429=80 L.T. 733. And the view which we take seems to me that which was laid down by the Master of the Rolls, the

late *Lord Lindley,* in a passage contained in page 91 of the Report.

"In addition to that, under the old clause in England, which was slighty different in form, an equally strong court came to the conclusion in *Baker* v. *Stephens,* (1867) L.R. 2 Q.B. 523=8 B. & S. 438=36 L.J.Q.B. 236, that 'entering upon the reference' means not when an arbitrator accepts the office, or takes upon himself the duty when he actually enters upon the matter of the reference, when the parties are before him, or under some peremptory order compelling him to conclude the hearing *ex parte*". See also, *In re Varipati & Co. and Olympia Oil and Cake Co., Ltd.,* (1914) W.N. 208.

When a notice is served upon arbitrators by one of the parties to the arbitration to appoint an umpire, they are 'called upon to act' in the matter of the arbitration within the meaning of clause (*c*) of Schedule I to the Arbitration Act, 1889, and the three months within which the arbitrators are by that clause bound to make their award run from the service of notice upon them. *Baring Gould* v. *Sharpengton,* (1899) 2 Ch. 80.

549. Para. (5) Schedule I.—"The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow." An umpire does not enter on a reference by mere acceptance of appointment of fixing a place and time for meeting but when he begins to inquire into the case judicially. *Baker* v. *Stephens,* (1867) L.R. 2 Q.B. 523=8 B. & S. 438=36 L.J.Q.B. 236=15 W.R. 902; *Cudiff* v. *Walters,* (1839) 2 Mood & R. 232. Where the reference is to two arbitrators and an umpire, and the power of making the award has devolved on the umpire, he under this clause must make his award within one month after the original or extended time for making the award of the arbitrators has expired, or on or before any later day to which the court may from time to time enlarge for making the award. It seems that after the time for making his award has expired, the umpire has no longer any power to have the time extended by court.—*Vide Halsbury,* Vol. I, page 463.

550. Entering on the reference.—An arbitrator does not enter upon a reference the moment he accepts to work as an arbitrator, nor can it be said that he enters a reference when he actually hears the reference. An arbitrator enters upon a reference to him, after having accepted the reference, he applies his mind and does something in furtherance and execution of the work of arbitration. The exact date on which an arbitrator enters on a reference in a particular case, however, has to be determined on the facts and circumstances of the case. *Soneylal* v. *Lachminarain,* A.I.R. 1957 Pat. 395=1957 B.L.J.R. 456; see also (1941) 1 K.B. 396; A.I.R. 1951 Cal. 78; A.I.R. 1956 Bom. 146. He must do some act which is referable to his position as an arbitrator and nothing else before it can be said that he entered upon the reference. In any event the arbitrator must take upon himself and exercise the functions of an arbitrator. The exercise of a function does not necessarily mean hearing the matter on the merits. Thus, where an arbitrator holds a preliminary meeting and gives directions to the parties as to the progress of arbitration proceeding before him, he assumes the office of an arbitrator and exercises the functions of an arbitrator. *Babubhai* v. *Probhod,* 58 Bom. L.R. 917=A.I.R. 1956 Bom. 146.

The umpire's obligation to enter on the reference does not normally begin until the arbitrators disagree. *Russell* 15th Edn., p. 192. It is the duty of the arbitrators to give such notice of disagreement to the umpire. *Vide Ibid.*

551. Delay is not misconduct.—Arbitrators do not render themselves to a charge of misconduct by mere delay or inattention. *Wali Mohammad* v. *Sohara,* 41 P.R. 1875. But the court may remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. *Russell,* 15th Edn., p. 192.

SUB-SECTION (2).

552. Sub-section (2).—This sub-section corresponds to section 16 of of the Indian Arbitration Act, 1899. That section ran as follows: "Where an arbitrator or umpire has misconducted himself, the Court may remove him." In this sub-section the words "or the proceedings" have been added by following the amendment made by section 15 of the English Arbitration Act of 1934 to section 11 of the English Arbitration Act of 1889. Section 11 of the English Arbitration Act of 1889 before amendment by section 15 of the English Arbitration Act of 1934, ran as follows:

"11. (1) Where an arbitrator or umpire has misconducted himself the Court may remove him.

"(2) Where an arbitrator or umpire his misconducted himself or an arbitration or award has been improperly produced, the Court may set aside the award."

Section 15 of the Arbitration Act of 1934 runs as follows: "Section eleven of the Principal Act (which empowers the Court to remove an arbitrator and set aside an award) shall be amended by the insertion of the words 'or the proceeding' after the words 'has misconducted himself' in both places where those occur in the said section."—*Report of Committee on Law of Arbitration,* March, 1927.

553. Object of amendment.—"Section 11 of the Act of 1889 speaks of an arbitrator or umpire having 'misconducted himself'. When a motion is made under that section it is very common to hear counsel disallow any suggestion of turpitude and to allege only technical misconduct. But we believe that laymen whose awards are impunged under the section feel some grievance from the phrase that it employs. We suggest that the section, or its equivalent, might well use the phrase (in both sections) 'has misconducted the proceedings' in place of 'misconducted himself." See also *Russell* on *Arbitration and Awards,* 13th Edn., p. 477; section 39 (*a*) *infra.* But the law was the same even before the amendment *vide* 9 All. 253: 14 Bom.L.R. 1007 and other cases noted under the heading "misconducted himself or the proceedings."—*Vide infra.* Commenting on this section *Sarkar* in his *Tagore Law Lecture* said: "Later it will be found under S. 30 of the Indian Arbitration Act, 1940, an award is liable to be set aside on the ground 'that an arbitrator or umpire has misconducted himself or the proceedings'. The authorities before the amendment show that the addition has obviously been made solely for purposes of clarification and not for effecting any change in the law. Even when the statutes did not contain the words 'or the proceedings,' the court exercised the power of removal of arbitrators by reason of their misconduct in the proceedings before them." *Sarkar's Law of Arbitration,* pp. 124-125. According to *Russell,* these words were introduced to meet the case where there had been no moral turpitude on the part of the arbitrator or umpire but only technical misconduct in relation to the proceedings. *Russell* on *Arbitration and Award,* 13th Edn., p. 477.

554. Law of England previous to the enactment of the English Arbitraton Act of 1889.—Before the passing of the English Arbitration Act of 1889, apart from inherent jurisdiction of court, an award could be set aside by 9 Will. III, c. 15 passed in 1698. Section 2 of that statute enacts as follows:—

"II. And be it further enacted by the authority aforesaid, that any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties; anything in this Act contained to the contrary notwithstanding". There was no provision in the Act to remove an arbitrator or umpire who has misconducted himself or the proceedings. That provision was introduced for the first time by the English Arbitration Act of 1889.

But it was held in *Pedley* v. *Goddard*, 7 T.R. 73=4 R.R. 382, that the time limit for objection imposed by the statute (9 & 10 Will. III, c. 15) which enacted that awards procured by corruption or undue means should be set aside, does not apply to an objection (whether urged against a motion for attachment or by plea in action for enforcing the award) appearing on the face of the award. The case of *Pedley* v. *Goddard* (*supra*), illustrates the broad distinction which exists between what may be termed *intrinsic* nullities in an award and the objections which arise from what may be broadly termed *misconduct* in the arbitrator, the proof of which is entirely extrinsic to the award. The latter class of objection must be promptly verified and established; the former class of objections, being inherent in the award itself, may be taken at any time.—*Camp. Rul. Cases*, Vol. III, p. 519. So the cases which are decided by the English courts before the passing of the English Arbitration Act, were cases of misconduct of arbitrators sufficient for setting aside the award.

555. Cases under the former English Act, i.e. Act of Will. III.—In *Whitmore* v. *Smith*, (Exch. Ch. 1861) 7 H. & N. 509=31 L.J.Ex. 170, where the award was made on all matters in difference and was in the required form and intended by the arbitrators to express their decision, the court decided that an objection that the arbitrators adopted the opinion of a third person by which they agreed to be bound, cannot be raised under the plea of "no award". *Pollock, C.B.*, said: "We are all of opinion that the Rule must be discharged. I think that the award is bad, or rather that, as the plea correctly states, no award was made. In substance, this was a sub-reference by the arbitrators to a third person, and they had no right to delegate to him the powers entrusted to them. No doubt there was evidence of an agreement between the parties, that the arbitrators might consult Rotton, but not that they should substitute his opinion for their own. The consent gave them liberty to consult him or refer to his advice, but not so as to bind themselves to decide according to his opinion, whatever their own might be. When arbitrators have referred the matters in dispute to someone else, and agreed to be bound by his decision and make an award according to it, the parties have not what they bargained for, viz., the judgment of the arbitrators, and so have not had their award." *Bramwell, B.*, observed: "I am of the same opinion, I think that an

arbitrator may take advice upon a matter in which he considers it may be useful to him ; and if he adopts it, even though he admits its influences on his judgment, his award may be good. But he must not renounce his opinion to substitute that of another. Here I think the facts show that the decision was that of Rotton, not of arbitrators, and therefore it was not their award There was in fact no act of the arbitrators' minds upon the question decided by him. The language of the Court of Common Pleas in *Little* v. *Newton,* 58 R.R. 436=2 Man. & G. 351, is strong to show that this was no award."

In *Walker* v. *Forbisher,* 6 Ves. 70, an award was set aside on the ground that the arbitrator received evidence after giving notice to the parties that he would receive no more, in which they acquiesced. *Lord Eldon, L.C., said*: "The award cannot be supported.....It does not appear to me, that he has by the award improperly exercised the authority given by the order of reference: but on account of the transaction, that took place on the 10th of February, the award cannot stand. He had examined different witnesses at different times in the presence of the parties. He recommended to them not to produce any more witnesses. To that recommendation they accede ; and in effect say, 'Upon the view of what is disclosed to you, you do what is right between us.' After this he hears these other persons ; and he admits, he took minutes of what was said. It did not pass as a mere conversation. It does not appear, that he afterwards held any communication with the other party ; or disclosed what passed to him ; but the arbitrator swears, it had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. *A judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind.* The award may have done perfect justice: but upon general principles it cannot be supported." This principle was followed in *re Hicks,* (1819) 8 Taunt. 694 : *Dobson* v. *Groves,* (1844) 6 Q.B. 637=14 L.J.Q.B. 17 ; and in *Plews* v. *Middleton,* (1845) 6 Q.B. 845=14 L.J.Q.B. 139.

In *Haigh* v. *Haigh,* 3 D.F. & J. 157=8 Jur.N.S. 983=5 L.T.N.S. 507, in proceedings under a reference to arbitration involving complicated accounts relating to a business, the arbitrator excluded the son of one of the parties who had been a clerk in the business, and whose assistance the father desired in the proceedings as to the accounts. He also excluded a shorthand writer whom the same party wished to employ to take notes under the proceedings, no reason justifying such exclusion being shown. *Held* that the award ought to be set aside, and that the party did not, by attending the further proceedings under the reference, waive his right to take the objection.

So also omission to give one of the parties the opportunity of being heard or of cross-examining the witness is misconduct affording ground for an application to set aside, though it is no ground of defence to an action on the award. *Braddick* v. *Thompson,* (1807) 8 East 344=15 R.R. 751 ; *Thorburn* v. *Bornes,* (1867) L.R. 2 C.P. 384=36 L.J.C.P. 184 : *Bache* v. *Billingham,* (C.A. 1893) (1894) 1 Q.B. 107. In the last-named case *Lord Esher M.R.* said: "Billingham then had a decision against him by the arbitrators to whom he had agreed to refer the matter of his complainant, and he asked the Justices to hear the case again. Why ? Not because the committee had not decided, but because they had decided improperly, that is to say, that they heard him, but then they examined witness against him when he was not present, and did not give him the

opportunity of cross-examining those witnesses. That is a wrong procedure in the arbitration.... ...." *Lopes L.J.* said: "If this were an ordinary arbitration, I take it that it would be a good ground for applying to the court to set it aside upon the ground of misconduct of the arbitrators: but if an action had been brought upon that award, it would not have been a good plea to have said, there was no award. The objection could not have been taken in answer to an action upon the award, but only on an application to set it aside."

Where matters in difference, are referred to arbitrators, and if they disagree, to an umpire, the umpire who is called in to act after the arbitrators have heard the witnesses and disagreed, must rehear the witnesses. If he omits to do so, and it is not shown, that the requirement has been waived, the award will be set aside. *Re Salkeld and Slater,* (1840) 12 Ad. & El. 767. See also, *Jenkins* v. *Ward,* (1841) 1 Dowl.N.S. 276; 3 *Camp. Rul. Cases,* p. 521.

Mere social entertainment not shown to have influenced the arbitrator or umpire, is no ground for setting aside the award. *Crossley* v. *Clay,* (1848) 5 C.B. 581; *Re Hopper, Barningham and Wrightson Arbitration, etc.,* (1867) 8 B. & S. 10=(1867) L.R.Q.B. 367=36 L.J.Q.B. 97; *Moseley* v. *Simpson,* (1873) L.R. 16 Eq. 226=42 L.J.Ch. 739.

556. Scope of section 11 of the English Arbitration Act, 1889, and the previous law.—Under Stat. 9 Will. II, c. 15, s. 2, there were two grounds for setting aside an award, namely, where the arbitration or umpirage was procured by "corruption" or "undue means". The phrase "undue means" was interpreted to mean to some act contrary to natural justice.—*Russell* on *Arbitration.* Under the English Arbitration Act, 1889, as amended by Arbitration Act of 1934, an award can be set aside where the arbitrator has misconducted himself or the proceeding and the second ground of setting aside an award is where an arbitration or award has been improperly procured. The first ground is wider than anything in the statute of William III. "The word 'misconduct' includes any act which is ordinary to natural justice, but is not limited to such acts, and there is no necessity for the court to consider whether the misconduct has resulted in the procurement of an arbitration or award by 'undue means'. The section does not place any limitation on the meaning of the word 'misconduct' and the court might now set aside an award or remove an arbitrator for ordinary misconduct, e.g., if during the proceedings in the arbitration he was constantly drunk and therefore incapable of adjudicating properly. The power now given to the court to remove an arbitrator or to set aside an award on the ground of misconduct, as compared with the more limited powers of the court before the Arbitration Act, 1889, must be borne in mind in considering the decisions before and since the passing of that Act."—*Russell* on *Arbitration,* 13th Edn., p. 174.

557. Sub-section (2) and section 30 (a).—Under sub-section (2) of section 11, the court is empowered to remove an arbitrator or umpire who has misconducted himself or the proceedings. This power is discretionary. Under section 30(*a*), the court is entitled to set aside the award of such an arbitrator or umpire. It seems that the powers of the court under the Act are limited by the words of the section.—*Russell,* 13th Edn., p. 173. See also, *Re Smith and Nelson's Arbitration,* (1890) 25 Q.B.D. 545. "The court has power" says *Russell* "to remove an arbitrator or umpire, who misconducts himself, in any case where it could set aside his award, upon that ground. The power is discretionary, and no doubt be sparingly

exercised in cases where the misconduct was of a technical nature not affecting his competence or the properiety of allowing him to continue his office." *Russell* 15th Edn., p. 191.

558. Authority of arbitrator is confined by the terms in the reference.—The authority of arbitrators is limited to the matters lawfully submitted to them. *Babu Bhai* v. *Madhavji*, 55 Bom. 503=134 Ind.Cas. 705=33 Bom.L.R. 759=A.I.R. 1931 Bom. 343. See also, *Dagdusa* v. *Bhukham*, 9 Bom. 82. In the first-named case *Parkar, J.* observed : "Under by-law 38A only disputes arising out of or in relation to contracts made subject to the by-laws shall be referred to arbitration. Under by-law 81 such contracts must be in writing in the form given in the appendix. It would, therefore, follow that the arbitrators had no jurisdiction to decide disputes arising out of contracts not in the sanctioned form. In cases where an arbitrator enters upon a consideration of matter which are not referred to him or which he has no jurisdiction to try by arbitration clause or submission between the parties, the appearance of the party after objection taken and protest made, does neither give the arbitrator authority to make an award nor estop him from urging that the arbitrator has exceeded his authority : See *Ringland* v. *Lawndes*, (1864) 33 L.J.C.P. 337=17 C.B. (N.S.) 514=10 Jur.N.S. 859 and *Chetandas* v. *Radha Kissen*, A.I.R. 1927 Bom. 553=104 Ind.Cas. 174. The attendance of the applicant before the arbitrators after protest would not amount to a waiver of his right to object to the jurisdiction of the arbitrators". The duty of arbitrators in heáring evidence is to act according to the terms of the agreement in pursuance of which the dispute is placed before them. *Krishna Kanta Paramanik* v. *Baidya Sundari Dasi*, 2 B.L.R.App. 25. So also arbitrators appointed under an order of reference can exercise no great power than is vested in them by the referring order. Their power are confined to the said order and can neither be enlarged nor narrowed by the view the arbitrators may themselves take of their duties. *Ram Ditta* v. *Bhagan*, 3 P.R. 1883. In case of private arbitration an arbitrator's power is limited by the arbitration contract. *Narsing Narain* v. *Ajodhya Prasad*, 13 Ind.Cas. 118= 15 C.L.J. 110=16 C.W.N. 256 ; *Sabitri* v. *Promoda*, 19 Ind.Cas. 941=21 C.L.J. 248 ; *Juggobandhu* v. *Chand Mohan*, 31 Ind. Cas. 33=22 C.L.J. 237 ; *Champsey* v. *Jivraj*, 73 Ind.Cas. 436 (439)= A.I.R. 1923 P.C. 66=47 Bom. 578=50 I.A. 324 ; *Bombay Fire* v, *Ahmedbhoy*, 1 Ind.Cas. 14=11 Bom.L.R. 1=34 Bom. 1 ; *Chenna* v. *Veeraswami*, A.I.R. 1933 Mad. 862=149 Ind.Cas. 778 ; *Ram* v. *Durga*, 53 Cal. 258=92 Ind.Cas. 633=A.I.R. 1925 P.C. 293 ;*Chuna* v. *Behari*, A.I.R. 1934 All. 7. An arbitrator derives his power from the agreement of arbitration which furnishes the source and prescribes the limits of his power and he is bound to make an award in conformity with it both in substance and in from. *Dattaram* v. *Harji Mal*, A.I.R. 1930 Sind. 170.

In *Badruddin Hasan* v. *Amir Begam*, 14 O.C. 308=13 Ind.Cas. 520, the court observed : "Now as regards the powers and duties of an arbitrator no fixed rules can be laid down. The extent of the power and the nature of the duties are to be ascertained from the terms of the agreement to refer by which he is appointed. In the present case, the language of the agreement is of the widest possible description. The parties after declaring the existence between them of disputes regarding the estate of the deceased Farid-uddin and the will left by him, agree to appoint Shakhawat Ali as their arbitrator to settle these disputes. They empower him to decide their difference 'in any way he might deem proper' and they undertook to be bound by his decision. Clearly, therefore, it was

the intention of the parties to arm the arbitrator with most extensive powers ; in fact they gave him authority to act in any manner he pleased, provided, of course, that he dealt fairly with all parties concerned. As for his duties it is well understood. He was to decide whether the deceased had executed the will and he was to determine how the estate was to be distributed between the persons who had any claims as heirs of Farid-uddin.

"Subject to any limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he is to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit so long as he acts in accordance with the principles of justice, equity and good conscience. He is not fettered by rules of practice which courts of law adopt for general convenience. He is not bound, for example, (as the lower court appears to think he was) to record statements or admissions of witnesses, to mark and file documents and to behave in other respects as if he were the Judge of a Civil Court bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it. He is not under any obligation to make notes of his proceedings, though it may be advisable for him to do so ; and if he does elect to keep such notes they are his own property and he cannot be compelled to produce them in court. He is not bound to observe the rules relating to evidence to be found in the Indian Evidence Act. (Cf. section 3 of the Act). In short, he has greater latitude than the courts of law in order to do complete justice between the parties and may, in forming his judgment, act upon merely moral considerations of which a court of law could not take cognisance. (Cf. *Russell* on *Arbitration*, 9th Edn., page 98). Again as the parties select the arbitrator to be the judge of their disputes they cannot, where the award is good on the face of it, object to his decision either upon law or fact and the courts will not ordinarily review his discretion provided he acts within his authority and behaves fairly to each party. Nor will they interfere with his judgment on any mere ground of mistake. He should hear all evidence material to the questions before him which the parties choose to produce but all evidence must be tendered, otherwise no objection will lie. And, lastly, while he may be called as a witness to give evidence respecting his proceedings in the arbitration, there are certain limits beyond which he cannot properly be questioned." See *Duke of Bucclench* v. *Metropolitan Board*, L.R. 5 H.L. 418=27 L.T. 1=41 L.J.Ex. 137 ; *Knox* v. *Symmonds*, 3 Bro.CC. 358=1 Ves.Jur. 369. In the last-named case *Lord Thurlow* said: "Upon a general reference to arbitration of all matters in dispute, the arbitrator has a greater latitude than the court in order to do complete justice between the parties." Where the submission or the statute under which he is acting prescribes his powers or duties he must strictly observe and comply with the same.—*Russell* on *Arbitration* citing *Samways* v. *Eldsley*, (1677) 2 Mod. 73 ; *Winter* v. *White*, (1818) 1 B. & B. 350 (357) ; *Couvela* v. *Volkart*, (1888) 4 T.L.R. 209.

559. Interpretation of arbitration agreement.—The most general and comprehensive form of words is that which refers to arbitrators' decision, "all matters in difference between the parties". In such a case the arbitrator is at liberty to consider all questions affecting the parties' civil rights. *Baker* v. *Townshend*, 7 Taunt, 422. See also, *Wild* v. *Holt*, 9 M. & W. 161 ; *Porter* v. *Porter*, 55 L.T. 206 ; *Winter* v. *White*,

1 B. & B. 350. On a reference of all disputes "arising out of a contract" the arbitrator may decide a dispute as to the construction of the contract. *Thornburn* v. *Bornes,* (1867) L.R. 2 C.P. 384=36 L.J.C.P. 184; *North British Rail* v. *Newbergh & Co.,* (911) S.C. 710; *Brodie* v. *Cardiff Cor.,* (1919) A.C. 337; *Hohendollern & Co.,* (1886) 54 L.T. 596; *Russell,* 13th Edn., p. 77; see also *Tolaram* v. *Birla Jute,* I.L.R. (1928) 2 Cal. 171.

In *Bombay Fire Insurance Co.* v. *Ahmedbhoy,* I Ind.Cas. 14 (19)= 34 Bom. 1=11 Bom.L.R. 1, *Chandravarkar, J.,* observed: "In construing the agreement to refer to arbitration we ought to bear in mind one cardinal principle, viz., that by a submission to arbitration, a party deprives himself of the right accord to him by common law to have the dispute to which the submission relates decided by a court of law. Therefore, it must clearly appear from the terms of the submission that with reference to any point arising the party has so deprived himself." See, also, *Dattaram* v. *Harjimal,* A.I.R. 1930 Sind 170. In *Gopalam* v. *Myneni Suryanarayana,* A.I.R. 1926 Mad. 752=50 M.L.J. 514=23 M.L.W. 681= (1926) M.W.N. 445=95 IndCas. 740, the court observed: "The principle on which such cases have to be decided are clear. Firstly, it must be clear that the dispute has been referred before the arbitrators get jurisdiction to decide it. See *Bombay Fire Insurance Co., Ltd.* v. *Ahmedbhoy, Habibbhoy,* 34 Bom. 1=1 Ind.Cas. 14=11 Bom. L.R. 1. Courts, no doubt, will not be unreasonable or unduly technical in construing documents drawn up by persons not familiar with law and legal phraseology: but at the same time the court must be satisfied by the language used that a matter decided was in truth referred to the arbitrators for decision."

560. Denial of factum or validity of arbitration agreement.— Where the factum or validity of a contract (or arbitration agreement) is disputed, it is not within the province of the arbitrators to decide upon the same and thus to assume jurisdiction in the matter of the dispute. The decision as to the factum or validity of a contract is exclusively within the jurisdiction of the court. *Vishambhar* v. *Gulamally,* 4 D.L.R. (Bom.) 91; *Ghulabhai* v. *Keshadev,* 51 Bom.L.R. 499=A.I.R. 1949 Bom 343.

561. Misconduct.—"It is difficult to give an exhaustive definition of what amounts to misconduct on the part of an arbitrator or an umpire. The expression is of wide import, including on the one hand bribery and corruption and on the other a mere mistake as to the scope and authority conferred by the submission."—*Halsbury,* Vol. I, p. 478. See also, *Coster* v. *Oakeley,* 12 Mys. L.J. 81=39 Mys.H.C.R. 263. The word "misconduct" it would seem may be construed in its widest sense and need not be confined to the kind of misconduct which was necessary to justify the setting aside of an award before the Arbitration Act, i.e., to some act contrary to natural justice.—*Russell* on *Arbitration,* 13th Edn., p. 147. See also, *Ganga Sahai* v. *Lekhraj Singh,* 9 All. 253; *Haji Ahmed* v. *Essanjji,* 17 Ind.Cas. 696. In *In re Hall and Hinds,* (1841) 10 L.J.C.P. 210 *Tindal C.J.* said: "The mistake as a matter of carelessness is so gross as to amount, though not in a moral point of view yet in a judicial sense of that word, to misconduct on the part of the arbitrators."

In *Gunnis* v. *Amanmal Tulsidas,* 83 Ind.Cas. 353=A.I.R. 1923 Sind 75 (F.B.), the court observed: "The question turns upon the meaning to be attached to misconduct. It has been suggested that the arbitrators behaved in any other way than as honourable gentlemen. But the term 'misconduct' has in the legal sense a wider significance than personal

behaviour. At page 387 of the *Russell's Arbitration,* 10th Edn., is the following passage: 'Legal misconduct is an ambiguous term, though constantly used. It would seem that it means misconduct in the judicial sense of the word, not from a moral point of view, and means, for example, some honest though erroneous breach of duty causing miscarriage of justice'." In interpreting section 521 of the Civil Procedure Code of 1882, it was observed: The word "misconduct" as used in section 521, Civil Procedure Code, does not necessarily comprehend or include misconduct of a fraudulent or improper character, but it does comprehend and include action on the part of the arbitrator which is upon the face of it opposed to all rational and reasonable principles that should govern the procedure of any person who is called upon to decide upon questions in difference and dispute referred to him by the parties. An arbitrator will be guilty of misconduct when he takes no evidence on the matter referred to him and has not allowed a party an opportunity of proving his contention. When objection is taken on that score to the proceedings of an arbitrator, the court must consider whether there really have been any proceedings before him upon which he could come to any decision either one way or the other. *Deoki Nandan* v. *Raj Kumar,* 9 A.W.N. 124.

Legal misconduct is a term which is commonly used in reference to awards. It does not necessarily involve any moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been generally described to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of justice. Misconduct is a question of fact in each case and has to be ascertained from the facts of the entire proceedings before the arbitrator. *It really lies in the conduct of the arbitration proceedings and the onus of proof lies on the party who alleges it.* The court never sits in appeal from the award of an arbitrator. Its function is to so whether the grounds of misconduct alleged by the party have been strictly found. If material piece of evidence is tendered and rejected, it may amount to misconduct entitling the party to set aside the award. And a party is not precluded from impeaching an award on the ground of misconduct even if the arbitrator has been suggested by such a party. *Aboobaker Latif* v. *Reception Committee,* A.I.R. 1937 Bom. 410; Set also *Mediterranean & Co.* v. *Fortress* (1948) 2 All. E.R. 186; *Williams* v. *Wallis & Cox,* (1914) 2 K.B. 478=83 L.J.K.B. 1296=110 L.T. 999=78 J.P. 337. In the last-named case *Lush, J.,* observed: "Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it, would have been seen to be vital, that is misconduct in the hearing of the matter which he has to decide, and misconduct which entitled the person against whom the award is made to have it set aside". *Atkin, J.* said: "With regard to the main question, I think the Deputy Judge formed a misconception of the meaning of misconduct. It does not necessarily involve an imputation of personal turpitude in the arbitrator. It really does not mean much more than such a mishandling of the arbitration as is likely to cause some substantial miscarriage of Justice, and one instance of this is where the arbitrator refuses to hear evidence upon a material issue". See also, *Haji Ahmed* v. *Essanji,* 17 Ind.Cas. 696; *Joggi* v. *Ganga,* 76 Ind.Cas. 275=A.I.R. 1924 Sind 132: *Amir Begam* v. *Badruddin,* 23 Ind.Cas. 625=36 All. 336 (P.C.). The

word "misconduct" as used with reference to arbitrations does not necessarily or at all imply anything in the nature of fraud. It certainly may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator as he is occupying a *quasi*-judicial position *Bhogilal* v. *Chimanlal,* 52 Bom. 116=30 Bom. L.R. 92=I.L.T. 40 Bom. 29=107 Ind.Cas. 707=A.I.R. 1928 Bom. 49. It is wrong to suppose that there must be some misconduct in a moral sense on the part of the arbitrator in order to justify the setting aside of his award. The term "misconduct" simply means legal misconduct. *Ayyanal* v. *Naranappa,* (1927) M.W.N. 917.

Misconduct on the part of the arbitrators must be misconduct in carrying out the terms of the reference and within the scope of it. Anything beyond that is action without jurisdiction whether or not it may amount also to misconduct. *Ramaswami* v. *Venkatarama,* 49 M.L.J. 523. But when parties have agreed to abide by the decision of a tribunal of their own selection unless there has been something radically wrong and vicious in the proceeding it must not be set aside. An award should not be set aside on the ground of failure to observe the highly technical web of procedure and rules of evidence which surrounds judicial procedure. *Maung Shwe Hpu* v. *U. Min Nyun,* 3 Rang. 387= A.I.R. 1925 Rang. 383; *Andrews and Mitchell,* (1905) A.C. 78; *In re Hopper,* (1867) 2 Q.B 367=36 L.J.Q.B. 97. In the last cited case, *Cockburn, C.J.,* said: "I would observe that we must not be overready to set aside awards where parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something *radically* wrong and vicious in the proceedings." As regards what would amount to misconduct on the part of an arbitrator, vide *Great American Insurance Co.* v. *Hindusthan Flash Light,* A.I.R. 1953 Cal. 474. For further discussion of this topic, *vide* notes on section 30 clause (*à*).

562. "Misconducted himself or the proceedings".—In *Ganga Sahai* v. *Lekhraj Singh,* 9 All. 253, *Mahmood J.,* in interpreting the word 'misconduct' observed: 'There may be ample misconduct in a legal sense to make the court set aside an award, even where there is no ground for imputing the slighest improper motive to the arbitrator. It should be interpreted in the sense in which it is used in English law with reference to arbitration proceedings. It does not necessarily imply moral turpitude, but it includes neglect of duties and responsibilities of arbitrators and of what courts of justice expect from them before allowing finality to the award.' This was quoted with approval by *Davar, J.,* in *Haji Ahmed* v. *Essanji Tajbhoy,* 14 Bom. L.R. 1007=17 Ind.Cas. 696. Does then the failure of arbitrators to examine the parties and their witness amount to misconduct? In *Lachmi Narain* v. *Sheonath Pande,* A.I.R. 1919 All. 98=54 Ind.Cas. 443=42 All. 185 (187)=18 A.L.J. 78, *Lindsay, J.,* said: 'It is argued here that the mere fact that the arbitrator decided the case of his own knowledge and without taking any evidence does not amount to misconduct. The matter has to be determined in the light of the language of the agreement by which the dispute was referred to arbitration. If the parties agreed that the arbitrator should decide the dispute between them on his own knowledge, and further agreed that there was no need for him to take any evidence, no misconduct can be imputed. But there is nothing in the language of the agreement to suggest that it was the intention of the parties that the arbitrator should act solely upon his own knowledge of the facts

That he has done so is fatal to the award, in which he expressly says that he has decided the case upon the basis of his own knowledge.

"The learned Judge did not cite any authority for this proposition in law, but support is to be found in *Haigh* v. *Haigh,* (1862) 31 L.J.Ch. 420=8 Jur. N.S. 983=5 L.T. 507, and that of *Amir Begam* v. *Badruddin,* A.I.R. 1914 P.C. 105=23 Ind.Cas. 625=36 All. 336=17 O.C. 120 (P.C.). In the first case *Turner, L.J.,* said in the course of his judgement: "The parties have chosen him (arbitrator) to be their judge, and have agreed to abide by his determination; and by the determination, if fairly and properly made, they must be content to be bound; but, on the other hand, arbitrators, like other Judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice; and this court, when called upon to review their proceedings, is bound to see that those rules have been observed.'

"In the second case *Lord Parmoor* delivering the judgment of the Judicial Committee said: "If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator.'

"The first case deals with the English law, and the second case dealt with the Indian Statute law, but the principle enunciated is the same. I may also refer to *Maung Shwe Hpu* v. *U Min Nyun,* A.I.R. 1925 Rang. 383=91 Ind.Cas. 659=3 Rang. 387, where a Bench of this court following certain English decisions has laid down as follows: 'Unless in the procedure adopted by the arbitrators there has been something radically wrong or vicious, an award cannot be impeached on the ground that the technical web of judicial procedure and rules of evidence which surround judicial procedure were not strictly adhered to.'

"The principle that can be deducted from the cases cited above is that an arbitrator, though not bound by the technical web of judicial procedure and rules of evidence, must hear the parties and, if requested, their witnesses, unless he is absolved therefrom by the terms of the submission and must apply his mind to the points in dispute and decide it according to the ordinary rules of justice, equity and good conscience. The failure to hear the parties and, if necessary, their witness, unless absolved therefrom by the terms of the submission amounts to misconduct on the part of the arbitrator within the meaning of para 15, Schedule II, Civil Procedure Code". *Per Ba U. J.,* in *Ma Hnine Le* v. *Ma Nyein Bwin,* 162 Ind.Cas. 772=A.I.R. 1936 Rang. 191.

Unless it is proved that the arbitrator refused to examine any evidence tendered by the parties, the mere fact that he did not hold a public enquiry will not be enough to vitiate and award. *Kanshi Ram* v. *Harnam Das,* A.I.R. 1940 Lah. 73. Where it is left to the discretion of the arbitrator to take or not to take evidence while proceeding with arbitration and his descretion is not restricted in any way, the award cannot be challenged on the ground that one of the directions to the arbitrator was to proceed with or without taking any evidence. *Visharam Mavji* v. *Gangaram,* A.I.R. 1935 Sind 235. See also, *U Po Kyaw* v. *U Shwe Mya,* 158 Ind.Cas. 832=A.I.R. 1935 Rang. 308.

563. Arbitrator should give notice to each party.—All the parties should get notice of the time, and place appointed for hearing of the arbitration proceeding by the arbitrator and umpire. Such notice should be served upon them by the arbitrators or umpire long before the time

so fixed so that may come before them with documents and evidence. *Banerjee's Arbitration,* 4th Edn., 218 ; *Protapsingh* v. *Kishan Prosad,* 33 Bom.L.R. 1357. "In fixing the place of trial the arbitrator should take all the circumstances into consideration and decide according to the balance of convenience. The chief circumstances to be taken into consideration are the place where most of the witness reside, the situation of the subject-matter of dispute, and the balance of convenience and expense." *Russell,* 15th Edn., 138. The court ought not to set aside an award or remove an arbitrator on the ground that he would have exercised his judicial discretion in the matter of place or dates of meetings or their adjournments in a different way, if the arbitrator has honestly exercised his discretion. *Laschin* v. *Ellis,* (1862) 11 W.R. 281 ; *Sarkar* on *Arbitration,* p. 126 ; *Russell* on *Arbitration,* 15th Edn., p. 138 ; see also *Solomon* v. *Solomon,* (1859) 28 L.L.Ex. 129.

564. Whether duty of arbitrator is to decide according to law.—"It is the duty of the arbitrator, in the absence of express provision in the submission to the contraty, to decide the question submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances."—*Russell* on *Arbitration,* 15th Edn., p. 112, citing *Juger* v. *Zolme,* (1916) 1 K.B. 939=85 L.J.K.B. 1116=32 L.T.R. 291 (C.A.) ; *Aubert* v. *Maze,* (1801) 2 *Bos. & P.* 371 ; *In re Badver,* (1819) 2 B & A. 691 ; *Blennerhasset* v. *Day,* (1811) 2 Bal. & B. 104. In the first-named case *Swinfen Eady, L.J.* said: "The council are to give a decision—they are to decide—and in the absence of fuller and wider powers expressly given that means to decide according to the legal rights of the parties." In *Aubert* v. *Maze,* 2 Bos. & P. 371=5 R.R. 624, *Chambre J.,* observed: "There is no doubt that an arbitrator is bound by the rules of law like any other Judge, *and if it appears on the face of the award that the arbitrator has acted contrary to law, his award must be set aside.*" So where the award recites as follows,—"I have investigated the case to my satisfaction, and have taken down the deposition of witness and the statement of the parties I have also taken into consideration of the custom of the brotherhood to which the parties belong, and persued the passage in the Hindu law referred to by the parties and their pleaders",—the court has no right to assume on the face of the statement that the arbitrator had not correctly applied the law. *Nanah Chand* v. *Ram Narayan,* 2 All. 181 : (187). All that is required is that he must make *bona fide* effort to decide the rights of the parties according to law and if he commits mistake, his award is not affected thereby, *Blennerhasset* v. *Day,* 2 Bal. & B. 104. See also, *King and Duven, In re,* (1913) 2 K.B. 32=82 L.J K.B. 733, where *Channel, J.,* observed: "No doubt the general doctrine is that if a mistake of law appears on the face of an award, the award is bad and can be set aside. The *Biritish Westinghouse case,* 81 L.J.K.B. 1132=(1912) A.C. 673, was doubtless a somewhat pecuilar case, but it shows that the general rule is clear. But it is also clear that if a specific question of law is submitted to an arbitrator and he answers it, the fact that the answer involves an erroneous decisions in point of law is nor a ground upon which the award can be set aside. Otherwise it would be futile to submit a question of law to an arbitrator. *Doe d. Stimpson* v. *Emmerson,* 9 L.T. (O.S.) 199, is an authority in favour of this view, and in *Adams* v. *Great North of Scotland Railway,* (1891) A.C. 31 (39), Lord Chancellor referring to that decision, said: 'In the Court of Common Pleas, forty years ago, in case in which the arbitrator heard a question of law submitted to him

according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, neverthless held that the parties having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts'."

In India the question was raised in the case of *Venkataswami* v. *Suramma*, 41 Mad. 1022=34 M.L.J. 323=24 M.L.T. 60=(1919) M.W.N. 462=8 L.W. 202=45 Ind.Cas. 644, where the court observed: "A large number of English decisions were quoted by Mr. Somasundaram for the respondents. They all assume that where an error of law appears on the face of the award the error can be remedied by courts. The various dicta to be found on the subject all refer to the decision in *Hodgkisson* v. *Ferne*, 3 C.B.N.S. 189=27 L.J.C.P. 66=111 R.R. 614, as first enunciating this proposition. On examining that case we find this statement of the law in the judgment of *Wallis, J.*, one of the ablest common law Judges of his time. If we may say with respect, we share the doubt expressed by the learned Judge regarding the practicability and soundness of enforcing the ancient principle referred to by him. Moreover, the later decisions to which we shall presently refer and the Civil Procedure Code do not appear to have accepted the proposition that an erroneous view of law appearing on the face of the award vitiates it. In *King and Duven, In re*, (1913) 2 K.B. 32=82 L.J.K.B. 733, *Channel, J.*, said that if, on a question of law referred to the decision of an arbitrator he has given an erroneous decision, it shold not be questioned by court. In *Mahammad Newaz Khan* v. *Alan Khan*, 18 Cal. 414=18 I.A. 73, the Judicial Committee have laid down the same principle. In *Ghulam Khan* v. *Muammad Hassan*, 29 Cal. 167=6 C.W.N. 226=29 I.A. 51=12 M.L.J. 77=4 Bom.L.R. 161, they say expressly that an arbitrator has jurisdiction to decide both on facts and on law and that the courts have no right to sit in judgment over his views. In *Adams* v. *Great North of Scotland Railway Co.*, (1891) A.C. 31, the same view was held. See also, *Dinabandhu Jana* v. *Chintamani Jana*, 26 Ind.Cas. 697=19 C.W.N. 476. As regards the decision in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railway Co.*, (1912) A.C. 673=81 L.J.K.B. 1132, what was said by *Lord Haldane* in the House of Lords was that, if the result of an arbitration was induced by a wrong direction as to law given by a court, the appellate Court is not powerless and the court below is not entitled to shelter itself under the award. It is true that the decision of a Division Bench in *Landauerz* v. *Asser*, (1905) 2 K.B. 184=74 L.J.K.B. 659, supports the contention of the learned vakil for the respondents. But that case stands by itself and although there are dicta of a very general character in the English reports, in no case except in the case in *Landauerz* v. *Asser (supra)*, was an award set aside on the ground that the arbitrator had given an erroneous decision on law". See also, *Dwarka, Das* v. *Krishna*, 61 Ind.Cas. 628=2 Lah. 114; *Mohammad* v. *Wilayet*, 113 Ind.Cas. 785=A.I.R. 1929 Oudh 1=5 O.W.N. 101: *Sartaj Fatima* v. *Muhammad*, 129 Ind.Cas. 322=A.I.R. 1931 Oudh 6=7 O.W.N. 1095; *Chhab Lal* v. *Parbati*, 33 Ind.Cas. 737=19 O.C. 48: but see *Jafri Begam* v. *Ali Rēza*, 23 All. 383=28 I.A. 11 (P.C.).

But deliberate disregard of law in matters of arbitration is misconduct. *Nga Tak* v. *Nga Kasim*, 14 Ind.Cas. 978=5 Bur.L.T. 55. So mistake of law on a legal point specifically referred to arbitrators would

not vitiate the award. *Dinabandhu* v. *Chintamani*, 26 Ind.Cas. 697=19 C.W.N. 476.

565. Procedure to be followed by arbitrators.—An arbitrator is ordinarily free from fetters of adjective law, but that does not make him free from the fundamental principles of justice. *Abdul Halim* v. *Ismail Momin*, 3 Pat.L.R. 59=6 P.L.T. 544=88 Ind.Cas. 773=A.I.R. 1925 Pat. 465. The ordinary rule is that the enquiry before the arbitrator is assimilated as near as may be proceedings on a trial in the courts. If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. *Tyebbhai* v. *Abdul Hussain*, 85 Ind.Cas. 424=A.I.R. 1924 Bom. 149. An arbitrator is not entitled to adopt the procedure of a special nature unless all the parties affected by it agree to the adoption of such procedure. To do so is to abrogate his function as an arbitrator, and that would be technical misconduct. *Dital* v. *Dhanraj*, A.I.R. 1925 Sind 287. In *Haigh* v. *Haigh*, (1861) 5 L.T. 507 (508), *Lord Justice Turner* said: "The arbitrator being a judge selected by the parties and chosen to decide without appeal, this court has nothing to do with any mere error in judgment on his part. The parties have chosen him to be their judge, and have agreed to abide by his determination; and by that determination, if fairly and properly made, they must be content to be bound; but on the other hand, arbitrators, like other Judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice; and this court, when called upon to review their proceedings, is bound to see that those rules have been observed." In *Gregson and Armstrong, In re*, (1894) 70 L.T. 106, *Mathew, J.*, observed: "Arbitrators are not valuers; they have judicial functions to perform. Though intending no injustice they must observe the fundamental rules which govern judicial proceedings." See also, *In re Camilla Eitson and Jewson & Sons*, (1896) 40 Sol.Jour. 438, where the court observed: "Whether the arbitration was conducted on the footing that it was a mercantile or a legal arbitration, the first principles of justice must be equally applied in every case."

566. Rules to be followed by arbitrators in deciding cases.—In *Hari Singh* v. *Kankinarah Co., Ltd.*, 66 Ind.Cas. 389=34 C.L.J. 39, *Mookerjee, Actg. C.J.* observed: "Now it may be conceded, as stated *by Lord Halsbury* in *Andrews* v. *Mitchell*, (1905) A.C. 78 at page 80=74 L.J.K.B. 333=91 L.T. 537, that although we must not insist upon a too minute observance of the regularity of forms among persons who naturally, by their education or by their opportunities, cannot be supposed to be very familiar with legal procedure, there are some principles of justice which it is impossible to disregard. Whether the arbitration is concluded on the footing that it is a mercantile or a legal arbitration, the first principles of justice, as *Lord Langdale, M.R.*, put it in *Harvey* v. *Shelton*, (1844) 7 Beav. 455=13 L.J.Ch. 466=64 R.R. 116, must be applied equally in every case. One of these elementary principles is that an arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents, though the rule has sometimes been ignored by mercantile arbitrators, whose awards have on this ground been set aside: *Matson* v. *Trurner*, (1824) R. & M. 17=27 R.R. 725.

Brook, In re, (1864) 38 L.J.C.P. 246=10 Jur.N.S. 704=139 R.R. 547, *Camillo Eitson and Jewson & Sons, In re,* 40 Sol.Jour. 439.

The validity of the proceedings in this case must, consequently, be tested in the light of the well-established doctrine that in arbitration proceedings both sides must be heard, and each in the presence of the other, however immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it, export in the presence of the opponent. This rule was formulated by *Lord Eldon* in *Walker* v. *Forbisher,* (1801) 6 Ves. 70=5 R.R. 223, where he set aside an award on the ground that the evidence had been improperly admitted, and observed that even though the arbitrator swore that the evidence received had had no effect on his award, no court would permit him to decide so delicate a matter as whether a witness examined in the absence of one of the parties had influence on him or not. The same view adopted by *Lord Denman* in *Dobson* v. *Groves,* (1844) 6 Q.B. 637=14 L.J.Q.B. 17=66 R.R. 509, and *Plews and Middleton, In re,* (1845) 6 Q.B. 845. In *Drew* v. *Drew,* 2 Marq. 1=140 R.R. 113, *Lord Cranworth* followed the rule, laying down that an arbitrator misconceives his duty if he, in the minutes respect, takes it upon himself to listen to the evidence behind the back of a party who is interested in controverting it or is entitled to controvert it. *Lord Eldon* and *Lord Cranworth* thus concurred in the view that the principles of universal justice required that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it. It is indeed parties that both should be present when proof is being had by either; the same rule applies to an inspection or an experimental test which are regarded as practical proof. *Paterandson* v. *Corporation of Glassgow,* (1901) 3 F. 34=38 S.C.L.R. 855. It is both unwise and unsafe proceeding for an arbitrator to take proof in the absence of either or both parties. These rules have been adopted and applied in *Cursetji Jehangir* v. *Crowder,* 18 Bom. 299=9 Ind.Dec. 707, and *Ganes Narain Singh* v. *Malida Koer,* 10 Ind.Cas. 450=13 C.L.J. 399. In the present case, the arbitrators decided of their own motion, to adopt a certain method to obtain a fair sample of disputed goods. It is conceivable that they might have adopted some other method equally convenient or efficacious; but this much is clear that they could not arbitrarily depart from the procedure they had invited the parties to follow. Now one of the parties complained that they had been prevented by the other party from making the selection in the manner directed by the arbitrators. The arbitrators did not investigate the matter. Their conclusion that the buyers had rightly exercised the option to select all the ten bales was arrived at *ex parte* without intimation to the sellers that the buyers claimed this right and without opportunity afforded to them to controvert the allegation of the buyers. This plainly affects the validity of the award, because, as pointed out by *Lord Parmoor* in *Amir Begam* v. *Badruddin Husain,* 23 Ind.Cas. 625=19 C.L.J. 494=18 C.W.N. 755=36 All. 336=1 O.L.J. 249=12 A.L.J. 537=17 O.C. 120=16 Bom.L.R. 413=(1914) M.W.N. 472=16 M.L.T. 35=27 M.L.J. 181=1 L.W. 1015 (P.C), if irregularities in procedure are proved which amount to no proper hearing of the matters in dispute, that would be misconduct sufficient to vitiate the award, without any imputation on the honesty and impartiality of the arbitrator." See also, *Badruddin* v. *Amir Begam,* 13 Ind.Cas. 520=14 O.C. 308.

It is the duty of the arbitrators before they proceed *ex parte* to see that the parties had sufficient notice to enable them to appear and put their case before the arbitrators. If a person is guilty of a final irrevocable or collusive refusal to have anything to do with an arbitration the arbitrators need not give notice but might proceed *ex parte*. *Louis Dreyfus* v. *Purusottam Das,* 47 Cal. 29=56 Ind.Cas. 325.

The term "misconduct" as applied to proceedings before arbitrators, covers violation of their duties and responsibilities as expected from them by courts of justice. It does not necessarily imply corruption or any other moral turpitude on their part. There may be ample misconduct in the legal sense sufficient to make the court set aside the award, even when there is no ground for imputing the slightest improper motive to the arbitrator. So an award will be set aside where the arbitrator has improperly refused to grant the necessary adjournments to the parties, or where he has refused to hear evidence within the scope of the reference, so likewise, if he has examined a witness or a party in the absence of his opponent. In the above cases, even in the absence of any corrupt motive in the arbitrator, his acts would amount to such misconduct as to render his award bad in law, and so liable to be set aside by the courts. *Ganga Sahai* v. *Lekhraj,* 9 All. 253. See also, *Sobha Ram* v. *Ram Das,* 66 P.R. 1907=159 P.L.R. 1908=148 P.W.R. 1907; *Sundara Mudali* v. *Ponnusami Mudali,* 13 M.L.J. 275.

567. Corruption implies misconduct.—"Misconduct" does not necessarily imply "corruption" though "corruption" necessarily implies "misconduct". *Kali Charan* v. *Sarat Chunder,* 30 Cal. 397=7 C.W.N. 545. See also, *Ganga Sahai* v. *Lekhraj,* 9 All. 253; *Thammiraju* v. *Bapiraju,* 12 Mad. 113; *Bhogilal* v. *Chimanlal,* A.I.R. 1928 Bom. 49; *Yusuf Khan* v. *Riyasat,* A.I.R. 1926 Oudh. 307=3 O.W.N. 279.

568. –"Misconduct" does not imply fraud.—The word "misconduct" as used with reference to arbitration does not necessarily or at all imply anything in the nature of fraud. *Bhogilal* v. *Chimanlal,* 52 Bom. 116=30 Bom.L.R. 92=I.L.R. 40 Bom. 29=107 Ind.Cas. 707=A.I.R. 1928 Bom. 49.

569. Section 12 of the English Arbitration Act, 1950.—By section 12 of the English Arbitration Act of 1950 (14 Geo. 6, c. 27) elaborate provisions have been made for conduct of proceedings witnessess, etc. (vide *infra*).

570. Arbitrator's procedure should not be opposed to natural justice.— The arbitrator may not be strictly bound by the rules and procedure observed in courts but this does not mean that his procedure should be opposed by natural justice. *Kesholal* v. *Laxman,* A.I.R. 1940 Nag. 386=(1940) N.L.J. 393; *Narsingh* v. *Ajodhya,* 15 C.L.J. 110. In *Municipality of Ahmedabad* v. *Ravjibhai,* A.I.R. 1935 Bom. 127=59 Bom. 268=155 Ind.Cas. 669=37 Bom.L.R. 69, *Murphy, J.,* observed: "The next point we must consider is whether this incident amounts to legal misconduct on his behalf. Mr. Setalvad, for the appellant Municipality, has relied on a series of English cases on arbitration, and the first of these is that of *Harvey* v. *Shelton,* 7 Beav. 455=13 L.J.Ch. 466. What happened in that case was the arbitrator heard one of the parties alone, and becoming satisfied with an explanation which that party gave as to an item in some accounts, accepted it as his own conclusion. The learned Judges in that case held that there had been legal misconduct on the ground that one party alone should not be permitted to satisfy the court and enable it to come to a conclusion and must not be allowed such means of influencing the Judge. The next case relied on is that of *Walker* v.

Probisher, (1801) 6 Ves. Jur. 70. In this case the legal misconduct found was that the arbitrator received some evidence from one party notice to both that he would receive no more, and it was held that he should not have done so, even though he deposed that he had not been influenced by this additional evidence. The third case is that of *Dobson* v. *Groves,* (1844) 6 Q.B. 637=14 L.J.Q.B. 17. The *ratio decidendi* of this case is that once the case is within the general probability that the arbitrator's mind may be biased by something which happened at the proceedings it is within the principle, and objection subsequently made to the award is sufficient. Counsel next referred to *W. Ramsden & Co.* v. *Jacobs,* (1922) 1 K.B. 640=91 L.J.K.B. 432=26 Com.Cas. 287. Here the evidence for each side was heard separately, apparently by agreement between the parties, but the courts held that such a procedure was wrong and contrary to natural justice it being a procedure unknown to courts of law. The fifth case relied on was *Tolsimoney Dassee* v. *Sudevi Dassee,* 3 C.W.N. 361. What happened there was that the defendant had not been given fair notice of the proceedings, award was *ex parte* against him, and the court thought that the arbitrator's conduct had been hasty and improper. Finally, there is the case of *Anderson* v. *Wallace,* (1835) 3 Cl. & F. 26. Here one of the parties was asked whether he admitted or disputed certain items, and a valuer was consulted. These are the cases relied on by Mr. Setalvad for the appellant.

"Mr. Thakor, who appeared for the respondent, has made out of a case of what may be called ministerial acts. His contention was that the incident of calling in the plaintiff and employing him to sort the papers and to find exhibits amounted to no more than using him for the purpose of what may be called ministerial as distinguished from judicial acts, and that this principle covers the case.

"The first authority relied on by Mr. Thakor was *Bignall* v. *Gale,* (1841) 9 Dow. 631=2 Man. G. 830=5 Jur. 701=10 L.J.C.P. 169. The irregularity in that case was lack of notice to one of the parties but it was held that since the person had had repeated notice, there was a fair inference that he had given up the whole business and it was held that the continuation of the proceedings in his absence was not an irregularity. In *Rolland* v. *Cassidy,* (1888) 13 A.C. 770=57 L.J.P.C. 97=59 L.T. 873, a point at law which arose out of the proceedings was decided in the absence of the parties. In *Buta* v. *Municipal Committee of Lahore,* 29 Cal. 854=7 C.W.N. 82 (P.C.), the arbitrator obtained the opinion of the lawyer who had drafted the agreement as to the meaning of certain clauses, and this action was held not to be legal misconduct. The next case relied on which is not in the official reports is *Manindra* v. *Mahananda,* 13 Ind. Cas. 161. It was held that the reception of the written statement put in by one party in the absence of the other is not a judicial act.

"These are the cases we have been referred to in the course of the arguments as to the limits of the doctrine of legal misconduct. The principle underlying them seems to be that where there has been an opportunity afforded to one side to get an advantage with the arbitrator over the other, either by lack of notice, or by the absence of the other side and there is even a remote possibility that the advantage so obtained may have unconsciously influenced the mind of the arbitrator the proceedings are vitiated by a breach of the principles of natural justice, and whether this is so or not must depend on questions of fact."

571. Arbitrators and umpire—duties of.—In *Enoch and Zaretzky, Beck & Co.'s Arbitration, In re,* (1910) 1 K.B. 327=79 L.J.K.B. (367)

Farwell, L.J., observed : "Where a case is referred to two arbitrators and an umpire, I think it is well-understood that the arbitrators act as connsel to try and settle a case without going into court, but the umpire or a single arbitrator occupies a judicial position and exercises judicial powers, to follow legal rules, although as *Lord Halsbury* said in *Andrews* v. *Mitchell,* (1905) A.C. 78 (80)=74 L.J.K.B. 333 (334): 'We must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions. I should be anxious myself, as I have no doubt all your Lordships would, to give every effect to their decisions ; on the other hand, there are some principles of justice which it is impossible to disregard, and giving every credit to the desire on the part of this arbitration court to do justice, I think it is manifest that they proceeded far too hastily in this case, and, apart from imputing to them any prejudice or any desire to do wrong, I think that the mode in which the whole thing arose and was disposed of was so slipshod and irregular that it might lead to injustice.' "

572. Arbitrators taking the position of an advocate of the parties. —In *Roff* v. *British and French Chemical,* (1918) 2 K.B. 677=87 L.J.K.B. 996, *Swinfen Eady M.R.* said : "It is said by counsel for the respondent that arbitrators often take up the position of advocates of the party by whom they were appointed. This court has frequently laid it down that that is not a proper position for an arbitrator to take up." See also, *Gajanand* v. *Phulchand,* (1930) A.L.J. 1373=A.I.R. 1930 All. 675, where *Naimatullah, J.* observed : "They and those who appoint them ought to understand that an arbitrator nominated by one of the parties is not 'his arbitrator' to whose care the party nominating him commits his interest. Once the arbitrator is appointed by a party and undertakes to discharge his duty as such, he becomes a judge in the case and is bound to act impartially and with scrupulous regard to the ends of justice. He should in no sense consider himself to be the advocate of the cause of the party appointing him, nor is such party to be deemed as his client. He should refrain from identifying himself with the interests of such party and from looking forward to future employment as arbitrator, an office, which, it should be mentioned, carries emoluments. This case is a sad commentary on what the arbitrators thought to be their duty. Each did his utmost, in utter disregard of propriety and sense of proportion, try to further the interests of the party nominating him. Mr. Bhim Roy was determined to put off the arbitration till the appellant filed an appeal before the High Court. L. Dina Nath Kapoor, on the other hand, was equally determined to rush the arbitration through and prevent an appeal filed before the arbitration was over. Each succeeded and failed in his efforts..... The learned District Judge .....characterises the conduct of the arbitrator as 'legal misconduct.....sufficient to set aside the award'. While agreeing with the learned District Judge we are not inclined to take as charitable a view of the conduct of arbitrators as he did. It was not merely a misconduct in the legal and technical sense but was grossly improper and inconsistent with their plain duty as arbitrators seriously disposed to settle a dispute referred to them for arbitration". See also *Fetherstone* v. *Cooper,* 9 Ves. 67 ; *Watson* v. *Duke of Northumberland,* 11 Ves. 153, *Calcraft* v. *Roebuck,* 1 Ves.Jur. 226 ; *Maule,* v. *Maule,* 4 Dowl. 363 ; *Oswald* v. *Earl Grey,* 24 L.J.Q.B. 69 (72) ; *Russell,* 13th Edn., p. 378.

573. Rejection of tendered evidence by arbitrator.—In order to make out a case entitling a party to impeach an award on the ground that the arbitrators improperly refused to take the evidence of an important wintess, the witness must be distinctly tendered to the arbitrators. *Maindra* v. *Mohananda,* 13 Ind.Cas. 161=15 C.L.J. 306; *Craven* v. *Craven,* 7 Taunt. 644; *Glaze Brooke* v. *Davis,* 4 L.J. (O.S.) K.B. 321; *In re Marsh,* (1847) 16 L.J.Q.B. 330. The arbitrators are bound to hear all material evidence tendered by the parties. The condition of being tendered is important, because unless specific evidence is tendered and rejected it cannot be made a ground for invalidating an award. *Sarkar* p. 134 citing *In re Marsh* (1847) 16 L.J.Q.B. 330; *Craven* v. *Craven,* (1817) 7 Taunt. 644; *Glaze Brook* v. *Davies,* (1826) 5 B. & C. 534; *Mahindra* v. *Mahananda,* 15 C.L.J. 360. "In order to make out a case entitling the party to impeach the award, the witness must be distincly tendered to the arbitrator. It is not enough to put an abstract proposition to an arbitrator, and upon his answer to decline to give evidence or prefer a claim. The party should tender a specific case and specific evidence." *Russel* on *Arbitration* 15th Edn., p. 156 citing the cases mentioned in *Sarkar Supra* as well as *Tatem Steam Navigation Co.* v. *Anglo-Canadian Shipping Co.* (1935) 53 L.I.R.Rep. 161.

574. Arbitrators as witnesses.—An award given by the arbitrators some of whom gave evidence in the arbitration proceedings, can be upheld if the parties agreed, while entering into the contract to refer to arbitration, that the arbitrators should also be witnesses. *Brojendra Kumar* v. *Purna Chandra,* A.I.R. 1931 Cal. 53=34 C.W.N. 689=129 Ind.Cas. 428=58 Cal. 269. In the above case *Graham J.,* observed: "No authority has been shown to us, at all events in this country, though there are no doubt English authorities to the contrary, in support of the proposition that the examination of an arbitrator as a witness before an arbitration tribunal will invalidate an award. Even in England there have been cases where it has been held that where a tribunal consists of a number of persons, e.g., arbitrators or a jury, one or more of such persons may be examined as a witness or witnesses before the remaining members of the tribunal. The case of a single judge is obviously on a different footing because if examined as a witness, he would then combine wholly in himself the dual functions both of judge and witness. As a matter of fact while we have not, as I have said, been shown any authority to the contrary, there is in this court, authority for the view that there is no impropriety in an arbitrator giving evidence before his colleagues. *Haridas Dutta* v. *Baidynath Ghose,* 40 Ind.Cas. 646. The decision in that case, the facts of which cannot be distinguished from the present case, is binding upon us,.....

But *Mitter J.,* in the same case observed: "The second ground taken is of substance. The position seems to be one of extreme anomaly that the arbitrators would be put in the position of judges and witnesses. In the case of *Bristol Corporation* v. *John Aird & Co.,* (1913) A.C. 241=82 L.J.Q.B. 684=108 L.T. 434=77 J.P. 209=29 T.L.R. 360, *Lord Shaw* said this: 'It is a contradiction of terms to say that the judge can appear as his own witness, be examined and cross-examined and pronounce judgment upon his own memory, credibility or evidence. Such a thing is a traverse of all ideas of judicial *decorum*'.....In the case above cited it is instructive to refer to the following observation of *Lord Atkinson,* page 248: '.....I cannot imagine any position more unpleasant, any position

more undersirable. If the arbitrator be really a witness, then he must in effect be examined before himself and cross-examined before himself and he must decide upon his own veracity or reliability. I think there could be no stronger reason to induce the court not to exercise their discretion to stay the action than that any gentleman who has taken upon himself the duties of arbitrator should be put in such an entirely anomalous position'..... In the case of *Haigh v. G. W. Ry. Co.*, (1896) 1 Q.B. 649, *Wright J.*, pointed out that an arbitrator could not obviously act both as a judge and a witness in the same inquiry. It is argued that where there is one arbitrator who is also witness this rule of law might apply but it has no application where there are more arbitrators than one. This view is no doubt supported by a decision of this court, *Haridas Dutta* v. *Baidyanath Ghosh*, 40 Ind.Cas. 646, the broad statement of law which seems to be opposed to the decisions of the English court which lay down that a judge must not either when acting alone or with others adjudicate on his own testimony; see *Phipson* on *Evidence*, p. 19, and *Taylor* on *Evidence*, *para*, 1379. It seems strange, however, that this objection was not taken specially before the lower court as one of the heads of misconduct as it goes to the very root of the matter and makes the whole proceedings regarding arbitration radically wrong and vicious if the parties did not assent to the course."

575. Whether arbitrators have greater latitude than court.— In *Enoch and Zaretzky Beck & Co.'s Arbitration, In re*, 79 L.J.K.B. 363 = (1910) 1 K.B. 317, *Farwell L.J.* observed: "it is plain that the courts do allow considerable latitude in practice, at any rate in the reception of evidence by umpire: but to say as a general proposition that they are not bound by the rules of evidence, appears to me to be entirely misleading, and likely to produce very great injustice in this arbitration." See also, *Knox* v. *Symmonds*, (1919) 1 Ves.Jur. 369; *Andrew* v. *Mitchell*, (1905) A.C. 78; *Hari Singh* v. *Kankinarah*, 34 C.L.J. 39 = A.I.R. 1921 Cal. 657; *Suppu* v. *Govindra Charyar*, 11 Mad. 85.

576. Arbitrators, how far bound by rules of evidence.—The Indian Evidence Act, is not applicable to proceedings before an arbitrator. In *Howard v. Wilson*, 4 Cal. 231, the question was whether an award is void in law on the ground that the arbitrator used in evidence a letter written by a party's attorney and stated to be without preiudice. An application to confirm the award was refused by the learned Judge of the first instance, upon the ground that the defendant had acted improperly in using the letter. In the Court of Appeal, *Garth C.J.* (*Markby J.*, concurring) in delivering the judgment observed: "Then as regards the letter itself, upon which the learned Judge in the court below has laid so much stress, it is perfectly true that it was a very improper thing for the defendant's attorneys to use a letter in evidence which was written *without prejujdice*, and obviously in the course of negotiation between the attorneys on both sides for an amicable adjustment of the plaintiff's claim. Communications such as these are clearly inadmissible in evidence. They are excluded on the ground of public policy and convenience, and the rule of law which excludes them is as binding upon the arbitrators as upon Courts of Justice, notwithstanding section 1 of the Evidence Act. (See *Taylor* on *Evidence*, 7th Edn., section 795, and the authorities cited therein). One is only surprised that a rule, so well-known amongst professional men, should have been transgressed, in this instance, by the defendant's attorneys.....After all, the utmost that can be said is, that the arbitrator made a mistake in receiving and

using as evidence a document which, according to law, ought not to have been received. It is not suggested that he knew that he was doing wrong, nor does it even appear that the plaintiff's advisers, who were present, objected to the letter being received, upon the ground that it was written *without prejudice*. They objected on a different ground. Under these circumstances, we think there was no sufficient reason to justify the learned Judge in refusing to confirm the award. His decision will therefore, be reversed, and our order will be, that judgement be given in accordance with the award in the usual way." (See also, *per Farwell L.J.* in *Enoch and Zaretzky, in re*, 79 L.J.K.B. 363 (367)=(1910) 1 K.B. 327 ; *Das & Co.* v. *Broach Electric Supply*, 30 Bom.L.R. 90=I.L.R. 40 Bom. 40=108 Ind.Cas. 18=A.I.R. 1928 Bom. 55 ; *In re, M'clean and Marcus*, (1890) 6 I.L.R. 355. So where the arbitrator allows to be given, and acts upon evidence which is absolutely inadmissible and goes to the very root of the question before him the award may be set aside, notwithstanding that the parties may have agreed that they should not be bound by the rules of evidence. *Walford Baker & Sons*, (1915) 84 L.J.K.B. 2221=113 L.T. 180. In the above case *Lush, J.*, observed. "It may be that the rules of evidence which are acted on in these courts may not be strictly enforced in proceedings before a lay arbitrator. It is unnecessary to express an opinion whether that is so or not. But when it appears that an umpire allows to be given, and acts upon, evidence which is absolutely inadmissible, and which goes to the very root of the question before him, this court has ample jurisdiction to set the award aside on the ground of legal misconduct on the part of the umpire."

In *In re Keighley Masterad & Co.*, (1893) 1 Q.B. 405, *Lord Esher M.R.* said: "The parties have agreed to go to an umpire, who is not bound by the strict rules of evidence enforced in a court, and to be bound by his decision ; and in our judgment the court ought not to fetter the arbitrator or the parties by its own rules of evidence, but should consider whether something has been discovered since the award which the arbitrator might think material, and which might alter his decision". This rule is of course contrary to the decision laid down by *Chief Baron Alexander* in *Attorney-General* v. *Davison* 4 Mode. & Y. 160 (166), where he observed: "But I have already understood that arbitrators are bound by the same rules of evidence as the courts of law". See also. *East and West* v. *Krik*, (1887) 12 App.Cas. 738 : *Harvey* v. *Sheltan*, (1844) 7 Beav. 455 ; *In re Enoch*, (1910) 1 K.B. 327, explaining, *In re Keighley*, (1893) 1 Q.B. 405, and *Byran Durant & Co.*, (1893) 1 Q.B. 405. But in India an award of the arbitrators cannot be set aside on the ground that they have not acted in strict compliance with rules of evidence. *Subbu* v. *Govindacharyar*, 11 Mad. 85 (87). See also, *Howard* v. *Wilson*, 4 Cal. 231. The view expressed by *Lord Esher* in *In re Keighley Maxtead & Co.* (*ubi supra*), is scarcely in accord with the decision of the House of Lords in the case of *East & West India Dock* v. *Kirk and Randall*, 12 App.Cas. 738=57 L.J.Q.B. 295.

If in intending to decide rightly, an arbitrator come to a wrong decision as to the competency of a witness, the admissibility of documentary or oral testimony, or the relevancy or the propriety of allowing proof or particular facts, it is now settled law that will not review his decision, or set aside an award for the mistake. *Hagar* v. *Baker*, 14 M. & W. 9 ; *Armstrong* v. *Marshall*, 4 Dowl. 593 ; *Perriman* v. *Steggal*, 9 Bing. 697 : *Wilson* v. *King*, 2 C. & M. 689 ; *Campbell* v. *Turlow*, 1 Price 81. But

an award must be set aside when an arbitrator refuses to hear evidence on a matter referred to arbitration. *Samuel* v. *Cooper,* 2 A. & E. 752; *Brophy* v. *Holmes,* 2 Mol. 1; *Raghubar* v. *Maina Koer,* 12 C.L.R. 564 (566); *Pir Baksh* v. *Nihal,* 58 P.R. 1889; *Manindra* v. *Mohander,* 15 C.L.J. 360. An arbitrator ought not to hear or receive evidence from one side in the absence of the other. If he does so he must give the other side an opportunity to meet his opponent's case. *Cursetji* v. *Crowder,* 18 Bom. 299 (311). See also, *Ganga Sahai* v. *Lakhraj* 9 All. 253; *Abdul Hamid* v. *Muhammad,* 8 Lah. 329=101 Ind.Cas. 153; *Bhaiya* v. *Jugeshwar,* 52 All. 938=128 Ind.Cas. 4; *Muhammad Afzal* v. *Abdul Hamid,* 88 Ind.Cas. 161; *Chintlapudi* v. *Chintalapudi,* 73 Ind. Cas. 470; *Delhi Cloth* v. *Kedari,* 64 Ind.Cas. 363=A.I.R. 1921 Lah. 396; *Ramaswami* v. *Sbbier,* A.I.R. 1926 Mad. 1158=97 Ind.Cas. 428; *Hari Singh Nehal Singh* v. *Kankinarah,* 66 Ind.Cas. 389=34 C.L.J. 39; *Alagappa* v. *Chidambara,* A.I.R. 1931 Mad. 619; *Venkata* v. *Venkata,* A.I.R. 1930 Mad. 646=126 Ind.Cas. 735; *Sitaram* v. *Susil,* 64 Ind.Cas. 706; *Dital* v. *Dhanraj Mal,* A.I.R. 1925 Sind. 287=93 Ind.Cas. 840; *James Finlay* v. *Gurdayal Pathlajraj,* A.I.R. 1924 Sind. 91 (95)=17 S.L.R. 93=76 Ind.Cas. 660; *Ganeshnaram* v. *Malida,* 10 Ind.Cas. 450=13 C.L.J. 399; *Joshi* v. *Joshi,* 33 Ind.Cas. 467; *Sobhasain* v. *Ramdas,* 66 P.R. 1907=159 P.L.R. 1908; *Andrews* v. *Mitchel,* (1905) A.C. 78; *Marston* v. *Tower,* (1824) Ry. & Mo. 17; *In re Camillo Eitzen,* (1896) 40 Cal.J. 438; *In re Brook and Delcomyn,* (1864) 16 C.B.N.S. 403. The taking of evidence of plaintiff in the absence of defendant is misconduct on the part of arbitrators even they are empowered to dispose of the case without taking evidence. *Venkatasubbhaya* v. *Venkataramanayya,* A.I.R. 1930 Mad. 646=126 Ind.Cas. 735. It is the duty of the arbitrator in hearing evidence to act according to the terms of the agreement in pursuance of which the dispute is placed before him. *Krishna* v. *Baidya,* 2 B.L.R.Ap. 25. Where an arbitrator has taken no evidence upon matter referred to for arbitration, and has not allowed a party an opportunity of proving his contention, he is guilty of misconduct. *Deoki* v. *Rajkumar,* (1889) A.W.N. 124; *Ram Chand* v. *Buta Ram,* A.I.R. 1931 Lah. 65=130 Ind.Cas. 833; *Ma Sat Kyi* v. *Maung Tun Gyi* (1897-1901) 2 U.B.R. 4. It is not misconduct to refuse to admit irrelevant evidence or to decline to summon witnesses in the exercise of his discretion. *Louis Dreyfus* v. *Araronal,* 4 Ind.Cas. 1151=3 S.L.R. 164; *Rajendra* v. *Abdul Hakim,* 39 Ind.Cas. 767. An arbitrator is not of course bound by the technical and strict rules of evidence. But he must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy. *Aboobaker* v. *Reception Committee,* 171 Ind.Cas. 470=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410. An arbitrator who does not give any clear notice to the parties to produce their evidence before him and who does not take all the evidence that the parties want to produce, is clearly guilty of misconduct. *Kanhaya* v. *Shew Karan,* 39 P.L.R. 582. An arbitrator is guilty of misconduct when he examine no witness, even though the nature of the dispute is such that it could not be settled without evidence. *Ram Chand* v. *Buta Ram,* 130 Ind.Cas. 833=A.I.R. 1931 Lah. 65. But the conduct of the proceedings depends upon the order of reference, and if in an order of reference there is an implied agreement that further evidence is not to be put forward by the parties and that the parties have sufficiently and completely stated their case, the award cannot be invalid because the arbitrators did not give notice that they were prepared to receive evidence. *Venkata Reddi* v.

Krishna Reddi, A.I.R. 1927 Mad. 1010 ; *Sanyasi* v. *Venkata,* 73 Ind.Cas. 470=44 M.L.J. 263=32 M.L.T. (H.C.) 32=(1923) M.W.N. 7=17 L.W. 71=73 Ind.Cas. 470=A.I.R. 1923 Mad. 301.

If once it is proved that evidence has been improperly admitted, the question whether such evidence had or had not an effect on the arbitrator's mind is immaterial and the award cannot be supported. *Sanyasi* v. *Venkata* (*supra*). See also, *Dobson* v. *Groves,* (1844) 4 Q.B. 637=66 R.R. 509 ; *Walker* v. *Forbisher,* 6 Ves. 70=5 R.R. 223.

577. Arbitration proceeding—procedure—rules applicable.—It is clear law that mercantile usages in the conduct of references cannot be supported if contrary to the principles of natural justice, however well-established the usage or practice may be. *Fazalally* v. *Khimji,* 36 Bom. L.R. 1005=A.I.R. 1934 Bom. 476. See also, *In re Brook and Delcomyn,* (1864) 16 C.B. (N.S.) 403, where *Earle C.J.,* at page 414 observed : "I have always a great desire to give effect to mercantile customs, and to the awards of mercantile arbitrators, unless they infringe upon principles of wider importance". Though arbitrators are not bound by technical rules of evidence and procedure. The presence of all arbitrators at all meetings is essential to the validity of the award and the non-participation of any of them in the deliberation of the others renders the award a nullity and the omission of all the arbitrators to act together amounts to misconduct. There is no presumption from the mere fact that an uneven number of arbitrators are appointed that the parties contract that a mapority award shall be binding. *Hayath Sub* v. *Mahomed Sadik,* 11 Mys. L.J. 300=39 Mys. H.C.R. 51.

Where there are several arbitrators, all must act together and each must act in the making of the award. Every stage of the proceedings must be in the presence of all, and every judicial act, to be done by two or more, must be completed in the presence of all who do it. *Fazalally* v. *Khimji,* A.I.R. 1934 Bom. 476=36 Bom.L.R. 1005. See also, *Morgan* v. *Boult,* 11 W.R. (Eng) 265=7 L.T. 671 ; *Re Plews and Middleton,* (1845) 6 Q.B. 845 ; *Lord* v. *Lord,* 5 El. & Bl. 404=26 L.J.Q.B. 34.

578. Arbitrator using personal knowledge.—In *Chidambaram Chettiar* v. *Ayyappa Chettiar,* A.I.R. 1935 Mad. 152=155 Ind.Cas. 1095=(1935) M.W.N. 572=41 L.W. 104=69 M.L.J. 558, the court observed : "There is no doubt that if the arbitrators used knowledge or information derived from other sources than those, if they failed to communicate to the parties what they so knew and if the party making objection was prejudiced, the award would be invalidated. These principles must of course be applied within reason. The three arbitrators were of the same village and community as the parties and must necessarily have been well acquainted not only with Nattukottai Chetty customs and procedure, but also with the family circumstances and antecedent of the two brothers. They could not have been expected to bring to the enquiry minds as devoid of particular information as is required of a court. We agree in the view taken by a Bench of the Bombay High Court, based, as it is on English authorities, that where an arbitrator has been selected because of his personal knowledge of the matter in dispute, it would not be misconduct on his part to use his personal knowledge in coming to a certain decision although in such cases it is desirable that he should tell the parties what his personal knowledge is and give an opportunity to them to adduce evidence sufficient to vary his views. (See *Daulat Singh* v. *Ratan Anand Singh,* A.I.R. 1926 Bom. 527=97 Ind.Cas. 673). In *Muhammad Nawaz Khan* v. *Alam Khan,* 18 Cal. 414=18 I.A. 73 (P.C.),

the Privy Council referred to the fact that the arbitrator was selected by reason of his knowledge of the circumstances of the family, so that a decision based upon that knowledge would not amount to misconduct".

In *Daulat Singh* v. *Ratna Anand Singh,* A.I.R. 1926 Bom. 527 (529)= 96 Ind.Cas 673, *Martin J.,* said: "The main argument addressed to us is that the arbitrator had no right to use his personal knowledge of the Raul family and of these other Raul *Inams* in Khandesh, and that he could only make his award on the evidence actually before him. It was said that an arbitrator is in exactly the same position as a Judge, and that he can no more act on his own knowledge than a Judge can. We were referred, in support of this proposition, to a passage in *Russell* on *Arbitration,* 11th Edn., at page 394, where it is said, Arbitrators are bound by the same rules of evidence as the courts of law and reference was made to *In re Enoch and Zartzky, Beck & Co.,* (1910) 1 K.B. 327=79 L.J.K.B. 303=101 L.T. 801, a decision of the Court of Appeal in England, where the head-note runs :—'Arbitrators are bound to observe the rules of evidence no less than Judges.' But that rule, like other rules, must be taken subject to certain recognised exceptions. For instance, there is a further passage in *Russell* at page 397, which illustrates what I mean. It runs : 'Where a submission recited that the arbitrators had been appointed on account of his skill and knowledge of the subject, and one of the parties brought before him a statement of certain facts which he alleged to be material, and offered to support it by proof, the House of Lords held that the arbitrator was justified in refusing to receive it, if taking all the matters alleged to be facts into consideration, with his own local knowledge to guide him, and all the circumstances in his view, he felt that such facts would have no effect upon his determination' : *Johnston* v. *Cheape,* (1817) 5 Dow. 247.

"Similarly, there is a reference to the judgment of *Lord Cranworth* where certain surveyors were appointed to settle the amount of rent and other terms of a lease of a coal-mine *Lord Cranworth* said : 'I do not agree in the suggestion that it was incumbent on the arbitrators to examine witnesses. I do not think that is the meaning, when a matter is referred to surveyors and people of skill to settle what the value of the property to be bought or let is. Necessarily they are entrusted, for their experience and their observation, to form a judgment which the parties referring to them agree shall be satisfactory. Therefore, I do not think there was anything of importance in their not examining witnesses, provided, *bonafide,* they meant to say: "We know sufficient of the subject to decide properly without examining witnesses".' *Eads* v. *Williams,* (1854) 24 L.J.Ch. 531=4 De G.M. & G. 674=1 Jur.N.S. 193 ; *See also Bottomely* v. *Amblar,* 38 L.T. 544 ; *Ruttonsey* v. *Rombay United,* 37 Ind.Cas. 271=18 Bom.L.R. 532=41 Bom. 518.

"Then reference is made to *Wright* v. *Howson,* (1888) 4 T.L.R. 386, where an arbitrator experienced in cloth was held justified in deciding a dispute as to quality upon inspection of samples only. And, indeed, every-day practice tells us that in many important commercial matters, such as in the sale of goods by sample, the whole benefit of referring a dispute to expert arbitrators would be almost nullified, if it was essential for them to decide the case solely by witnesses called on the one side or the other as to the comparison between the goods tendered and the sample".

Whether arbitrators could import their own personal knowledge into the consideration of the case before them would depend upon the terms

of the submission to arbitration. If the submission simply asks the arbitrators to decide a case that would not give them a right to import their own personal knowledge into the consideration of the case. But where the submission to arbitration gives them an option either to take evidence or to decide the case upon their own personal knowledge they would be entitled to import into the consideration of the case their own personal knowledge. *Palavesam Chettiar* v. *Narayana Aiyar,* (1925) M.W.N. 503=88 Ind.Cas. 660=A.I.R. 1925 Mad. 1086=49 M.L.J. 115. So it is clear that an arbitrator is not entitled to examine witnesses in the absence of parties or institute private enquiries behind their back and an award based on such information or knowledge is invalid, unless a power is expressly vested in the arbitrator by agreement of parties, where they are *sui juris. Sanyasi* v. *Venkata,* 73 Ind.Cas. 470=44 M.L.J. 263=32 M.L.T. 32=(1923) M.W.N. 7=17 L.W. 71=A.I.R. 1923 Mad. 301; *In re Gregson and Armstrong,* (1894) 70 L.T. 106; *Harvey* v. *Shelton,* 7 Beav. 455=13 L.J.Ch. 406; *Dobson* v. *Groves,* 6 Q.B. 637; *Daya Kishen* v. *Dharmdas,* 4 A.L.J. 159=(1907) A.W.N. 75; *Lachminarain* v. *Sheo Nath,* 54 Ind.Cas. 443=42 All. 185=18 A.L.J. 78; *Ganesh Narain* v. *Malida,* 10 Ind.Cas. 450=13 C.L.J. 399; *Harisingh* v. *Kankinarah Co.,* 66 Ind.Cas. 389=34 C.L.J. 39; *Tyebbhai* v. *Abdul,* 25 Bom. L.R. 392; *Sheo Paltan* v. *Sukhedeo,* 26 O.C. 107=74 Ind.Cas. 401=A.I.R. 1923 Oudh 235; *Haji Husain Baksh* v. *Firm of Lachman Das,* L.R. 3 All. 106=64 Ind.Cas. 934; *Ganga Sahai* v. *Beldeo Singh,* 20 A.L.J. 117=L.R. 3 All. 104=A.I.R. 1922 All. 64=65 Ind.Cas. 778; *Budh Ram* v. *Chandu,* 67 Ind.Cas. 866; *Sia Ram* v. *Chet Ram,* L.R. 3 All. 84; *Bari Sahu* v. *Protap Singh,* 57 Ind.Cas. 604; *Venkatasubbiar* v. *Ramiah,* A.I.R. 1935 Mad. 184=41 M.L.W. 51=(1935) M.W.N. 263=155 Ind.Cas. 381; *Ramlal* v. *Mahadeo,* 89 Ind.Cas. 832=A.I.R. 1925 Oudh 741; *Ramchand* v. *Gurdas,* 53 Ind.Cas. 337=13 S.L.R. 75. Where the question is one relating to the market rate on a particular date, *prima facie* it is not necessary for the arbitrators to hear oral evidence as market rates are as a rule, well within their knowledge and within the special experience for which arbitrators are selected. *Bhican* v. *Tagot,* A.I.R. 1927 Cal. 227. See also, *O. S. Wald* v. *Early Grey,* (1855) 24 L.J.Q.B. 69.

579. Arbitration before Bengal Chamber of Commerce.—In *Bhican Chand Charorla* v. *Fogt,* A.I.R. 1927 Cal. 227=44 C.L.J. 422=100 Ind.Cas. 299, the question was one relating market rate on a particular date and the arbitrators decided the case on their personal knowledge. In upholding the decision of the arbitrators on appeal, *C. C. Ghose J.,* said : "In these circumstances the learned Judge had to consider whether having regard to the rules of the Bengal Chamber of Commerce, it was incumbent upon the Tribunal for Arbitration of the Bengal Chamber of Commerce to give the appellants an opportunity of adducing oral evidence". In the same case *Rankin C.J.,* observed : "'It appears to me that the nature of the arbitration before the Bengal Chamber of Commerce is such that one is quite safe in saying that *prima facie* it is not necessary for the arbitrators to hear oral evidence about market rates which are as a rule well within their own knowledge and within the special experience for which the arbitrators are selected". See also *Chaitram* v. *Bridichand,* 42 Cal. 1140=19 C.W.N. 820.

580. Rules of the Bengal Chamber of Commerce.—Rules nos. XIII and XIV of the Bengal Chamber of Commerce are as follows :— Rule XIII: "Unless oral evidence beyond mere proof of documents of which the factum is not disputed is taken, it shall not be necessary to have a

formal hearing of reference before the court (Arbitration Court), but in all cases the Court shall have power to appoint a time and place for the hearing of references when it considers a hearing to be necessary."

Rule XIV.—"No party to a reference shall without express permission of the Court, be entitled to appear by counsel, Attorney or other Advocate or Adviser, before the Court but the Court at its discretion may, through the Registrar, require the parties, with or without witnesses, to attend before it or before any Committee or Sub-Committee of the Chamber to be examined on or without oath or solemn affirmation."

581. Arbitrator agreeing to be bound by the opinion of third party.—In *Sheokaran* v. *Kanhaya,* 152 Ind.Cas. 1023=37 P.L.R. 18=A.I.R. 1935 Lah. 113, *Abdul Rashid J.,* observed : "It is well-established that an arbitrator cannot abdicate his functions in favour of a third party. If the parties desired the arbitrator to take he opinion of he members of the *panchayat* of Dighal he could do so, but he acted illegaliy when he undertook to be bound by the decision ot the *panchayat,* and give his award in accordance with the wishes of the *panchayat*". Where it appears from the award that the arbitrator in arriving at the decision was influenced by secret inquiry about the case made by him after recording the evidence and by the opinion of the third persons about the merit of the case, his conduct amounts to judicial misconduct and vitiates the award. *Ram Chandar* v. *Hans Ram,* A.I.R. 1931 Lah. 111=131 Ind.Cas. 220.

582. Equiry behind the back of parties.—Apart from an agreement to allow the arbitrators to do so, private enquiries behind the back of the parties are against the ordinary rules of justice. *Ganga Bhagat* v. *Sokhi Ram,* 152 Ind.Cas. 309=15 Pat.L.T. 693=A.I.R. 1934 Pat. 550. See also, *Ram Chander* v. *Hans Ram,* A.I.R. 1931 Lah. 111=131 Ind.Cas. 220; *Ganga Sahai* v. *Lakhraj,* 9 All. 253 (265); *Badri* v. *Lakshya,* A.I.R. 1936 Nag. 291; *Sanyasi* v. *Venkata,* 73 Ind.Cas. 470=47 Mad. 30; *Daya Kissen* v *Dharmdas,* 4 A.L.J. 150; *Cursetji* v. *Crowder,* 18 Bom. 299: *Hari Singh* v. *Kankinarah,* 66 Ind.Cas. 389; *Kanhaiya Lal* v. *Khairati Lal,* 49 Ind.Cas. 303=9 P.W.R. 1919; *Haji Ahmad* v. *Essaji,* 17 Ind. Cas. 696=14 Bom.L.R. 1007; *Abdul Halim* v. *Ismail Mian,* 86 Ind.Cas. 773=A.I.R. 1925 Pat. 465. "Except in a few cases, where exceptions are unavoidable, both sides must be heard, and each in the presence of the other". *Per Lord Langdale M.R. in Harvey* v. *Shelton,* (1864) 7 Beav. 155 See also, *Oswald* v. *Earl Grey,* (1855) 24 L.J.Q.B. 69; *In re Camillo Eitzen and Jewson & Sons,* (1896) 40 Sol.J. 438. Unless expressly authorised to do so, an arbitrator cannot be allowed to make private enquiries and allow himself to be influenced by evidence which either party had no opportunity to check or meet. *Bhaya Raj* v. *Jageshar,* 128 Ind.Cas. 4=(1930) A.L.J. 944; *Sheik Mohidin* v. *Ramaswami,* 65 Ind.Cas. 676; *Neba Ram* v. *Khota Ram,* 110 Ind.Cas. 833=A.I.R. 1928 Lah. 550. But the mere fact the arbitrators questioned the parties as to their respective case would not amount to misconduct so as to vitiate an award unless the parties were denied the opportunity of meeting the representation made by the other side. *Ramaswami* v. *Subbier,* 24 L.W. 482=97 Ind.Cas. 478=A.I.R. 1926 Mad. 1158. The fact that the arbitrators persue the relevant papers in the absence of parties does not amount to misconduct. *James Finlay* v. *Gurdyal,* 76 Ind.Cas. 660=A.I.R. 1924 Sind 91. It is misconduct on the part of the arbitrators to make secret enquiries. *Babu Ram* v. *Behari Singh,* L.R. 5 All. 367; *Harvey* v. *Shelton,* 7 Beav. 455; *Ganesh* v. *Malida,* 13 C.L.J. 399. But an award is not vitiated by material irregularity by reason of the facts that one of the arbitrators used know-

ledge obtained by him privately provided he communicated that knowledge to the other arbitrators in the presence of the parties. *Sheik Mohidin* v. *Ramaswami,* 41 M.L.J. 276=(1921) M.W.N. 509=14 L.W. 394. See also, *Black* v. *John Williams & Co.,* (1924 S.C. (H.L.) 22

583. Outside legal advice taken by arbitrators and umpire.— An arbitrator is guilty of misconduct if he has taken independent legal opinion on the question to be decided. *R. A. Arunachala Iyah* v. *Louis Dreyfus,* A.I.R. 1928 Mad. 107=27 L.W. 267=(1928 M.W.N. 132=107 Ind.Cas. 793. In this case *Ramesam J.,* said : "The next item of misconduct relied on is that the arbitrator has taken independent legal opinion .....The appellant's counsel relied on *Russell* on *Arbitration,* 10th Edn., p. 404. It is there pointed out that a lawyer arbitrator may discuss a question of law with a legal friend, but in the case of a layman, advice should not be obtained in the absence of the parties unless both parties agree that the arbitrator should so inform their mind. The respondents' counsel relied on several English cases which it is unnecesasry to refer to at length. His contention is that unless the arbitrator substitutes the opinion of another for his own, consulting another does not amount to a misconduct ; for example, see *Ellison* v. *Bray,* (1864) 9 L.T. 730. But on the other hand, *Lord Denman C.J.,* in *Dobson* v. *Groves,* 115 E.R. 239=6 Q.B. 637=9 Jur. 86=14 L.J.Q.B. 17, observes at p. 243 of E.R.: 'The proceeding is quite different from that of consulting a legal friend on the framing of the award ; that is legitimate ; but here the conference is on something to be done by the consulting party, as arbitrator, on the matters referred ; it turns upon a point in the cause on which a bias may be given to his mind without the possibility of its being removed.' At page 244 he again observes: 'When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biased, there is a sufficient objection.'

"The same view was taken by *Sir John Edge* in *Dava Kishen* v. *Dharam Das,* A.L.J. 159=(1907) A.W.N. 75. Relying on these cases, I hold that there has been legal misconduct on the part of the umpire in taking independent opinion on the question whether the agreement of 3rd November was a concluded agreement or whether it superseded the earlier agreement so far as Arunachala Ivah is concerned. On this ground also I would set aside the award" *Cornish J.,* observed: "On the second ground, I think, it must be held, on the authority of *Dobson* v. *Groves,* (1844) 6 Q.B. 637=9 Jur. 86, that the umpire was guilty of legal misconduct in taking 'an independent legal opinion.' without the knowledge of the parties."

On appeal to the Privy Council in *Louis Drefus & Co.* v. *Arunachala Iyah,* 134 Ind.Cas. 1080=(1931) A.L.J. 1116=54 C.L.J. 372=33 Bom.L.R. 1536=34 L.W. 676=35 C.W.N. 1287=8 O.W.N. 1066=A.I.R. 1931 P.C. 289=61 M.L.J. 623 (P.C.), *Lord Tomlin* said: "The precise length to which an arbitrator may go in seeking outside advice upon matters of law may be difficult to prescribe in general terms. It is less difficult in a particular case to determine whether or not an arbitrator has gone further than is justifiable. Here unless the language of the award is itself sufficient to fix the umpire with misconduct, the charge against him must fail. In their Lordships' judgment, the language of the award does not more than indicate that the umpire took advice upon the general rules of law bearing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead exercising his own judgment thereon. The case against the

umpire in this respect is not, in their Lordships' view, strengthened because the umpire in the exercise of his discretion refused to state a special case. Their Lordships are, therefore, of opinion that the award is good and ought to stand."

In *Threfall* v. *Fanshaw*, (1850) 19 L.J.Q.B. 334 (336), *Coleridge, J.* said: "But where parties appoint a lay arbitrator, if the reference is to be brought to a safe conclusion, it is almost of necessity that he should have professional assistance in the conduct of it and in framing the award; and as the defendant was present at the hearing by one who represented him, I must take him to have assented to what was reasonable and so much to his own interest; and if so, he cannot object to that item swelling the amount which he has in this instance to pay."

584. Reference empowering arbitrator to dispose of case with or without enquiry—whether he can take one party's evidence in the absence of the other party.—Even where under the reference the arbitrator was empowered to dispose of the case either with or without enquiry, he is not entitled to receive evidence given by the plaintiff in the absence of the defendants. *Venkata Subbayya* v. *Bhamidipati Venkataramanayya*, A.I.R. 1930 Mad. 646=126 Ind.Cas. 735. In the above case the court observed: "But another point was also argued by the learned advocate for the petitioners, viz., that the award is vitiated by the misconduct of the arbitrator inasmuch as he received the evidence given by the plaintiff in the absence of the defendants. In support of this argument various decisions of English courts were brought to my notice, viz., *Dobson and John Sullon* v. *Groves*, (1844) 115 E.R. 239, *Harvey* v. *Shelton*, (1844) 49 E.R. 1141, *and Walker* v. *Frobisher*, (1801) 31 E.R. 943. These decisions support the petitioner's contention and are referred to in *Sanyasi Rao* v. *Venkata Rao*, A.I.R. 1923 Mad. 301=47 Mad. 30, where the point is dealt with elaborately. It should be held on the authority of these decisions that the arbitrator in this case did not conduct himself properly if the facts alleged against him by the petitioners are true. His conduct was apparently sought to be justified in the lower court on the ground that under the reference the arbitrator may dispose of the case with or without enquiry. This provision no doubt, gives power to the arbitrator to dispose of the matter without holding any inquiry at all. But it does not give him any power if he decides to hold an enquiry to take the evidence given by one party in the absence of the other party."

In *Ganga Sahai* v. *Baldeo Singh*, 65 Ind.Cas. 779=20 A.L.J. 117= A.I.R. 1922 All. 64, *Piggott, J.*, observed: "The misconduct attributed to the arbitrator is that he had made 'private enquiries' behind the back of the parties. There is authority of this court for the proposition that the making of such enquiries, where the arbitrator is not empowered to do so by the terms of the reference, amounts to legal 'misconduct' on his part. The whole controversy of this case is whther the arbitrator was or was not empowered to act as he did. For the applicants it is contended that the parties had agreed that the arbitrator might decide the case on his personal knowledge of the facts and that this necessarily implies a right to supplement his knowledge in respect of any relevant circumstances by any kind of enquiries which he might see fit to make. To this it is replied that, while the parties were quite willing that the arbitrator should make use of such knowledge of the facts as he possessed on the date of the agreement of reference, they never agreed that he might supplement his knowledge by listening to *ex parte* statements

behind the back of either or both of the parties to the reference. The learned Subordinate Judge has applied his mind to this point and has held that the terms of the agreement did not empower the arbitrator to act as he did. I am not sure that I should have arrived at this conclusion if I had been called upon to decide the matter in his place; but the point is at least an arguable one, and the most that could be said in support of the case for the applicants, even if the matter were before us as an appeal on a point of law, would be that the court below had misinterpreted the terms of the agreement of reference." But see *Hussain Baksh* v. *Lachmandas,* A.I.R. 1922 All. 69=20 A.L.J. 125=64 Ind.Cas. 934; *Neba Ram* v. *Khotaram,* A.I.R. 1928 Lah. 550=110 Ind. Cas. 833.

585. Enquiry in absence of parties.—Where an arbitrator makes enquiries behind the back of the parties that is misconduct. *Badrilal* v. *Lakshya,* A.I.R. 1936 Nag. 291=168 Ind.Cas. 100; *Ram Chandar* v. *Hans Ram,* A.I.R. 1931 Lah. 111=131 Ind.Cas. 220. In the first-named case the court observed: "The evidence of one of the arbitrators shows that he made private enquiries, and the award itself shows that they made secret enquiries. There is ample authority for the view that, if arbitrator made enquiries behind the back of the parties, that is misconduct." *Abdul Hamid* v. *Muhammad Afzal,* A.I.R. 1927 Lah. 425= 101 Ind.Cas. 153=8 Lah. 329=9 L.L.J. 218=28 P.L.R. 425; *Raj Kishore Lal* v. *Jogeshar Dayal,* A.I.R. 1931 All. 276=128 Ind.Cas. 4=(1930) A.L.J. 944=52 All. 938; *Oulad Hussain* v. *Asmad Khan,* (1936) A.M.L.J. 55 *Abdulla* v. *Bahram,* 155 Ind.Cas. 1022=A.I.R. 1935 Pesh. 69. In *U. Pyyinnya* v. *Ottama,* 13 Rang. 648=158 Ind.Cas. 865=A.I.R. 1935 Rang. 376 (F.B.), *Page, C.J.* observed: "To decide a case, as the arbitrators did, without giving the appellants an opportunity of being present or of presenting their defence before the tribunal, was not only contrary to the rules laid down in the *vinaya,* but was manifestly a violation of natural justice that wholly vitiated the award that was made; *Cape Town (Bishop)* v. *Long,* 1 Moore.P.C. (N.S.) 411=9 Jur.N.S. 805; *Leeson* v. *General Council of Medical Education,* (1890) 43 Ch.D. 366=59 L.J.Ch. 233=61 L.T. 849; *Maclean* v. *Workers' Union,* (1929) 1 Ch. 602=98 L.J.Ch. 293=45 T.L.R. 256=141 L.T. 83; *Stuart* v. *Haughley Parochial Church Council,* (1935) 1 Ch. 452."

In *Allagappa* v. *Chidambaram,* 133 Ind.Cas. 522=34 L.W. 507= (1931) M.W.N. 451=A.I.R. 1931 Mad. 619. *Curgenven, J.* said: "It is then said that the arbitrators examined each party in the absence of the other and examined the witness cited by the plaintiff in the absence of the defendant.....These methods of proceeding were admittedly irregular, so that it is unnecessary to adduce authority in support of the contention. It may only be noted that, as has been held in *Dobson* v. *Groves,* (1844) 6 Q.B. 637=14 L.J.Q.B. 17=19 Jur. 86, the court will in such circumstances set aside the award without taking into consideration the nature of the statements made or the probability of their having influenced the decision. In other words, it is not necessary to prove prejudice. There is no doubt too, however, that irregularities of this description, and indeed of any description, may be cured by waiver." See also, *Mills v. Bawyers,* 3 K. & J. 66; *Dayaram* v. *Naraindas,* A.I.R. 1929 Sind 200=119 Ind.Cas. 529. The holding of confidential enquiries behind the back of either party has been consistently condemned as misconduct in the legal sense. *Abdul Halim* v. *Ismail Momin,* 3 Pat. L.R. 59=6 P.L.T. 544=86 Ind.Cas. 773=A.I.R. 1925 Pat. 465. An

arbitrator must not take evidence behind the back of the parties unless the terms of the reference to him construed in the light of the circumstances of the case, give him authority to do so. *Chandrika Dutt* v. *Shyam Lal,* 29 O.C. 253=3 O.W.N. 397=94 Ind.Cas. 162=A.I.R. 1926 Oudh 383 [construing and referring 4 A.L.J. 159, 20 A.L.J. 125, and A.I.R. 1922 All. 69]. See also, *Baijnath* v. *Bajranglal,* A.I.R. 1938 Cal. 166=I.L.R. (1937) 2 Cal. 509=178 Ind.Cas. 816. But simply because the arbitrator asks a person certain questions relating to the accounts in the absence of the parties, it cannot be said that he misconducted himself. *Kanhaiya Lal* v. *Shoalel,* 152 Ind.Cas. 838=A.I.R. 1935 Pat 16; But see *Ramchand* v. *Butaram,* A.I.R. 1931 Lah. 65=130 Ind.Cas. 833.

586. Recent Supreme Court case.—In *Vengamma,* v. *Vengamma* A.I.R. 1953 S.C. 21, all the parties filed a petition under S. 21 agreeing to appoint K as sole arbitrator for settling the disputes in the suit and to abide by his decision. The petition did not give any special powers to the arbitrator. The plaint, the written statement and the other records were agreed to be sent to him for his decision and the arbitrator was directed to make his award after persuing the plaint and the written statement which were given to him by the court along with the order. The arbitrator examined the defendant in the absence of the plaintiff and also persued the will without giving an opportunity to the plaintiff to have her say in the matter. The statement which was obtained from the defendant contained several statement of fact, which did not find in the written statement. In holding that the arbitrator is guilty of legal misconduct, the court observed : "There is thus no doubt that the arbitrator heard the defendant 1 in the absence of the plaintiff. No notice of this hearing was given by the arbitrator to the plaintiff nor had she an opportunity of having the evidence of the defendant 1 taken in her presence so that she could suggest cross-examination or herself cross-examine the defendant 1 and also be able to find evidence, if she could, that would meet and answer the evidence given by the defendant 1.

"As was observed by *Lord Longadale, M.P.* in *Harvey* v. *Shelton,* 7 Beav. at page 462=13 L.J.Ch. 466=64 R.R. 116 : 'It is so ordinary a principle in the administration of justice, that no party to a cause can be allowed to use any means whatever to influence the mind of the judge, which means are not known to and capable of being met and resisted by the other party', that it is impossible, for a moment, not to see, that this was an extremely indiscreet mode of proceeding, to say the very best of it. It is contrary to every principle, to allow of such a thing, and I wholly deny the difference, which is alleged to exist between mercantile arbitration and legal arbitration. The first principles of justice must be equally applied in every case. Except in the few cases where exceptions are unavoidable, both parties must be heard and each in the presence of the other. In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly constituted courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decision of the Judge, which means are not known to the other side.

"This case of *Harvey* v. *Shelton* is the leading case on this point and it has been followed not only in England but in India (See *Ganesh Narayan Singh* v. *Malida Koer,* 13 C.L.J. 399 at pp. 401, 402). She had also no opportunity to have her say in the matter of the settlement of 1-5-1927. The course of proceedings adopted by the arbitrator was

contrary to the principles of natural justice.....We must hold without meaning the least reflection on the arbitrator, that he was guilty of *legal misconduct* and that was sufficient to vitiate the award."

Then the learned Judge continued : "*Shri S. P. Sinha,* however, urged before me that no prejudice was caused to the plaintiff by the reason of the arbitrator having obtained the statement Ex. No. 5 from defendant I and that therefore the arbitrator was not guilty of any misconduct. The contention is unsound. The arbitrator may be a most respectable man but even so, his conduct cannot be reconciled to the general principles. (A Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind). The award may have done perfect justice, but upon general principles it cannot be supported. (See *Lord Eldon, Lord Chancellor* in 6 Ves. para. 70 at p. 79).

"To the same effect are the observations of *Lord Justice Knight Bruce* in *Haigh* v. *Haigh,* [31 L.J.Ch. (N.S.) 420 at p. 423] : 'It is true that he states in his affidavit that he did not allow those explanations to influence him in his report upon the accounts, and I have no doubt he honestly intended to be the case, but it is impossible to gauge the influence which such statements have upon the mind.' "

587. Reference to three arbitrators but enquiry by two.—Where the parties agreed that the case should be decided by three arbitrators, but enquiry was made and the award given by two arbitrators alone, and where the parties never agreed to accept the decision of two arbitrators alone, that the action of the two arbitrators in proceeding alone in such a way was undoubtedly misconduct. *Badrilal* v. *Lakshya,* A.I.R. 1936 Nag. 291. In the above case the court observed : "The parties agreed that the case should be decided by three arbitrators and the opinion of the majority should prevail. The enquiry was made by two arbitrators only and the award was by these two arbitrators alone. The parties never agreed to accept the decision of two arbitrators alone, and in my opinion the action of the two arbitrators in proceeding alone in this way was undoubtedly misconduct. In support of this view I may cite the decisions in *Nand Ram* v. *Fakir Chand,* 7 All. 523=(1885) A.W.N. 139. *Thamiraju* v. *Bapiraju,* 12 Mad. 113, and *Ma Sin* v. *Ma Pu,* A.I.R. Rang. 136=121 Ind.Cas. 801=7 Rang. 713. In *Mahmud Sheikh* v. *Kankinarah Co., Ltd.,* A.I.R. 1924 Cal. 665=81 Ind.Cas. 574=28 C.W.N. 634, another arbitrator was co-opted with the consent of the parties in place of the arbitrator who refused to work and that case is not in point" ; see also *United Kingdom* v. *Huston,* (1896) 1 Q.B. 567=65 L.J.K.B. 484 ; *Morgan* v. *Boult,* 7 L.T. 671.

588. Duty of all aribtrators to act.—On a reference to several arbitrators together, when there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were sole arbitrator ; for as the office is joint, if one refuse or omit to act, the others can make no valid award. *Russell* 15th Edn., p. 124 citing *Little* v. *Newton,* 2 M. & G. 351 =10 L.J.C.P. 88. *Stalworth* v. *Inns,* 13 M. & W. 466=14 L.J.Ex. 81 ; see also *Manindra* v. *Mohananda,* 15 C.L.J. 360=13 Ind.Cas. 161 ; *Re Lord & Lord* (1855) 5 E. & B. 404 ; *Nand Ram* v. *Fakir,* 7 All. 523=1885 A.W.N. 139 ; *Babua* v. *Badri,* 49 Ind.Cas. 522 ; *Mamidi* v. *Vedham,* (1918) M.W.N. 477=47 Ind.Cas. 597 ; *Alru* v. *Golam,* 22 C.W.N. 301=40 Ind.Cas. 422 ; *Ma Sin* v. *Ma Pu,* A.I.R. 1930 Rang. 136=7 Rang. 715.

589. Arbitrator should disclose his relationship with one of the

parties.—In *Madhomal Kishore Chand* v. *Gurdial Radha Kissen*, 53 Ind. Cas. 1007, *Sir Shadi Lal, C.J., observed* : "It is a well-established rule of law that there should be the greatest good faith on the part of all the parties concerned in relation to the selection and appointment of the arbitrator, and every disclosure which might in the least affect the minds of those, who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. *Kali Prosanna Ghose* v. *Rajani Kanta Chatterjee*, 25 Cal. 141." Omission of an arbitrator to disclose the fact that he has been consulted, engaged or retained by the defendants-respondents, previous to the arbitration, is such a misconduct as to vitiate the award. *Maung Lu Gyi* v. *Maung Lu Ngwe*, (1897-1901) U.B.R. Vol. 11, 13.

590. Fraudulent concealment of fact as regards monetary transaction whether amounts to misconduct.—The failure of a party to an agreement which provides for a reference to arbitration to disclose to the opposite party his relationship and monetary dealings with the arbitrator, amounts to a fraudulent concealment of a matter which he ought to have disclosed and is a good ground for setting aside the award. *Nihal Chand* v. *Shanti Lal*, 155 Ind.Cas. 522 = (1935) O.W.N. 582 = A.I.R. 1935 Oudh 349. There is undoubtedly a duty upon the arbitrator to disclose material facts which might reasonably be held to have prevented any of the parties to the arbitration agreeing to his appointment as arbitrator. An arbitrator failing to disclose such facts is guilty of misconduct. But the failure of an arbitrator to disclose the fact of his indebtedness to the father-in-law of one of the defendants would not amount to misconduct where the debt due by the arbitrator is an ordinary business debt. *Jogrup* v. *Kashi*, 148 Ind.Cas. 1168 = (1934) A.L.J. 694 = A.I.R. 1934 All. 658.

591. Taking money from one side whether amounts to misconduct.—It is, generally speaking, undesirable, not to say improper, for arbitrators to take money from one side only before the award is actually made. *Akshoy Kumar Nandi* v. *S. C. Das & Co.*, 38 C.W.N. 784 = 156 Ind.Cas. 165. In that case *Costello, J.*, observed. "Mr. Isaacs sought to bring the present case within four courners of an old case decided in England in the year 1734—the case of *Shephard* v. *Branad*, (1734) 2 Barn. 463. In that case, arbitrators to whom disputes between A and B had been referred, before making their award, demanded three guineas from each of the parties in respect of their charges and expenses. A paid the money but B did not. On a motion to set aside the award it was held that where arbitrators take money from one of the parties singly, whether for charges or anything else, before making their award, that is sufficient cause to set aside the award. No doubt the principle there enunciated is sound and correct and it is, therefore, generally speaking undersirable, not to say improper, for arbitrators to take money from one side only before the award is actually made. The decision in the case just referred to was made upon the footing that the arbitrators were or, at any rate, might have been biased in favour of the party who in fact, had paid their charges. In a much later case, *In re Kenworthy and the Queen Insurance Co.*, (1893) 9 T.L.R. 181, however, the court refused to set aside an award on the ground that an undertaking had been given by one side to take up the award in any event. In that case, disputes

arising out of a policy of insurance were referred to two arbitrators and an umpire under an arbitration clause in the policy at the end of the hearing met before making of the award. The arbitrator for the company asked the solicitor for the company whether the company would undertake to take up the award in any event. The company gave this undertaking. On a motion to set aside the award on the ground that the undertaking to take up the award amounted practically to a payment of money by the company to the arbitrator, it was held, distinguishing *Shephard* v. *Brand* (*supra*), that the arbitrators had not been guilty of such misconduct as would require that the award should be set aside. All the same, however, in my judgment, the principles underlying the decision in *Shephard* v *Brand* (*supra*), still hold good and it is imperative that arbitrators should always scrupulously avoid any course of action which even remotely bears the complexion of their having put themselves into a position where it might be said against them that they had received a pecuniary inducement which might have had some effect on their determination of the matters submitted to their adjudication. In the present instance I do not think it can be rightly contended that the circumstances attending the payment of the fees of the arbitrators brings the case between the ambit of the decision in *Shephard* v. *Brand* (*supra*)."

592. When can arbitrator proceed ex parte.—Where from the conduct of one of the parties to an arbitration it is abundantly clear that he has no intention of appearing before arbitrators, the arbitrators are justified in proceeding *ex parte*...*Grahams Trading* v. *Chande Lal,* A.I.R. 1935 Sind 228. A reference to arbitration expressly provided that if the parties did not appear after notice, the arbitrator could proceed *ex parte.* He gave notice in time of the date fixed and one of the parties failed to appear. He gave an *ex parte* award. It was held that the award was valid and could not be objected to. *Hemchandra* v. *Jnanendra,* 90 Ind. Cas. 624. Arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear. Where the arbitrators are alleged to have proceeded *ex parte* without giving special notice of their intention to do so and the award is attacked on that ground, the true test is, has the complainant who has taken exception to the validity of the award been in fact, prejudiced by the omission of the arbitrators to serve the special notice on him ? If it is established that notwithstanding such warning, he could not have appeared before the arbitrators, he has really no grievance and cannot invite the court to set aside the award on the ground of the alleged defect in procedure. *Bhowanidas* v. *Harsuk Das,* 27 C.W.N. 933. See also, *Haridas Dutt* v. *Vaidyanath Ghosh,* 21 C.W.N. 895 ; *Crompton* v. *Mohan Lal,* 41 Cal. 313 ; *Udai Chand* v. *Debi Bux,* 47 Cal. 951 ; *Sukhamal* v. *Babu Lal,* 42 All. 527 ; *Gladwin* v. *Chitcote,* (1841) 8 Dowl. 550 ; *Scott* v. *Van Sandu,* (1844) 6 J.B. 237 ; *Vide* the remarks of *Mookerjee, J.* in *Udai Chand* v. *Debi Bux, supra* at page 958. It has been held in many cases that where the arbitrators proceed *ex parte* without sufficient cause or refuse or fail to give reasonable time or opportunity to all parties to be heard, it amounts to legal misconduct. *Toolsimony* v. *Sachin,* 3 C.W.N. 361 ; *Deoki* v. *Rajkumar,* 9 A.W.N. 124 ; *Raghubar* v. *Maina,* 12 C.L.R. 561 ; *Muzaffardin* v. *Gulam,* 111 Ind.Cas. 82.

593. Taking documents from one of the parties without the knowledge of the other.—If an arbitrator receives documents from one party and bases his judgment upon those documents without giving the other party an opportunity of seeing those documents and of meeting the

inference deducible therefrom, he is guilty of misconduct. *Delhi Cloth* v. *Kedari Prosad,* 64 Ind.Cas. 363=22 P.L.R. 1922=4 U.P.L.R. (Lah.) 15.

594. Notice of meeting not given whether amounts to misconduct. —If the parties are not given notice of any meeting, in the ordinary case that would clearly amount to misconduct, on the part of the arbitrators. *Tyebbhai* v. *Abdul,* 85 Ind.Cas. 424=A.I.R. 1924 Bom. 149 ; *Firm of Jaggi & Co.* v. *Firm of Ganga Ram Vishendas,* 76 Ind.Cas. 275=A.I.R. 1924 Sind 132.

595. Misconduct—holding enquiry behind the back of the party. —An arbitrator is guilty of misconduct if he makes enquiries in the absence of one of the parties although he did not record evidence at that time. *Abdul Hamid* v. *Mahomed Ali,* 8 Lah. 329=101 Ind.Cas. 153=9 Lah.L.J. 218=28 P.L.R. 425=A.I.R. 1927 Lah. 425. See also, *Chandrika Datt* v. *Shyama Lal,* 29 O.C. 258=3 O.W.N. 397=94 Ind.Cas. 162=A.I.R. 1926 Oudh 388. It is illegal on the part of the arbitrators to take evidence in the absence of either party. *Palavesam Chettiar* v. *Narayana Aiyar,* (1925) M.W.N. 503=88 Ind.Cas. 660=A.I.R. 1925 Mad. 1086=49 M.L.J. 115. An arbitrator should record evidence in the presence of both parties allowing each to examine and cross-examine the witnesses. Recording evidence in the absence of one of the parties amounts to judicial misconduct and vitiates the proceedings. *Mahomed Afzal* v. *Abdul Hamid,* 7 Lah.L.J. 463=88 Ind.Cas. 161=A.I.R. 1925 Lah. 570.

596. Power of minor's guardian to allow arbitrator to proceed on his own information etc.—Where, on a reference to arbitration by a guardian on behalf of a minor agreeing to be bound, by the decision of an arbitrator, either on his own information, or examination of witnesses, and undertaking not to dispute the validity of the award on any ground, an award was passed based on private inquiries and information not accessible to the parties, *held* that the guardian's conduct in waiving the minor's right to object to irregular procedure was grossly negligent and that the minor was not bound either by the reference or by the award. *Sanyasi* v. *Venkata,* 73 Ind.Cas. 470=44 M.L.J. 263=32 M.L.T. (H.C.) 32=17 Law. 71=A.I.R. 1923 Mad. 301. See also, *Swamirao* v. *Collector of Dharwar,* 17 Bom. 299 ; *Rhodes* v. *Swithinbank,* (1889) 22 Q.B. 577= 58 L.J.Q.B. 287=60 L.T. 856 ; *Lakshminarayana* v. *Ramchandra,* 45 Ind. Cas. 763=34 M.L.J. 71=23 M.L.T. 89 ; *Chundurn Punnaya* v. *Rajan Virama,* 70 Ind.Cas. 668=42 M.L.J. 429=15 L.W. 427=(1922) M.W.N. 213=45 Mad. 425=A.I.R. 1922 Mad. 273.

597. Delegation of powers by arbitrators.—An arbitrator may delegate to a third person the performance of acts of a ministerial character but this doctrine cannot be invoked to cover a case where evidence was taken in the absence of one or more of the arbitrators. *Pandit Sankata* v. *Jagannath,* 9 Q.L.J. 410=A.I.R. 1922 Oudh 276.

598. Error of judgment whether amounts to misconduct.— Where arbitrators have allotted through error of judgment an asset of uncertain and fluctuating value upon the basis of a gross overvaluation, to one branch of the family instead of to all the branches according to their respective shares, this does not amount to misconduct. *Rajkumar* v. *Shiva Prasad,* 184 Ind.Cas. 553=A.I.R. 1939 Cal. 500. It is not misconduct for an arbitrator to be wrong. *Venkatachellam* v. *Suryanarayanamurty,* A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 M.L.W. 556= (1940) M.W.N. 1083. See also, *Alagappa* v. *Chidambaram,* 133 Ind.Cas. 522=34 L.W. 507=(1931) M.W.N. 451=A.I.R. 1931 Mad. 619.

599. Indebtedness of arbitrators.—Fact that an arbitrator was

indebted to some of the referring parties unknown to the other of the referring parties might well entitle a court to hold that it would not be safe to rely on his judgment. *Venkatachellam* v. *Suryanarayanamurty*, A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 M.L.W. 556=(1940) M.W.N. 1083.

600. Arbitrator hearing parties independently of each other with their consent.—Where with the consent of the parties the arbitrator heard them independently of each other and in the absence of their respective solicitors, the arbitrator is not guilty of misconduct and irregularity and his award is not liable to be set aside. *Baij Nath* v. *Bajrang Lal*, I.L.R. (1937) 3 Cal. 465.

601. Misconduct of umpire.—An umpire in an arbitration outside court is guilty of misconduct if he holds no enquiry and decides the matter on the notes of the arbitrators without giving notice to the parties to appear before him and to state their case and adduce evidence. *Karam Chand* v. *Mt. Jasodhan*, 100 Ind.Cas. 896=A.I.R. 1927 Lah. 347.

602. Removal of arbitrator or umpire for misconduct.—Where an arbitrator has fixed a certain date for commencing the arbitration proceeding but refused to give facility to a party for examining his witness by fixing an earlier date he cannot be removed for misconduct as he has done nothing which he is not entitled to do. *Re Whitwham and Wrenham & Co.*, (1895) 39 S.J. 692. An arbitrator is not guilty of any misconduct when he made certain orders for costs which he had no jurisdiction to make and as such he cannot be removed on that ground. *Schofield* v. *Allen*, (1904) 116 L.T. 239. In *Enoch and Zaratzby, Beck & Co.'s Arbitration, In re* (1910) 1 K.B. 327=79 L.J.K.B. 363, an umpire in the course of an arbitration refused to state a special case on a question of law on the application of one of the parties unless a payment of £ 150 were made to him to cover expenses. He further ruled that a person connected with one of the parties must appear and give evidence, and he himself called and examined another person as witness. He refused an adjournment to enable one of the parties to adduce relevant evidence on the matters dealt with by the witness he had called. *Held* that the umpire had been guilty of legal misconduct and that he must be removed. In the course of his judgment *Cozens-Hardy, M.R.*, said : "The jurisdiction of the court to remove an umpire for misconduct, of course, is quite plain. It is given in express terms by section 11 of the Arbitration Act, 1889. There are at least four transactions in this case which compel me, taking them altogether, to conclude that there has been here such misconduct on the part of the umpire, Mr. Von Limburg, as not only justifies, but merely compels us, in the exercise of our duties to remove him.

"Now the first point, and one to which I attach personally very considerable importance, is that unfortunate transaction about the £ 150... Then another matter which impress me very much is this—that the umpire thought fit formally to rule that one of the parties Mr. Zaretzky, who was not personally connected with this matter and who had not been concerned with it, must come and give evidence. What possible authority has an umpire to do that ? I do not know.

"The next thing is this umpire upon himself to call a gentleman whose name is Kolwry. a gentleman being in London, repressenting a company carrying on business at Burmah. What right the umpire had to call a witness, I confess I do not understand. But that is not all. When this gentleman was called he produced documents which it is really ludicrous to call evidence at all. He produced copies of certain documents

which were said to show that certain parcels of rice had been purchased at Rangoon from certain people at certain prices and of certain qualities. That being so, the vendors said, 'This is entirely a new point resulting from the witness whom you have thought fit to call, and we must have permission to send out to Rangoon, where we can get something deserving the name of evidence as to the place from which and the terms on which the parcels of rice which were in the cargo in question were obtained. The umpire would not allow the adjournment, and he actually proposed to make his award and deal with the matter, preventing the sellers from adducing evidence most obviously relevant, in order to deal with the matter, which to my mind it was equally obvious was not evidence and which the umpire has no right to admit.

"Then I am impressed with this—that he has thought fit in this dispute to make a very long affidavit, which is to my mind coloured throughout by an obvious bias in favour of the purchaser and against the sellers. I wish to make it clear that I am not suggesting fraud on the part of Mr. Von Limburg; but I do say his conduct as umpire, as manifested by the particulars which I have given, is such that it would not be satisfactory, it would not be fair, it would not be just, to leave the rights of the parties in his sole hands to make the award, as they necessarily would be, unless we interfered."

Fletcher Moulton, L.J. said: "The point to which I wish to allude is the question of the umpire procuring evidence in the arbitration himself. It is quite clear both from his conduct and from the line that has been taken up by counsel for the respondent on his appeal, that there is an idea that an umpire, a person in judicial position, has the powers, and I suppose the duty, to call witnesses in civil dispute whom the parties do not either of them choose to call. In my opinion there is no such power. A judge has nothing to do with the getting up of a case. The argument is based on a case in the Court of Appeal of *Coulson* v. *Desborough*, (1894) 2 Q.B. 316 (318), in which certainly there are dicta which require to be carefully examined.....One of the learned Judges, the Master of the Rolls (*Lord Esher*), did, however, give a dictum to which I was to refer particularly, but it is quite evident that nothing was said throughout the argument of this witness being called *in invitos* as far as the particulars were concerned. *Lord Esher* said this: 'If there be a person whom neither party to an action choose to call as a witness, and the Judge thinks that that person is able to elucidate the truth, the Judge, in my opinion, himself is entitled to call him. If that means that the Judge is entitled to call him when either side objects, I am satisfied that there is no basis for that dictum. It certainly was not necessary for the decision: and the consequences to which it would lead if so interpreted are such that I am satisfied that the Court of Appeal would never in the form of a dictum have given a decision so wide-reaching and so destructive of procedure without either authority or reasoning. It is not based on any course of reasoning, and no authority is cited for it. I say it would be destructive of the fundamental principles of our law of procedure because of this; according to such dictum, if witnesses were called against the will of one of the parties, the civil rights of a man might be decided by evidence given by a person whose personal credibility and the accuracy of whose statements he would have no right to test by cross-examination; because the Court of Appeal laid down that if a Judge does call a witness then neither party can cross-examine him as of right."

603. S. 11(2) and other Act.—Sub S. (2) of S. 11 of the Act, which

gives powers to a court to remove an arbitrator who has misconducted himself or the proceedings, is not applicable to an arbitration proceeding under S. 54 of the Delhi Co-operative Society that, 1925, as applied to Delhi. *Shiv Charan* v. *R.L. Dhungara* I.L.R. (1963) 2 Punj. 615=65 Punj. L.R. 1114=A.I.R. 1964 Punj. 89.

603A. Court's inherent jurisdiction to decide misconduct of arbitrators even before award.—The Court has inherent jurisdiction to deal with allegations of misconduct of arbitrator, even though the award is not made. *Anand Das* v. *Rambhusan Das,* 146 Ind.Cas. 1081=A.I.R.

604. Broad allegations of misconduct whether sufficient.—A broad allegation of misconduct on the part of the arbitrators without any particular is not enough. *Venkatchellam* v. *Suryanarayanamurty,* A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 M.L.W. 556=(1940) M.W.N. 1083.

605. Where a party with full knowledge of misconduct on the part of an arbitrator takes part in it—waiver.—A court would be unwilling to assist a party who with full knowledge of the circumstances allows an arbitration to proceed and takes part in it and then seeks to evade it later on by raising a number of objections which have never occurred to him before. *Venkatachellam* v. *Suryanarayanamurty,* A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=52 M.L.W. 556=(1940) M.W.N. 1083. In the above case in the course of his judgment *Mokett,* J. *observed:* "In my opinion these charges of misconduct are wholly unfounded and are a pure after-thought on the part of a disgruntled party to the reference. I think a reasonable latitude should be allowed in examining awards such as these having regard to the people concerned and the circumstances. More especially would I be unwilling to assist a party who, with full knowledge of the circumstances, allows an arbitration to proceed and takes part in it and then seeks to evade it later on by raising a number of objections which have never occurred to him before. The observation of their Lordships of the Judicial Committee on this topic in *Chowdhuri Murtaza Hussain* v. *Bibi Bechunnissa,* 3 I.A. 209=26 W.R. 10=3 Sutli. 342 (P.C.), are important. In the above case both parties having agreed to the appointment of arbitrators to determine their rights in dispute according to the terms of a will, and it being contended by the appellant that it was miscarriage on the part of the arbitrators to make their award without having had the whole of the will before them, their Lordships, sensible, on the one hand, of the extreme impolity of allowing parties to get rid of the awards upon objections which really did not affect the substantial justice of the case, and, on the other hand, considering the necessity of not allowing arbitrators to act without jurisdiction by doing that which the terms of the submission to arbitration did not entitle them to do, came to the conclusion that, as the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on, and allowed arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself, it was too late for him, after the award had been made, and on application to file the award, to insist on this objection to the filing of the award."

So a party who is aggrieved by the misconduct of an arbitrator or umpire should take the first opportunity to have him removed under this sub-section, otherwise his application under section 30 (*a*) *to have award*

set aside on the ground of self same misconduct may not be maintainable on the ground of waiver and acquiescence.

In *Municipality of Ahmedabad* v. *Ravjibhai,* 59 Bom. 268=155 Ind. Cas. 669=37 Bom.L.R. 69=A.I.R. 1935 Bom. 127, *Murphy, J.* observed : "The next point raised by Mr. Thakor was that even if there a teachnical irregularity, it would not be good enough ground to set aside the award, since in fact it has been waived by the appellant. The waiver is worked out from the report made by Mr. Bhagwat, which I have already referred to, to the Municipality urging them not to grant a further extension of time. Mr. Thakor also stated that Mr. Bhagwat himself had waived the irregularity, for it seems he was aware of the sorting of the papers from the first day of the proceedings, and continued to attend without protest until 18th December. We are not sure that Mr. Bhagwat's waiver of the irregularity would really have the effect of binding the Municipality, but there is no doubt that the fact of this irregularity, if it was one, was brought forcibly to the notice of the Municipality by Mr. Bhagwat on the 18th, that they considered it at a meeting held on he same day, and that they chose to disregard what he said and to grant further time to the arbitrator.

"On this point Mr. Thakor has relied on *Cursetji Jehangir* v. *W. Crowder,* (1894) 18 Bom. 299, where a party aggrieved by an irregularity knew of it, but did nothing by way of protest ; and on *Ardesar Hormasji* v *Secretary of State,* (1872) 9 B.H.C.R. 177, where one arbitrator was absent throughout the proceedings before the *Mamlatdar* acting as Land Acquisition Officer, and his absence was never objected to, it was held that the Government could not have the award set aside on this ground as their representative the *Mamlatdar* had acquiesced in the absence of the third arbitrator ; also on *Murtaza Hussain* v. *Bibi Bechunnissa,* 26 W.R. 10, where the principle enunciated is that a party having taken his choice cannot afterwards be allowed to have the award set aside when he should have objected at the time. The point is put clearly in *Russell* on *Arbitration and Award,* 12th Edn., at p. 436, where the learned author observes : "The obvious course therefore is for a party complaining of irregularity to protest against the irregularity and to continue to conduct his case in the proceedings before the arbitrator under such protest. The other alternative is to submit to the irregularity, and forego any rights he may have to object to the award on that ground when it is made, for he cannot lie by and then object to the award if it is against him.

"Mr. Setalvad has argued that this doctrine is modified by another passage at page 443, where it is stated : 'There is a marked distinction between an irregularity passed over when all parties are present and an irregularity committed when the parties are not present. The latter may be incapable of being set right except by agreement of the party injured.'

"We think, on considering cases, that in fact Municipality did waive this right to protest and to have the award set aside on this ground."

But in *Ramsden* v. *Jacobs,* (1922) 1 Q.B. 640=91 L.J.K.B. 342=26 Com.Cas. 287, *Bray, J.* observed : "This is an application to set aside an award, and the main ground on which the application is based is that the arbitrators heard evidence on behalf of one party in the absence of the other party. That procedure was absolutely wrong. I wish to lay that down in the strongest possible terms. But in view of what happened I feel a difficulty in deciding whether the application should now he heard. The buyer made no protest at the time, but that in itself is not

conclusive, though it is a matter which must be borne in mind.....But it is contended that we should show our disapproval of this irregularity in procedure, and with some reluctance, I yield to that contention. The award will therefore be set aside." Where a party to a reference to arbitration, on becoming aware of the relationship of the opposite party with the arbitrator, allows the arbitrator to carry on the arbitration without any objection or protests, in the belief that having executed the agreement he is bound by its terms and has no right to revoke the submission, his failure to lodge an unequivocal protest against the arbitrator acting as such does not operate as a waiver, as there can be no waiver without full knowledge of one's legal right. *Nihar Chand* v. *Shanti Lal,* 155 Ind.Cas 522=(1935) O.W.N. 582=A.I.R. 1935 Oudh 349. In *Darnley (Earl)* v. *London, Chattam & Dover Rail Co.,* (1867) 2 H.L. 57, *Lord Chelmsford said* : *"A waiver must be an intentional act with knowledge."*

Too precise an insistence on the forms of judicial procedure cannot be expected in private arbitration and where the party took no objection at the time to the alleged irregularities in the procedure adopted by the arbitrator (consisting of failure to record evidence or to give notice of personal knowledge) but allowed the proceeding to continue without any protest, he must deemed to have waived the irregularities. *Varutha* v. *Mani,* 142 Ind.Cas. 668. See also, *Chennakeshavalu* v. *Veeraswami,* 38 L.W. 927=A.I.R. 1933 Mad. 862=65 M.L.J. 755 ; *Allagappa* v. *Chidambaram,* 133 Ind.Cas. 522=(1931) M.W.N. 451=34 L.W. 507=A.I.R. 1931 Mad. 619 ; *Mohidin* v. *Ramaswami,* A.I.R. 1921 Mad. 271 ; *Gurestji Jehangir* v. *W. Crawder,* 18 Bom. 299.

In *C. I. Engineering Co.* v. *Mallick Thakurdas,* A.I.R. 1930 Sind 79= 24 S.L.R. 351=123 Ind.Cas. 234, the court observed : "It is well settled that an objection to irregularity or improper conduct of an arbitrator may be waived by parties either expressly or by their conduct provided the party waiving it has full knowledge of the defect (*Redman on Arbitration* 4th Edn., 155 ; *Russell on Arbitration,* 10th Edn., pp. 417-27, and *Halsbury's Laws of England,* Vol. I, para. 926). The principle on which the cases referred to in these text-books have proceeded is that the court will not permit a party to lie by or act in an indecisive manner so as to obtain the benefit of the award if it is in his favour and endeavour to set it aside if it is not. In *Bignall* v. *Gale,* (1841) 10 L.J.C. 169 (171)=2 Man. & G. 830=5 Jur. 701, *Tindal, C.J.* said : "In coming to a determination upon this case I cannot get rid of what makes a great impression upon my mind, that the defendant for three weeks knew of every objection which has now been urged to this award, and gave no notice of his intention to dispute it on those grounds. He knew on 17th of December, these witnesses had been examined in his absence. What right had he then to lie by with this grievance dormant in his own bosom and now dispute for the first time the validity of the authority which has been exercised ? He ought at that time to have made his election and to have insisted on another meeting at which he ought to have been confronted with the witnesses and given his explanation of their testimony."

In *Drew* v. *Drew,* (1855) 25 L.T. (O.S.) 282, it was likewise held that where an arbitrator examined witnesses behind the back of any of the parties such party is justified in at once obtaining the reference and applying to the Judge to rescind the submission, but if he continues to attend the subsequent proceedings, this will be a waiver of the irregularity and he cannot afterwards set aside the award on that ground. In *Thomas* v. *Morris,* (1867) 16 L.T. 398, it was held that an award was not necessarily

bad because the arbitrator had taken evidence in the absence of both parties. Such an irregularity may be so treated by the disputants as to prevent them afterwards taking any objection to it.

"In *Dobson* v. *Groves,* (1844) 14 L.J.Q.B. 17, *Lord Denman, C.J.* distinguished some of the earlier cases by observing: 'With regard to any supposed waiver it is clear that one of the plaintiffs wished to be present but was excluded. That was a protest against the proceedings and I think upon that refusal the plaintiff was not bound to take any further step.'

"The *ratio decidendi* of *Haigh* v. *Haigh,* (1861) 31 L.J.Ch. 420=5 L.T. 507=8 Jur.N.S. 983, is that a party does not waive his objection by continuing to attend the proceedings after protest or under the compulsion or irregularity and without his intention to waive his objection.

"Both these authorities affirm the principle that a party may waive the objection as to the irregularity of the arbitrator in the conduct of his proceedings. But whether there has been a waiver or not in any particular case must depend upon the facts of that case. The principle of waiver is not confined merely to irregularities in the examination of witness during the absence of one of the parties. It applies to every irregularity which does not affect the jurisdiction of the arbitrators. It is not necessary to refer to the rulings on various other irregularities where this principle has been applied. It will be sufficient to refer only one of them which pertains to objection No. 1 (*b*). In *Gunawa* v. *Pyinnyadipa,* A.I.R. 1923 Rang. 187=1 Rang. 15, the irregularity complained of was that one of the arbitrators was absent at the second of three sittings at which witness were examined and, therefore, had not taken part throughout the proceedings. That complaint was not allowed to prevail *inter alia,* on the ground that it was not taken at the time of the arbitration.

"In the present case the defendants appeared before the arbitrators on and after 2nd September, with full knowledge of what had transpired at the previous hearing and without any protest." There is no misconduct of arbitrators in having made private enquiries or examined evidence in the absence of a party to the arbitration proceedings where the party by his own conduct waives the objection he has to such a procedure. *Dayaram* v. *Narain* Das, 119 Ind.Cas. 529=A.I.R. 1929 Sind 200. See also, *Gunawa* v. *Pyinnyadipa,* 1 Rang. 15=2 Bur.L.J. 30=74 Ind.Cas. 6=A.I.R. 1923 Rang. 187; *Rama Nath* v. *Ramranian,* 67 Ind.Cas. 866.

606. Where arbitrator has no jurisdiction—doctrine of waiver. —In cases where an arbitrator enters upon a consideration of matters which are not referred to him or which he has no jurisdiction to try by arbitration clause or submission between the parties, the appearance of the party after objection taken and protest made, does neither give the arbitrator authority to make an award nor estop him from urging that the arbitrator has exceeded his authority. *Babubhai* v. *Madhabji,* A.I.R. 1931 Bom. 343=55 Bom. 503=134 Ind.Cas. 705=33 Bom.L.R. 759=A.I.R. 1931 Bom. 343; *Ringland* v. *Lowndes,* 33 L.J.C.P. 337=17 C.B.N.S. 514=10 Jur.N.S. 850; *Chetandas* v. *Radha Kissen,* A.I.R. 1927 Bom. 553=104 Ind.Cas. 174; *Rambaksh* v. *Bombay Cotton,* 128 Ind. Cas. 881=32 Bom.L.R. 1451=A.I.R. 1931 Bom. 81; *Hamlyn* v. *Betteby,* (1880) 6 Q.B.D. pp. 431-432, where *Lord Selborne* said: "In arbitrations where a protest is made against jurisdiction the party protesting is not

bound to retire; he may go through the whole case subject to the protest he has made."

607. S. 11(2) and 13 (b) scope of.—Section 11(2) gives no power to court to give any direction regarding the scope of the reference. Subject to any limitation contained in the instrument of his appointment and to any statutory provisions as to the manner in which he is to discharge his duties, an arbitrator may act as he thinks fit so long as he does so in accordance with principles of equity, justice and good conscience.

Unlike the English law, under S. 13 (b) the arbitrator can not be compelled to refer any question to the court. Therefore the court's order giving a direction to the arbitrator to regard a certain date as to the date of retirement of the persion of a firm was set aside on the ground that the direction was given without any reference being made by the arbitrator under S. 13 (b). *Jivarajbhai* v. *Chintemanrao* 1961 Jab.L.T. 1173=1961 17P.L.J. 1987.

SUB-SECTION (3).

608. Scope of sub-section (3).—By section 14(1) the arbitrators are empowered to give notice in writing to the parties of the amount of fees and charges payable in respect of the arbitration and award. [*Vide* section 14(1)]. In the absence of express agreement to the contrary an umpire or arbitrator cannot claim any payment on an implied promise until the completion of his award, and this sub-section presupposes an arbitrator or an umpire being removed prior to his award, and would prevent an arbitrator or an umpire removed under sub-section (1) and (2) of this section from bringing an action for his fees even where there is an agreement in express terms entitling the arbitrator or the umpire to get fees prior to the making of award. *Vide Russell* on *Arbitration,* 13th Edn., p. 459. This sub-section corresponds to sub-section (2) of section 6 of the English Arbitration Act of 1934.

609. Arbitrator appointed by parties whether entitled to any remuneration.—In *Girdharilal* v. *Surendra Nath,* A.I.R. 1934 Nag. 199=17 N.L.J. 153=152 Ind.Cas. 373, the court observed: "In England it was at one time held that the appointment of an arbitrator was not of such a nature as to raise a demand for payment in the absence of an express promise to pay him for his services: *Virany* v. *Warne,* (1801) 4 Esp. 47, and *Burroughes* v. *Clarke,* (1801) 1 D.P.C. 48; but that is not the law in England as it now stands and it is now the rule that the appointment of an arbitrator must be taken to imply a promise to remunerate him at a reasonable rate. *Wills* v. *Wakeley Brothers,* (1891) 7 T.L.R. 604. In *Llandrindod wells Water Co.* v. *Hawksley,* (1904) 68 J. P. 242=20 T.L.R. 241, it was stated 'that where the parties have chosen their own arbitrator they must be taken to have intended to pay him at the rate ordinarily charged by persons of his experience, and they must pay his fees, unless it is proved that the charges are extortionate.'

"The case of *Hoggins* v. *Gordon,* (1842) 3 Q.B. 467=11 L.J.Q.B. 286, cited by the applicants was decided prior to these cases and goes no further than laying down that on an express promise to pay for his services an action could always be maintained by an arbitrator, but the question of an implied promise does not seem to have arisen in the case of express terms. The decision turned on the construction of the words 'would take upon themselves the burden of the reference' (i.e. of arbitration)

and it was held that the words were intelligible words, describing a known duty, the non-performance of which would excuse the defendants from paying. This decision might be interpreted as an earlier authority for the proposition developed later that there may be an implied as well as an express promise to pay which would be binding. In the absence of any express provision in Schedule, II, Civil Procedure Code, for the remuneration of arbitrators, I am of opinion that the English law should be applied unless there in an express to the contrary.....

An attempt to support the proposition that the court had no jurisdiction whatever to award remuneration to the arbitrators is made by a reference to *Mulchand* v. *Narinjin Das,* 94 P.R. 1894, but in that case it was admitted in argument that para. 13, Schedule II (then section 519), Civil Procedure Code, would have no application to the particular case since no award was filed and the reference to arbitration was cancelled soon after it was made. What was laid down in that case was that if para. 13 did not apply, it was impossible to bring the jurisdiction of the court to order remuneration to arbitrators within paras. 2 and 3, Schedule II (at that time section 507 and 508), Civil Procedure Code. Another case which the applicants cited was *Arunchala Iyah* v. *Louis Dreyfus & Co.,* A.I.R. 1928 Mad. 370. There it was held that when the court was of opinion that there was no valid reference to arbitration there could be no jurisdiction in the court to pass an order as to costs of the award. As there was no question here of the invalidity of the award, the case is of no assistance. In *Thadomal* v. *Menghraj,* A.I.R. 1930 Sind 190, it appears to have been tacitly admitted that the remuneration of arbitrators would come within the ambit of para. 13, Schedule II, Civil Procedure Code, since an objection was taken in revision that the amount awarded to the arbitrators was excessive and that it should be reduced. The arbitrators' claim in that case was entered at the end of the award after their signatures and it was held that it formed no part of the award.

"In the case which I am now considering the application for remuneration was filed separately a few days after the filing of the award. The learned Judges in *Thadomal* v *Menghraj,* A.I.R. 1930 Sind 190, held that as the amount had not actually been paid to the arbitrators, it was open to the applicants, if they chose, to apply to the lower court to have the same reduced. The contention that the lower court had no jurisdiction to order any remuneration at all does not appear to have been raised and in the view that I take, if raised, would certainly have been disallowed. The order of the learned Judges in that case is not easily explicable on any other assumption. Finally, in *Bulchand* v. *Thakurdas,* A.I.R. 1933 Sind 330, the learned Judicial Commissioner applied the English law to arbitration proceedings in India and held, on the authority of *Llandrindod Wells Water Co.* v. *Hawksley,* (1904) 68 J.P. 242=20 T.L.R. 241, that where the parties have chosen their own arbitrator they must be taken to have intended to pay him at a fair remuneration. I am satisfied therefore that the court below had jurisdiction in giving remuneration to the arbitrators for their services."

In England the Taxing Master has power to enquire into the propriety of the arbitrator's charges when objection is made to them and tax them as between the parties [*Webb* v *Wyatt,* (1857) 3 Jur.N.S. 496; *Barnes* v. *Hayward,* (1857) 1 H. & N. 742; *Westwood & Co. and Cape of Good Hope Government, In re,* (1886) 2 T.L.R. 667]—*Russell,* 13th Edn., 445.

SUB-SECTION (4)

610. Sub-section (4).—This sub-section is taken verbatim from section 6 (4) of the English Arbitration Act of 1934. "By the terms of this sub-section if two arbitrators who are unable to agree fail to use all reasonable despatch in giving notice of that fact to the umpire, they may be removed by the court on application by any party to the reference and under such circumstances they receive no remuneration for their services." *Russell*, 13th Edn., p. 460.

Power of Court where arbitrator is removed or his authority revoked.

12. (*1*) *Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.*

(*2*) *Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either—(a) appoint a person to act as sole arbitrator in the place of the person or persons displaced or (b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.*

(*3*) *A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.*

611. N.B.—This section which follows section 3 of the English Arbitration Act of 1934 makes provisions for the consequences of the removal of arbitrators.—*Notes on Clauses.* This section does not apply to statutory arbitration (*vide* section 46). Now see section 25 of the English Arbitration Act of 1950.

612. Object of this section.—This section adopting the substance of the English Arbitration Act; 1934, fills up a gap, namely, makes provisions for the consequences of the removal of arbitrators—a gap which existed in the previous law under the Arbitration Act, 1899, and the second schedule of the Civil Procedure Code, 1908. Along with this section there needs to be considered section 36 of the Arbitration Act, 1940, which gives power to the Court to practically rescind an arbitration agreement in certain circumstances. *Sarkar's Law of Arbitration*, pp. 150-157.

613. Section 3 (1) of the English Arbitration Act of 1934.—Sub-section (1) of section 3 of the English Arbitration Act of 1934 runs as follows :—"(1) When an arbitrator (not being a sole arbitrator), or two or more arbitrators (not being all the arbitrators) or an umpire who has not entered on the reference is or are removed by the Court, the Court may, on the application of any party to the arbitration agreement, appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed."

614. Scope of sub-section. (1).—Sub-sections (1) and (2) of section 11 make provisions for the removal of an arbitrator or umpire (1) who fails to use all reasonable despatch in entering on and proceeding with the reference and making an award, or (2) who has misconducted himself or the proceedings. But under none of the previous sections, any power is given to court to replace such an arbitrator or an umpire. This power is given by section 12. Section 8 of the Act enacts that where the parties will not appoint an arbitrator or the appointed arbitrators do not appoint an umpire or an appointed arbitrator or umpire refused to act or is incapable of acting or dies and there is no machinery in the arbitration agreement whereby an appointment can be obtained, in such a case the Judge may appoint an arbitrator or arbitrators or an umpire. The sub-section deals with cases where the court removes an umpire who has not entered on the reference or one or more arbitrators (not being alll the arbitrators) and in such a case court is empowered. on the application of any party to the arbitration agreement, to appoint persons to fill the vacancy.

It is open to a party to seek revocation of the reference if he discovers after the reference is made, that the arbitrator suffers from a personal disqualification or is for reason which the party could not have ascertained with due deligence at the time of reference, likely to take sides or to be incapable of attending to his duties. *Ramsashi* v. *Harish Chandra* 1962 M.P.C. 345=1962 Jab. L.T. 1099=1963 M.P.L.T. 121= A.I.R. 1963 M.P. 143 (mere expression of demand to move for revocation of the reference not sufficient).

615. "Removes."—Under section 11, the Court may remove an arbitrator or umpire who is either dilatory or has misconducted himself or the proceedings.

616. "An umpire who has entered on the reference."—"If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators."—*Vide* para. 4 of the First Schedule.

617. "Not being all the arbitrators."—Where all the arbitrators have been removed by the court under sub-sections (1) and (2) of section 11, it is tantamount to revocation of the authority of the arbitrators and falls under sub-section (2) section 12.

618. Sub-section (2).—This sub-section is based on sub-section (2) of section 3 of the English Arbitration Act of 1934. That sub-section runs as follows :—

"(2) Where the appointment of an arbitrator or arbitrators or umpire is revoked by leave of the Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the Court, the Court may, on the application of any party to the arbitration agreement, either—

(*a*) appoint a person to act as sole arbitrator in place of the person or persons removed ; or

(*b*) order that the arbitration agreement shall cease to have effect with respect to the dispute referred."

This sub-section gives power to court to appoint a person as sole arbitrator in the place of a person or persons displaced or order that the arbitration agreement shall cease to have effect with respect to the difference referred, where the authority of an arbitrator or arbitrators or

an umpire is revoked by leave of the court, or where the court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators." See also Sub-section (2) of Section 25 of the English Arbitration Act of 1950.

619. Sub-section (2)—Effect of revocation.—Even when the authority of an appointed arbitrator is revoked with the leave of the Court, the revocation has not the effect of cancelling an arbitration agreement. It is only when there is something in the arbitration agreement itself giving to the parties not only the right to revoke the authority of an appointed arbitrator in the event of his failure to make an award within the specified time but also the right to revoke the arbitration agreement for that reason, that the revocation of the authority of the arbitrator would make the arbitration agreement infructuous. *Somelal* v. *Lalla Prosad,* A.I.R. 1955 Madh.B. 92=I.L.R. (1954) Madh.B. 31 ; but see *Gopal Das* v. *Kedar Prosad,* 1958 A.W.R. (H.C.) 66. Under s. 12. sub s. (2) where the authority of an arbitrator or arbitrators is revoked by leave of the court, the court may order that the arbitration agreement shall cease to have effect with respect to the difference referred. If the decisions of the arbitrators have not been accepted by the parties, with the revocation of the reference all proceedings which the arbitrators have adopted may fall through ; if however, the parties have accepted the decisions made by the arbitrators from time to time, the cancellation of the reference under s. 12(2) has not the effect of vacating decisions concerning the divisions of the properties already made by the arbitrator in the partition reference. *Kashinath Sayamosa* v. *Narsingha* A.I.R. 1961 S.C. 1077

620. "Where the authority of an arbitrator, etc.....is revoked by leave of the Court.—Section 5 of the Act enacts : "The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement." As to when the authority of an arbitrator or arbitrators or an umpire can be revoked by the leave of the court, *vide* notes under section 5, *supra.*

621. Powers of court where there is an arbitration agreement— In *Doleman & Sons* v. *Ossett Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1097. *Fletcher Moulton, L.J.* said: "By English law the courts are the recognised machinery for settling disputes between the parties to contracts. A complainant by taking out a writ can cause his opponent to be ordered to appear before the court, and the parties must accept its decision. But it has long been a practice in certain classes of contracts for the contracting parties to name a private tribunal to whom contractually they give authority to settle disputes under that particular contract. If a dispute has been brought before the private tribunal thus constituted, and an award made, that award is binding on both parties and concludes them as to that dispute. In effect the parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award, so that in essence it partakes of the character of accord and satisfaction by substituted agreement. The original rights of the parties have disappeared, and their place has been taken by their rights under the award."

622. Sub-section (1)—Who has not entered into reference.—An express admission of the arbitrators that they cannot agree is not necessary to give umpire jurisdiction to make an award. *Hill* v. *Marshall,* 5 L.J. (O.S.) C.P. 161. *Vide* notes under S. 10 *supra* under the heading *commencement of authority of umpire.*

623. Sub-section (2)(b).—"After a reference to arbitration has

been made in a suit through the court, the parties cannot be allowed, by mere consent, to abandon the arbitration and go on with the suit or ask for a fresh reference. But if a concluded compromise in undisputed terms be placed before the court by all the parties, whether before an award has been made or after, the court may grant leave to revoke the submission under S. 5, Arbitration Act and on superseding the arbitration agreement thereunder under S. 12(2)(b) pass a decree in terms of the compromise." *Per Chakravarti, J.* in *Profulla* v. *Panchanan*, 222 Ind.Cas. 597=50 C.W.N. 287=A.I.R. 1946 Cal. 427=81 C.L.J. 1.

624. Sub-section (3).—This sub-section corresponds to section 3(3) of the English Arbitration Act of 1934, which runs as follows: "(3) A person appointed under this section by the Court as an arbitrator or umpire shall have like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the arbitration agreement." The effect of this sub-section is that an arbitrator or umpire substituted by court under sub-sections (1) and (2) of this section, to fill up the vacancy, will be entitled to exercise the same powers in proceeding with the reference and in making an award as if he had been appointed in accordance with the original arbitration agreement. By the enactment of this sub-section any controversy as regards the powers of the newly substituted arbitrator or umpire has been set at rest.

625. Para 6 of the repealed Second Schedule of the Civil Procedure Code.—"Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference."—*Vide* para. 6 of the repealed Second Schedule of the Civil Procedure Code. Like the original arbitrator or umpire the substituted arbitrator or umpire also is not bound by technical rules of court. *Reedoy* v. *Puddo Lochun*, 1 W.R. 12; *Purushottamdas* v. *JetaBhai*, 17 Ind.Cas. 33=(1912) M.W.N. 1076. The substituted arbitrator or umpire can exercise all the powers, enjoy all the privileges and is subject to all the disabilities of the original arbitrator or umpire. An award made by such an arbitrator or umpire also is not to be set aside unless there has been something radically wrong and vicious in the proceedings, nor on the ground of failure to observe the highly technical web of procedure and rules of evidence which surrounds judicial procedure. *Andrews* v. *Mitchell*, (1905) All. 78; *Maung Shive* v. *U. Min*, A.I.R. 1925 Rang. 383=3 Rang. 387. He is to decide according to the rules of enquity, justice and good conscience, *Narasingnarain* v. *Ajothya*, 13 Ind.Cas. 118=16 C.W.N. 256=15 C.L.J. 110.

Power of arbitrator

13. The arbitrators or umpire shall unless a different intention is expressed in the agreement, have power to—

(*a*) administer oath to the parties and witness appearing;

(*b*) state a special case for the opinion of the Court on a question of law involved, *or state the award wholly or in part, in the form of a special case of such question for the opinion of the Court*;

(*c*) *make the award conditional or in the alternative*;

(*d*) correct in an award any clerical mistake or error arising from any accidental slip or omission;

(e) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.

626. N.B.—"Section 13 sets out the powers of arbitrators; it is based to some extent on section 10 of the 1899 Act, and on paragraph 11 of the Second Schedule to the Code of Civil Procedure, 1908."—*Notes on Clauses.* "We have omitted the words 'acting under an arbitration agreement' as being unnecessary and as being inappropriate in certain cases such as when the arbitration is under a statute. We have also inserted a provision giving power to the arbitrators to make a conditional award."—*Report of the Select Committee.* In section 12 of the English Arbitration Act of 1950 elaborate provisions have been made for conduct of Proceedings, Witness, etc. (*Vide* Appendix *infra*). In the First Schedule of the English Arbitration Act 1889, certain provisions implied in submissions have been stated. (*Vide* Appendix H *infra*). Section 2 that Act states as follows: "A submission unless a contrary intention is expressed therein shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission." In *Lanza* v. *Winner,* (1917) 2 K.B. 558=86 L.J.K.B. 1236, the scope of S. 2 of the English Arbitration Act of 1889, was considered. In the course of his judgment, *Viscount Reading C.J.* observed: "The sole question is whether an arbitrator under a submission has power to order the party in the position of plaintiff to give security of costs. The plaintiff in this case were a foreign corporation, which in an ordinary action in the courts would, if the defendant applied, be ordered to give security. The arbitrator doubted whether he had power to make the order asked for, and in my opinion he had no such power. The power might have been, but was not given by express agreement in the submission; if it exists at all it must be given by the Arbitration Act, 1889. The defendants rely, first on the judgment of *Mr. Justice Scrutton* in *Creighton* v. *Law Car and General Insurance Corporation,* 80 L.J.K.B. 49=(1910) 2 K.B. 789, in which he refers to the arbitrators inherent powers as a judicial officer; but I do not think that by that phrase *Mr. Justice Scrutton* meant it to be understood that an arbitrator was in the position of Judge, and had all the powers of a Judge. The fact that the arbitrator in that case was held to have the power to order amendment of pleadings is not enough to support the defendant's contention here. Then the words in sub-section (f), on which reliance is placed, do not shew that there is any power to order a stay of proceedings pending the giving of security for costs; they are only words of general import giving the arbitrator power to do anything that may be needful for ascertaining the facts or the law. so that he may properly decide the dispute between the parties. Obviously they do not give him all the powers of a Judge; for instance, it is not contended that he has power to commit for contempt. The words at the end of sub-section (f); 'do all other things which.....the arbitrators.....may require', must be read with a limitation; they mean that the arbitrator may order the parties to do everything which he needs to assist him in determining the dispute. Now the dispute can be determined, whether security for costs or not; and order to give security, merely puts an obstacle in the way of the plaintiff, and has nothing to do with the ascertainment by the arbitrator of the true position between the parties.

"Sub-section (1), which was relied on in the alternative, only gives the arbitrator a discretion with regard to the costs of the reference and the award; it empowers him to direct by whom the costs must be paid; but that is one entirely different thing from empowering him to order a stay pending the giving of security, and there is nothing in his sub-section giving the power to order security. A Judge of the High Court has inherent power to do so, but an arbitrator has no such power."

627. Section 10 of the Indian Arbitration Act of 1899.—Section 10 of the Indian Arbitration Act of 1899, ran as follows:—

"10. The arbitrators or umpire acting under a submission shall, unless a different intention is expressed therein—

(*a*) have power to administer oaths to the parties and witnesses appearing;

(*b*) have power to state a special case for the opinion of the Court on any question of law involved; and

(*c*) have power to correct in an award any clerical mistake or error arising from any accidental slip or omission."

628. Para. 11 of the Second Schedule of the Civil Procedure Code.—Para. 11 of the Second Schedule of the Civil Procedure Code ran as follows:—

"11. Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order, such opinion to be added to and to form part of the award."

629. Section 7 of the English Arbitration Act of 1889.—"The arbitrators or umpire acting under a submission shall, unless the submission express a contrary intention, have power—

(*a*) to administer oaths or to take the affirmation of the parties and witness appearing; and

(*b*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and

(*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

630. Scope of the section.—This section sets out the powers of the arbitrators when there is no different intention expressed in the arbitration agreement. This section is applicable to statutory arbitration as well. In *Kursell* v. *Timber Operators and Contractors, Ltd.*, (1923) 2 K.B. 202=92 L.J.K.B. 607. *Salter, J.* observed: "The powers of such an arbitrator depend entirely on the contract. Every power given to him by the Arbitration Act is subject to the agreement of the parties." If the arbitrators, *ab initio* had no jurisdiction, appearance before him cannot confer jurisdiction on arbitrators at all. *Varadan* v. *Narsi*, A.I.R. 1956 Bom. 720.

631. Conduct of proceedings. witnesses etc.—In the English Arbitration of 1951 Section 12 makes elaborate provision for conduct of proceedings in arbitration proceeding. *Vide* S. 12 of that Act given in the Appendix *infra*.

632. Powers of arbitrators to determine validity of contract.—Primarily the arbitrator's jurisdiction depends always on the meaning and construction of the language of submission for an arbitration. Then again on a properly worded submission an arbitrator can be made a judge not only of facts but also of law. But when the question itself is in issue in the sense that the controversy is whether the parties

concerned at all entered into a valid agreement for arbitration then that controversy cannot be decided by the arbitrators. That jurisdiction belongs to the Courts. But where the question is not one whether there was at all a sub-mission void or unenforceable in law or statute, the arbitrator's jurisdiction is not thereby *ipso facto* ousted, if it is otherwise within the scope of the submission. Thus where the validity of an arbitration clause depends on the validity of the contract containing it which, in its turn, depends on deciding whether certain facts existed so as to make the provisions of the West Bengal Jute Goods Act, 1950 applicable to the contract, the arbitrators is competent to decide that issue of fact. *Bhudarmull* v. *Uma Sankar,* A.I.R. 1953 Cal. 613. As regards construction of arbitration clause in fire insurance policy—Vide *Great American Insurance* v. *Bodh Raj,* 54 P.L.R. 49R7=A.I.R. 1954 Punj.

633. Void agreement.—Where one of the considerations of agreement is to drop a prosecution of non-bailable offence the agreement is void. *Nand Kishore* v. *International,* A.I.R. 1953 Cal. 415.

634. Powers of arbitrator-General.—The arbitrators are entitled to look at the substance of the matter and to find out the relief asked for. *Juggilal* v. *N.V.,* 58 C.W.N. 730=A.I.R. 1955 Cal. 65. The arbitrators have got power to correct clerical mistake in an award. *Chautemal* v. *Ramchandra,* I.L.R. (1955) Nag. 100=A.I.R. 1955 Nag. 126.

CLAUSE (*a*).

635. Prevoius law.—Uuless an order of reference at *nisi prius* expressly gave power to the arbitrator to swear witnesses, the Stat. 3 & 4 Will, IV, c. 42, section 41 (repealed), did not enable him to administer an oath. *Simmonds* v. *Moss,* 5 W.R. 559. If in a case referred by order of *nisi prius* the submission contained a clause that the 'witnesses of each party respectively shall be sworn before a judge of a superior court, or a commissioner thereof' the arbitrator notwithstanding, is entitled to swear the witness himself if he thought proper to do so, as the above words were merely cumulative, and did not take away the power vested in him by Stat. 3 & 4 Will. IV, c. 42, section 41 (repealed). *Hodson* v. *Wilde & Wise,* 1 H. & H. 360=7 D.P. 15=4 M. & W. 536=8 L.J.Ex. 71=2 Jur. 992.

636. Power of arbitrators to administer special oath.—In *Wali-ulla* v. *Ghulam Ali,* I All. 536, the question arose whether arbitrators were legally entitled to administer oath to a witness under section 8 of the Oaths Act and the evidence so taken could form the basis of an award. That case was decided by a Bench of the Allahabad High Court consisting of *Pearson* and *Spankie,* JJ. in 1877. The learned Judges were divided in their opinion. *Pearson J.* in delivering his judgment observed: "A far more serious objection to the procedure of the arbitrators has been here orally urged by the learned counsel for the appellants, *viz.,* that the arbitrators were not legally competent to administer the oath to the respondent under section 10 of Act X of 1873, which only empowers a court to administer such an oath as is mentioned in section 8 thereof. The arbitrators were persons authorised by law to take evidence, and for that purpose to put witnesses upon oath or affirmation according to the provisions of the law for the examination of witnesses, but they do not constitute a court, and are not empowered to administer an oath of the nature mentioned in section 8 of the Oaths Act. Their proceeding in administering such an oath to the respondent

in this case was therefore invalid, as being without warrant of law, and consequently his statement, made on an oath so illegally administered, cannot form a valid basis of an award. I am constrained to admit the strength of this objection, which being one vitally affecting the arbitrators' procedure cannot, I think, be ignored by us, although it was not preferred in the lower courts, and is not to be found in the memorandum of special appeal."

But *Spankie, J.* observed: "It is conceded that arbitrators are authorised to administer an oath; they are also persons, if the Oaths Act applies to them, who by that Act are 'persons having by consent of parties authority to receive evidence.' They however, are not a court within the meaning of section 8 of the Act.....If the arbitrators in this case were authorised to affirm the witnesses in the manner now in force in our courts, and they substituted an oath on the Koran by the other party, the substitution, under section 13 of the Act, does not invalidate the evidence, and therefore does not render void the award founded on that evidence."

That question was again raised in the case of *Bhagirath* v. *Ram Ghulam*, 4 All. 283. In the first instance the case was heard by *Straight, J.* and *Oldfield. J.* But as the learned Judges differed in opinion the case was referred to the *Chief Justice, Sir Robert Stuart. Oldfield, J.* observed: "in the case before us, I find from the Judge's judgment that the matter in dispute, viz. a claim for Rs. 34-10-0 on a bond was referred to arbitration at the instance of the parties, and while before the arbitrator the 'plaintiff agreed to be bound by what the defendant might swear having placed his hand on Mahadeo; the defendant was sent with a muharrir and chaprasi to the temple of Mahadeo and then came back when his evidence was recorded, and on his statement as thus recorded the award was given.'

"The procedure thus adopted is that allowed by the Indian Oaths Act but it is by the Act confirmed to Courts of Justice, and not extended to arbitrators, and necessarily so, because it is inconsistent with the position of an arbitrator. and the material objection to the procedure adopted in this case is that it is inconsistent with a reference to arbitration.

"A reference to arbitration contemplates that the arbitrator shall exercise his own judgment on the evidence, but when the parties agree to be bound by the oath of a particular persons, the decision is taken out of the arbitrator's hands, and in fact he ceases to act as arbitrator. the arbitration is superseded, and the decision made is not that of an arbitrator, so as to be an award within the meaning of the Code of Procedure." But on reference to *Stuart C.J.* he observed: "It has been objected that he was warranted by the Oaths Act (X of 1873), in accepting the defendant's deposition, although it is not denied that a 'court' could act upon such evidence. That Act. however, need not be imported into the case; it does not take away from arbitrators any powers as to taking evidence or otherwise which they had previously possessed; but even if it applied to and governed this case, what took place was quite consistent with a reasonable application of the provisions of the Act. An arbitrator is entitled to conduct the proceedings in the arbitration and to determine question of evidence according to his own views of the exigencies of the case before him, and if one of the parties to the arbitration records by written application or otherwise his willingness to rest his case upon his opponent's deposition, the arbitrator can

make his award accordingly. In the present case it was the plaintiff himself who applied by petition to the court that the case might be determined, or in other words that an award might be made, in accordance with the evidence of his opponent, and this course was adopted. The arbitrator was clearly entitled to adopt such procedure and to make his award in accordance with the defendant's oath. His powers in this respect appear to me to fall within the principle recognised in the English case of *Hagger* v. *Baker,* (14 M. & W. 9), referred to on page 647 of *Mr. Russell's* learned and well-known work on *the powers and duties of arbitrators,* 4th Edition. 1870, where, it was held that an award would not be avoided even if the arbitrator were erroneously to reject admissible or receive inadmissible evidence."

In *Muthukaruppa* v. *Veerabhadra,* 29 Ind.Cas. 49=2 L.W. 320=17 M.L.T. 241, *Sadasiva Aiyar, J.* said: "Following *Bhagirath* v. *Ram Ghulam,* 4 All. 283=(1882) A.W.N. 34. I hold that there is nothing illegal in parties agreeing before *panchayatdars* to have evidence taken after the administration of any reasonable form of oath to witness." But an arbitrator is not entitled to adopt the procedure of a social nature unless all parties affected by it agree to the adoption of such procedure. To do so is to abrogate his function as an arbitrator and that would be a technical misconduct. *Dital* v. *Dhanraj,* A.I.R. 1925 Sind 287. But where such irregularities have not been objected to by the non-consenting party, he cannot afterwards raise that objection because the doctrine of waiver applies to such a case. *O'Neill* v. *Clark,* 57 Nebr. 760.

637. Powers of arbitrators to administer oath is discretionary.— The powers given to an arbitrator or umpire to administer oath to the parties or their witnesses are discretionary. He is not compelled to administer oath to any of them.—*Vide Russell* on *Arbitration,* 13th Edn., p. 132. But oath is to be administered if that be the condition of the submission unless it is waived by the complaining party by his conduct. It is no ground for setting aside an award, that the arbitrator (a layman) has examined witnesses not upon oath or affirmation, if that mode of proceeding was not objected to at the time of their examination. *Biggs* v. *Hansell,* 16 C.B. 562; *Ridout* v. *Pye,* 1 Bos. & P. 91. It is not absolutely necessary that the evidence before an arbitrator should be taken on oath: the parties may waive it. *Wakefield* v. *Llanelly Rf.,* 34 Beav. 245. Witnesses in an arbitration may be examined by consent without being sworn, if they are sworn before award is made. *Mansfield* v. *Partington,* 2 L.J. (O.S.) K.B. 153. Where a cause was referred to arbitration by an order directing the witnesses to be sworn before a Judge, and the arbitrator took the evidence of the plaintiff's witnesses not upon oath, which the defendant objected to, though he permitted his own witnesses to be examined unsworn, it was held that, by this proceeding, the defendant had waived the objection and that he could not on this ground impeach the award. *Allen* v. *Francis,* 9 Jur. 691.

It is well known that in proceedings before the arbitrator the law of evidence need not be strictly applied. *Gurumurthi* v. *Narasimha,* A.I.R. 1954 Orissa 235. An award based on hearsay evidence cannot be set aside. *Ibid.*

A case was referred by an order, which stated that the arbitrators should be at liberty, if they should think fit, to examine the parties and their witnesses on oath. *Held* that it was discretionary with the arbitrators whether they would examine the witnesses on oath or not; and

that it was no objection to the award that the witnesses were examined without being sworn, although the party against whom the award was made required, at the time, that they should be sworn. *Smith* v. *Goff*, 14 M. & W. 264. The law is thus stated by *Russell* in the latest edition of his book: "An arbitrator or umpire has power, unless the arbitration agreement expresses a contrary intention, to examine on oath or affirmation the parties and witness appearing before him. He is not powers compelled to take the evidence on oath; the matter is within his discretion, unless the mode of examination is expressly stipulated for in the arbitration agreement." *Russell*, 15th Edn., p. 158. For duties of parties to the reference *vide* Rule 6 of the First Schedule.

638. Examination on oath.—If a submission to arbitration is "so that the witnesses be examined on oath" affidavits cannot be read. *Banks* v. *Banks*, 1 Gal. 46. In such a case he should be examined *viva voce* after being sworn. *Ibid.*

639. Securing the attendance of witnesses.—Under 12 of the English Arbitration Act elaborate provisions have been made for securing the attendance of witness, conduct of proceedings. The witnesses may be summoned by *subpoena*. (*Russell*, 15th Edn., p. 160). As regards powers of Court to issue processes for appearance before arbitrators; *vide* S. 43 *infra*. It is the litigant who should approach the court and no duty is cast upon the arbitrator to invite a recalcitrant party to be present when it has evinced the intention to remain absent and especially in a case when the entire *exparte* evidence had already been recorded against such party. *Azad Hind* v. *Ramlal* I.L.R. (1960) 1 Punj. 178=A.I.R. 1961 Punj. 206 (dissenting from A.I.R. 1932 Bom. 68).

640. Application of the Evidence Act in enquiries in other tribunals than the court.—The Evidence Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry. Rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence and that he should be given the opportunity of cross-examining the witness examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. *Union of India* v. *T.R. Varma*, 1958 S.C.J. 142=1958 S.C.R. 499=A.I.R. 1957 S.C. 882: see also A.I.R 1957 SC. 232.

CLAUSE (*b*)

641. Clause (b)—power to state a special case is discretionary with the arbitrator.—This clause combines the clause (*b*) of section 10 of Act IX of 1899, and para. 11 of the Second Schedule of the Civil Procedure Code. In *Bombay Fire Insurance* v. *Ahmedbhoy Habibbhoy*, 1 Ind.Cas. 15=11 Bom.L.R. 1=34 Bom. 1, *Davar*, *J.* observed: "There are no materials before me to show whether the arbitrators will or will not comply with my rulings or obey my directions. Under section 10 of the Act (Arbitration Act of 1899) they have power to state a special case for the opinion of the court on any question of law involved in the proceedings before them. They have not chosen to do so. It

appears that in England the court can compel the arbitrator to state a case. See *In re Spellers & Bakers, Limited, and Leetham & Sons,* (1897) 1 Q.B. 312. I have no such power. The Indian Arbitration Act leaves it to the discretion of the arbitrators to state a special case or not as they choose. I have no power to enforce my rulings or directions if the arbitrators do not choose to follow my rulings or obey my directions; and under these circumstances, I must decline to comply with the alternative prayer of the petition." See also *Re Atlas Insurance Co.,* 10 Bom.L.R. 351; *Sewdutrai* v. *Tata Sons,* 27 C.W.N. 494. Similarly, in *Kodumal* v. *Volkart Bros.,* 48 Ind.Cas. 434=12 S.L.R. 34, the court observed: "Under the English Act the arbitrator can be compelled to refer a point of law for the opinion of the court, and on this there is authority that where the only matter in dispute is a question of law, the courts will be disposed to refuse to stay since it will be idle to remit to the arbitrator that which the arbitrator would, in his turn, have to remit to the court. But this argument does not apply in India. for the Indian Arbitration Act contains no provision under which the arbitrators can be compelled to refer to the court a question of law. The machinery of the Indian Act is adequate for the disposal both of questions of fact and questions of law, and section 10 (*b*) of the Act gives the arbitrators power to invoke the assistance of the court for a decision of a question of law, if they so desire. We do not, however, go to the length of saying that there may not be cases involving complicated questions of law which the court would be better able to try than the arbitrators."

The above case of *Kodumal* v. *Valkart Bros.,* 48 Ind.Cas. 434=12 S.L.R. 34, was followed in *Abdulla Haroon* v. *E. D. Sassoon,* 56 Ind.Cas. 76=13 S.L.R. 201, where the court observed: "In considering this objection the court must necessarily treat with great respect the decision of another Bench in the case of *Kodumal* v. *Volkart Bros.* (*supra*) which has already been referred to, where the subject-matter of the suit was of a similar nature to the subject-matter of the suit now under discussion. In that decision it was held that the arbitrators are competent to decide questions of law and fact and the fact that a difficult question of law is involved is not ordinarily a good ground for refusing to stay." See also *Ghulam Khan* v. *Muhammad Husain,* 29 Cal. 167=6 C.W.N. 226=29 I.A. 51=12 M.L.J. 77=4 Bom.L.R. 161=25 P.R. 1902 (P.C.), where it was laid down that arbitrators are judges of law as well as judges of fact and an error in law certainly does not vitiate an award.

In *Louis Dreyfus & Co.* v. *Arunachala,* A.I.R. 1931 P.C. 289 (293)= 8 O.W.N. 1066=35 C.W.N. 1287=58 I.A. 381=(1931) A.I.J. 1116=35 Bom.L.R. 1536=54 C.L.J. 372=61 M.L.J. 623=34 M.L.W. 676=134 Ind. Cas. 100, *Lord Tomlin* observed: "In their Lordships' judgment, the language of the award does no more than indicate that the umpire took advice upon the general rules of law bearing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon. The case against the umpire in this respect is not, in their Lordships' view, strengthened because the umpire in the exercise of his discretion refused to state a special case. Their Lordships are therefore of opinion that the award is good and ought to stand."

The power of the arbitrator to state a case under this section is discretionary. *Czarnikov* v. *Roth,* (1922) 2 K.B. 478; *Re Fisechal and Mann,* (1919) 2 K.B. 431=88 L.J.K.B. 1173, *Plamer & Co. and Hosken*

& *Co., In re,* (1898) 1 Q.B. 131=67 L.J.Q.B. 1. Even under the English law it was not misconduct for an arbitrator or umpire to refuse to state a case on a point of law if his finding on a point of fact renders the point of law immaterial. *Buerger* v. *Barnett,* (1919) 89 L.J.K.B. 161 See also *Russell,* 15th Edn., p. 285.

In *Haji Ebrahim* v. *Northern India Oil,* A.I.R. 1951 Cal. 230, the Court observed : "Section 13, Indian Arbitration Act, 1940 provides in sub-para. (b) thereof that the arbitrators have power to state a special case for the opinion of the Court on any question of law involved..... Section 9. English Arbitration Act, 1934, empowers the Court to direct an arbitrator to state a question of law, but under the Indian Arbitration Act. There are no powers in the Courts in India under the Indian Arbitration Act, 1940, to direct the arbitrator to state a special case." See also, *Nandlal* v. *Ambalal,* 60 C.W.N. 810=A.I.R. 1956 Cal. 476.

In exercising the power, which the statute gives the arbitrators under this clause they are not in the least compelled to accept the suggestion of the parties appearing before them nor are they confined to the suggestions made by the parties. In stating the case for the opinion of the court the material facts necessary for the opinion of question of law raised must be formed by the arbitrators and clearly set forth in the statement of case. In this procedure the court will not find facts or make an enquiry to find facts. *Clive Mills* v. *Swalal,* A.I.R. 1957 Cal. 692. Where the suit as framed is maintainable is a question of law or fact if it is comprised in the matter in dispute between the parties and all the matter in dispute is referred to arbitration, the arbitrator is accordingly clothed with power to decide it. It may be that if there is a mistake of law on the face of the award arising from the decision on this question, the court might have opportunity to interfere and correct it, unless of course the question of law is held to have been specifically referred as a point of difference for decision of arbitrator as such. A.I.R 1959 Ker. 174 ; A.I.R. 1955 S.C. 468. One of the limitations on the arbitrators' powers to state a special case for the opinion of the court, is that it must not be prohibited either expressly or by implication by the arbitration agreement between the parties. *Clive Mills* v. *Sewalal,* A.I.R. 1957 Cal. 692.

642. English Arbitration Act, (1950)—S. 21 (1)(a).—If the arbitrator has no jurisdiction to deal with the dispute, he would have no jurisdiction to state a case about it. *Windsor Rural* v. *Otterway,* (1954) 3 All.E.R. 721.

643. Question of jurisdiction.—A question of jurisdiction can be referred to arbitration. *Hiralal* v. *Kalinath.* A.I.R. 1955 All. 569.

344. Section 14 (3) and 13 (b).—The effect of s. 14 (3) and s. 13 (b) is that the court's opinion can be sought by the arbitrators on a question of law involved where the arbitrators find difficulty to decide it for themselves and which decision when given in the opinion of the court will help or assist them in making the award and not depart their very jurisdiction to make the award. Questions of law which go to the very root of the jurisdiction of the arbitrators themselves to act as arbitrators to conduct the arbitration proceedings and to make the award as arbitrators can not be asked by the arbitrators by the procedure of a satement of the case under S. 13 (b) read with section 14 (3) : 'The true interpretation, therefore, of the word "involved" in S. 13 (b) is that the question of law must be immanent in the dispute in the sense that their decision will help the arbitrators in making a true and just award and

not transcendent. Transcendental questions of law which transcend and override the jurisdiction of the arbitrator to make the award do not come within the true interpretation of the word involved. A.I.R. 1957 Cal. 692 ; (1954) 1 W.L.R. 1494 ; see also *Union* v. *Ramsukh,* A.I.R. 1959 Punj. 61.

An arbitrator has been given by the Indian Arbitration Act the choice to state a special care for the opinion of the court on a legal issue, or to state the award and a legal issue, for the opinion of the court. If he were to choose the first alternative, no appeal lies against the opinion. The opinion of the court under s. 13 (b) signifies the consultative jurisdiction of the court is not a judgment and cannot act as *resjudicata. Union of India* v. *South India Corporation Ltd.* (1960) 1 All. W.R. 198=1960 Audh. L.T. 108=A.I.R. 1960 A.P. 346 (A.I.R. 1957 Cal. 692 discented from).

645. Power of umpire is also discretionary.—In *Sewdutrai Narsaria* v. *Tata Sons, Ltd.,* 77 Ind.Cas. 769=27 C.W.N. 494=A.I.R. 1921 Cal. 576, *Greaves, J.* observed : "The power of an umpire under the Indian Arbitration Act to state a special case is contained in section 10 of the Act, whereby it is provided that an umpire shall, unless a different intention is expressed, have power to state a special case for the opinion of the court on any question of law involved. Section 7 of the English Act is practically the same and in *Russell* on *Arbitration and Award,* 10th Edn., p. 175, it is stated that this power is merely permissive and enabling and not compulsory, and reference is made to two cases—*Holloway* v. *Francis,* (1861) 9 C.B. (N.S.) 559=142 E.R. 219=127 R.R. 782, and *Gibbon* v. *Parker,* (1862) 5 L.T. 584, decided under section 4 of the Common Law Procedure Act, 1854. In *Wood* v. *Hohan,* (1839) 5 M. & W. 674=9 L.J. (N.S.) Ex. 3=52 R.R. 876=151 E.R. 286, it was held that a clause giving an arbitrator liberty, at the request of the parties, to raise any point of law for the opinion of the court was merely enabling and not compulsory and it did not involve the obligation to state case. *Miller* v. *Shuttleworth,* (1849) 7 C.B. 105=137 E.R. 43, is to the same effect as also *Baguly* v. *Markwick,* (1861) 30 L.J.C.P. 342 L.T. 245=9 W.R. 537. The English Act contains a section (section 19) which is not in the Indian Act, empowering an arbitrator or umpire at any stage of the proceeding to state in the form of a special case for the opinion of the court any question of law arising in the course of the reference and the section further provides that he shall do so if directed by the court. Under this section if the umpire when asked by a party to the reference to state a special case, refuses, he is bound at the request of the party asking for a specialcase to be stated to save time to enable the party to apply to the court and if he refuses to do so, he is guilty of misconduct. In the absence of such a clause as clause 19, the party who asks the umpire to state a special case and is refused, should on such refusal apply to the court forthwith to revoke the submission. If he does not do this, it is too late to come to the court when the reference is concluded and award has been made against him."

In *Arunchala Iyah* v. *Louis Dreyfus & Co.,* A.I.R. 1928 Mad. 107 & 39 M.L.T. 563=27 M.L.W. 267=(1928) M.W.N. 132=107 Ind.Cas. 793, *Ramesam, J.* observed :. "Section 10 of the Indian Act while giving power to the arbitrators to state a special case for the opinion of the court differs in this respect from the English Act. Section 19 of the English Act makes it obligatory on the part of the arbitrator to state a special case if directed by the court. It has been held that this section impliedly confers on a

party to the arbitration the right to apply to the court for such an order. *See Palmer & Co. and Hosken, In re,* (1898) 1 Q.B. 131. But this is wanting in the Indian Act." *Vide Louis Drefus* v. *Arunachala,* 58 I.A. 381=55 Mad. 93=134 Ind.Cas. 1980=61 M.L.J. 623=A.I.R. 1931 P.C. 289 (on appeal to Privy Council).

646. Special case when question of law is involved.—The arbitrators have power to state a special case for the opinion of the court on any question of law involved in proceedings before them. *Bombay Fire Insurance* v. *Ahmadbhoy,* 1 Ind.Cas. 15=11 Bom.L.R. 1=34 Bom. 1. See also, *Sreelal Mangulal* v. *J. F. Madan,* A.I.R. 1925 Cal. 599 (603) =52 Cal. 100=88 Ind.Cas. 49, where the court observed : "If there is any real difficulty in point of law as to which the opinion of the court should be taken, provision is made in clause 11 of the Second Schedule of the Civil Procedure Code for making the award in the form of a special case with the leave of the court." In *Lakshman Baburao* v. *Ramchandra Rajaram,* 84 Ind.Cas. 378=26 Bom.L.R. 836=48 Bom. 663=A.I.R. 1925 Bom. 22. *Shah, Actg. C.J.* said : "No doubt the consideration urged on the other side is that the specific words used in section 10(*b*) of the Indian Arbitration Act are not to be found in this para. 11 of the Second Schedule, and that the court should be slow to read words in a statutory provision which are not there. I have given due weight to this consideration ; and I recognise its force. But I am unable to think that the wording of para. 11 was intended to have a more comprehensive scope than clause (*b*) of section 10 of the Indian Arbitration Act." See also, *Sarkar,* p. 160. But now this controversy has been set at rest by re-enacting of the present clause (*b*) which reproduces the phrascology of old section 10, (*b*).

In a reference in a pending case, there is nothing objectionable in the court's helping the arbitrators with advice and orders when they come to it in a difficulty. *Kanhaia Lal* v. *Narain Singh,* 31 Ind.Cas. 700=11 P.W.R. 1916=28 P.R. 1916. Under para. 11, Schedule II of the C. P Code, now repealed by this Act, the omission to take leave of the court before stating an award for its opinion as required by that part could be rectified by the subsequent grant of leave. *Surji Sethani* v. *Ratan Lal,* 47 C.W.N. 266.

647. Duty of arbitrator to submit question of law.—A question of law can be submitted by an arbitrator to the Court and decided by it. Thus, where the jurisdiction of the arbitrator is in doubt or dispute. the arbitrator is fully competent and it is his duty to refer the matter of the Court. *Baldey* v. *Kotagin,* A.I.R. 1950 Hyderabad, 63 ; see also, *Ratan Mudaliar* v. *Vigiaranga Mudaliar,* A.I.R. 1926 Mad. 762=95 Ind.Cas. 581, *Champsey Bhova* v. *Jivraj,* A.I.R. 1923 P.C. 63 (69)=47 Bom. 578 ; *Kanhaia Lal* v. *Narain,* 31 Ind.Cas. 700=A.I.R. 1915 Lah. 253.

648. Duty of each party when special case is referred.—It is the duty of each party, when he gets the special case, to consider it and satisfy himself that the relevant facts are found. If they are not, he should apply to the court to have the case remitted for the findings he wants. *Universal Cargo* v. *Citale,* (1957) 2 All.E.R. 70.

649. S. 13 (b)—the jurisdiction exercised by court.—The jurisdiction exercised by a court which proceeds to give an opinion on a case stated by an arbitrator is consulative. It would be open to the arbitrator to accept it or not to accept this opinion. An advisory opinion cannot be regarded either as a judgment or as an order. for it does not finally determine the case. It merely advises the arbitrator to act upon the advice. The giving of advisory opinion is not the exercise of judicial

function. An opinion given by court in its execution or administration capacity cannot fall within the ambit of the expression "case decided." *Union of India* v. *Ramsukh*, A.I.R. 1959 Punj. 61 ; *Re Knight*, (1892) 2 P.B. 613 (619). *Gendevi* v. *Mohammad*, A.I.R. 1943 Lah. 65=I.L.R. (1943) Lah. 257 (F.B.)

650. Form of reference.—Under the present Act no form is given in the Schedule for referring a special case. Under section 44 the High Court is authorised to make rules consistent with this Act as to the forms to be used for the purposes of this Act. [*Vide* section 44(*d*).] The Second Schedule of the repealed Act of 1899 prescribed the following form for making references :

FORM V.

SPECIAL CASE.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A.B. of and C.D. of :—

The following special case is, pursuant to the provisions of section 10, clause (*b*),of the said Act, stated for the opinion of the (*Here specify the Court*) :—

(*Here state the facts concisely in numbered paragruphs*).

The question of law for the opinion of the said Court are :—

First, whether

Secondly, whether

(Signed) X.Y.,
Arbitrator.

Dated the

189

A similar form was also appended to the Second Schedule of the Civil Procedure Code, 1908.

In *Lakshman Baburao* v. *Ramchandra Rajaram*, 84 Ind.Cas. 378=26 Bom.L.R. 836=48 Bom. 663=A.I.R. 1925 Bom. 22, *Fawcett, J.* observed: "I think that special weight must be attached to the form of special case provided in the Appendix to the Second Schedule of the Civil Procedure Code. That form is copied almost word for word from the form of special case appended to the Second Schedule of the Indian Arbitration Act and having reference to section 10, clause (*b*), of that Act under which a special case is confined to questions of law. There is no such form appended to the English Arbitration Act of 1889, and there was no such form appended to the Code of 1882, so that it is obvious that the form was copied from that appended to the Indian Arbitration Act, as already mentioned. That form is put in a way which clearly contemplates nothing but questions of law being submitted for the opinion of the court, in contradistinction to the facts which have to be first stated by the arbitrator ; and if the Legislature had intended that questions of fact might be raised in a special case, I think the form would not have been put in that positive form. The forms can be looked at as a useful guide to interpreting a doubtful expression in an Act, as was done, for instance, by the Privy Council in *Fateh Chand Sahoo* v. *Lelumber Singh Doss*, 14 M.I.A. 129=16 W.R. 26 (P.C.)=9 B.L.R. 433. I think also that, as this para. 11 is obviously based on the corresponding enactment in section 7 of the English Arbitration Act and reproduces it practically word for word, with the addition of the words 'with the leave of the Court,' it must be taken that Legislature had regard to the practice of the English courts under which such special cases are confined to questions of law. The whole basis of arbitration

is that the arbitrators should themselves decide the questions referred to them. But it is recognised that they should be allowed the assistance of experts who have special knowledge in regard to matters of science, etc., and the whole object of allowing arbitrators to state a special case for the opinion of the court is that they may have benefit of the court's explicit decision on questions of law or that the award should be made dependent on the opinion of a court on these legal questions arising. The case of *Jiphson* v. *Hawkins,* (1841) 2 M. & G. 366 & 2 Scott (N.R.) 605, cited in *Russell* on *Arbitration and Award,* 10th Edn., p. 140, is an instance where the court objected to the arbitrators leaving it to the court to draw inferences of fact. It was there held that this was not a proper exercise of the duties entrusted to them, as having heard the evidence and seen how it was given, the arbitrators should have drawn the inferences of fact. Still more should an arbitrator, who has actually taken the evidence, decide the questions of fact that arise, however difficult they may be, and it is quite outside the proper scope of arbitration for the arbitrator to put on the court the responsibility of deciding such questions of fact. It really takes the case from the hands of the arbitrator to whom the parties have confided the decision by the reference to him."

In the case of *North and South-Western Junction Ry. Co.* v. *Assessment Committee of the Brentford Union,* (1888) 13 App.Cas. 592=58 L.J.M.C. 95, *Lord Halsbury* observed: "But the case as stated in each of the alternative prepositions suggests to your Lordships for decision question of fact, and even suggests the question which of two alternative methods is the best for arriving at the conclusion of fact. My Lords, no court has ever given directions in such a case. I am, therefore, of opinion, my Lords, that your Lordships should avoid establishing a precedent which has never, I believe, hitherto been adopted, namely, of giving directions to the arbitrator how he should arrive at the fact." So a special case must set out all the findings of fact necessary to enable the court to decide the point submitted to it. Questions of fact must not be left for court to decide. *Russell,* 15th Edn., p. 163; see also *Ferguson* v. *Norman,* (1837) 4 Bing. (N.C.) 52. The special case must be confined to question of law. *Laxman* v. *Ramchandra,* 48 Bom. 663.

651. Opinion of court whether binding upon arbitrators.— Where the contract between the parties provides for reference to arbitration, the arbitrators are not deprived of their jurisdiction merely because a question of law has arisen between the parties; but it is for the court to exercise a judicial discretion whether the nature of the dispute between the parties is of such a character as could be more satisfactorily disposed of by a court than an arbitrator. *Holland Bombay Trading Co.* v. *F. O. Essardas Dharamchand,* A.I.R. 1926 Sind 286=19 S.L.R. 168=98 Ind.Cas. 151. In the above case the court observed: "No doubt, arbitrators are not deprived of their jurisdiction merely because questions of law have arisen between the partis, but it is for the court to exercise a judicial discretion whether the nature of the dispute between the parties is of such a character as could be more satisfactorily disposed of by a court than an arbitrator. As said by *Mukherjee, J.* in *Kedarnath Babulal* v. *Sumpatram Doogur,* 47 Cal. 1020=60 Ind.Cas. 951, the question whether there is sufficient reason why the dispute should not be referred to arbitration in accordance with the submission is a matter largely in the discretion of the court which, no doubt must be judiciously exercised. So also in *Russell* on *Arbitration,* p. 49. 'The

court has a discretion and where the point is one of law and more fitted to be decided by a Judge, the court will refuse the application for stay."

In *In the matter of an Arbitration between Adamji Lakhmanji and Messrs. Louis Dreyfus & Co.*, 79 Ind.Cas. 986=A.I.R. 1925 Sind 83, by a reference dated 30th August, 1922, respondents I and II referred certain disputes pending between them and arising out of four contracts for sugar to the arbitration of Messrs. Clayton and Brachi. On 26th February, 1923, during the course of the arbitration the arbitrators Messrs. Clayton and Brachi stated a case for the opinion of the court under section 10(*b*) of the Arbitration Act. The matter J.Mis. 75 of 1923 was disposed of by *Madgavkar, A.J.C.* with an opinion dated 22nd March, 1923. Thereafter one of the arbitrators Mr. Brachi left for Europe and the appointment of a substituted arbitrator became necessary Mr. Brachi being the appointee of Messrs. Louis Dreyfus & Co. respondent I called upon them to appoint an arbitrator in place of Mr. Brachi and on their failure to do so they themselves proceeded to appoint Mr. Crawford to act as arbitrator on behalf of respondent II. Then followed an application to this court J.Mis. 169 of 1923 by respondent II for revocation of the submission under section 5 and 9 of the Arbitration Act. This application having been heard and dismissed on 27th July, 1923, the arbitrators Messrs. Calvton and Crawford proceeded with the reference. The points previously submitted for the opinion of the court have again been raised before the arbitrators-petitioners who find the matter further complicated by the rival contentions of the parties before them as to the relevance and binding effect of the opinion expressed by *Madgavkar, A.J.C.* and referred to above. They now under section 10 (*b*) of the Arbitration Act, seek the opinion of the court on the following points:—

I. Whether the petitioners are bound to follow the opinion of *Mr. Madgavkar, A.J.C.*

II. Whether the petitioners are bound to make their decision on the basis of that opinion.

III. If so, must or should the said opinion be added to or form part of their award.

Lobo, A.J.C. answered the question:

"I and II. The order of the court on an application by arbitrators under section 10 (*b*) of the Arbitration Act is an opinion given by the court in what is merely consultative jurisdiction and is not a judgment or decision of the court and cannot, therefore, operate by way of *res judicata*. See also, *In re Knight and Tubernacle Permanent Building Society*, (1892) 2 Q.B. 613=62 L.J.Q.B. 33. Furthermore when one of of the two arbitrators has not joined in seeking the opinion of the court. he is in no way bound by it on principle of *res judicata*, the parties to the two proceedings not being the same. See also, *Firm of Jainarain Babulal* v. *Firm of Naraindas Janimal*, 66 Ind.Cas. 796=16 S.L.R. 1922 Sind 6.

III.—"Before discussing the law on this point it is important to note that on the subject of the statement of a case by arbitrators for the opinion of the court *there is an essential distinction between the law as prevailing in India and the English Arbitration Act of* 1899; under the latter any referee, arbitrator, or umpire may at any stage of the proceedings, under a reference and shall, if so directed by the court or a Judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference. Under the

Indian Arbitration Act, section 10 (*b*), arbitrators have power to state a special case for the opinion of the court on any question of law involved, but there is no means of compelling them to do so. As stated by *Gopaldas* in his *Law of Arbitration in India*, 'in England the court can compel an arbitrator to state a case, but the courts in India have no such power. Clause (*b*) of section 10 leaves it to the discretion of the arbitrators to state a special case or not as they choose and the court has no power to enforce its rulings or directions upon the arbitrators if they do not choose to follow the rulings or obey the directions.' Now clearly this distinction must have an important bearing on the effect, so far as the arbitrators are concerned of an opinion on any question of law obtained from the court by arbitrators. If they can legally be compelled to obtain that opinion then it would seem that they are legally bound by the opinion when obtained; if it is merely optional to them to seek such an opinion it would appear that it has not necessarily a binding effect upon them. But in the case of *In re Knight and Tubernacle Permanent Building Society*, (1892) 2 Q.B. 613=62 L.J.Q.B. 33, decision of the Court of Appeal, *Bowen, L.J.* in dealing with the effect of an opinion obtained by an arbitrator under section 19 of the English Arbitration Act states as follows: "The section contemplates a proceeding by the arbitrator for the purpose of finding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject-matter of the arbitration. He still remains the final judge of law and fact. No doubt a fair and honest arbitrator would, in the absence of special circumstances, be bound in honesty and morality after taking the opinion of the court to act upon such opinion. If he did not, it would at any rate be a matter calling for explanation on his part. But the arbitrator is still clothed with the final duty of determining the case. The opinion of the court does not finally determine the case; it only binds the arbitrator in honesty or morals to act upon the law as the court states it. There could be no appeal from his decision because he did not do so, although it might be a ground for impeaching his award on the ground of misconduct if he did not.' This is direct authority that even in a case where under section 19 of the English Arbitration Act an arbitrator could be compelled to seek the opinion of the court, that opinion is not in any case and in all circumstances binding upon him and he still remains the final judge of law and fact. Of course he may not lightly flout the opinion so obtained, for he would run the risk of having his award set aside on the ground of dishonesty or immorality, but there may exist epecial circumstances which may not make it dishonest or immoral on his part not to act upon it. That under English law the jurisdiction of the court in a reference by an arbitrator under section 19 of the Arbitration Act, is merely consultative is established by a number of authorities cited in *Halsbury's Laws of England*. Vol. I, para. 976, *The Annual Practice*, 1924, p. 2215, and *Russell* on *Arbitration*, pp. 152, 153. Mr. Elphinston relied on a passage in the dissenting judgment of *Vaughan Williams, L.J.* in the case of *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railway Company of London*, (1912) 3 K.B. 128, in which the learned Judge states: 'The arbitrator is entitled and intended by the Arbitration Act to act upon the answers given by the court to the question in the special case. The arbitrator is, I think, bound but in any case entitled and intended to act upon them. I say intended because it must be intended at least in every case in which the arbitrator is directed by the

court to state a special case after a refusal on his part to do so on the request of a party to the arbitration.' Apart from the fact that in that case the House of Lords on appeal did not uphold the judgment of *Vaughan Williams* in *British Westinghouse Electric and Manufacturing & Co* v.*Underground Electric Ry.*, (1912) A.C. 673=81 L.J.K.B. 1132= 107 L.T. 325, the passage quoted can hardly be taken as an authority for the proposition that the opinion of the court is in all cases binding on the arbitrator. Now this being the law in England where, as I have already stated, arbitrators can be compelled under section 19 of the Arbitration Act to state a case it can scarcely be argued that, in India, where it is wholly optional with arbitrators to state a case under section 10 (*b*) of the Indian Arbitration Act, the opinion obtained from the court is final and binding on the arbitrators. And if such opinion is not binding even on the arbitrators who sought it much less can it be binding on the petitioners in this case one of whom, Mr. Crawford, was not a party to application in J.Mis. 75 of 1923." See also, *Adamji* v. *Shamsuddin*, 19 S.L.R. 1=A.I.R. 1925 Sind 293.

652. English law on the subject.—Now the English law on the subject is laid down by section 9 of the English Arbitration Act of 1934, which runs as follows :—

"9. (1) An arbitrator or umpire may, and shall if so directed by Court, state—

(*a*) any question of law arising in the course of the reference ; or

(*b*) an award or any part of an award, in the form of a special case for the decision of the Court." See also section 19 of the English Arbitration Acts of 1889.

The object of that section of the English law was to give the court control over an arbitration while it was still proceeding. *In re Knight and Tubernacle Permanent Building Society*, (1892) A.C. 298, *per Lord Halsbury, L.C.*, p. 302. But the opinion expressed not being an order is not binding on the parties. *In re Knight and Tubernacle Permanent Building Society*, (1892) 2 Q.B. 613=62 L.J.Q.B. 33.

The rule that an error of law, if it appears on the face of the award, is a ground for remitting it or setting it aside, is an exception to the general rule that an award is final as to both fact and law [cf. *Race Course Betting Control Board* v. *Secretary of State*, (1944) C.L. 114 (125, 127). explained in *R.* v. *Northumberland Appeal Tribunal* (1951) 1 K.B. 711 at 721], and will not be applied where the parties have specifically refered a question of law to arbitration. *Hodgkinson* v. *Fermie*, (1857) 3 C.B. (N.S.) 189 ; *Kelanton* v. *Duff Development Co., Ltd.*, (1923) A.C. 395—*Russell*, 15th Edn., p. 272.

In *British Westinghouse* v. *Underground Electric*, 81 L.J.K.B. 1132= (1912) A.C. 673, an arbitrator having stated a special case for the opinion of the Kings' Bench Division which court expressed their opinion answering the question in the affirmative, subsequently made his award incorporating the opinion so expressed by the court, and adjudicating in favour of the respondents in accordance with that opinion. An application by the appellants to the Kings' Bench Division for an order to set aside the award on the ground that the opinion was wrong and constituted error on the face of the award having been dismissed. the Court of Appeal (*Buckley, L.J.* and *Kennedy, L.J.*, *Vaughan Williams, L.J. dissenting*) held that though the decision of the King's Bench Division expressing their consultative opinion on the special case could not have been appealed against, yet their decision to set aside the award which incorporated

that opinion was open to review in the Court of Appeal :—*Held,* by the House of Lords, that the decision of the Court of Appeal was right, and that both the Courts of Appeal and also the House of Lords were, in the circumstances, competent to review the consultative opinion which the arbitrator, as he was bound to do, had adopted, and had set out his award. *Viscount Haldane* in the course of his judgment said : "The result is that the award cannot stand and must be sent back to the arbitrator, with a declaration that the contention of the appellant on the first question, so far, but only so far, as they contended that the several facts relied upon by them were relevant matter to be considered by the arbitrator in assessing the damages, was right, and that of the respondents on the second question was wrong."

In submitting the question of law under this clause the arbitrator must find affirmatively all the facts on which the question of law depends. *North and South Western Ry. Co.* v. *Brenford,* 58 L.J.M.C. 95 ; *Larrinaga* v. *Societe Franco-American,* (1922) 92 L.J.K.B. 45 ; *Ferguson* v. *Norman,* (1837) 4 Bing. (N.C.) 52. The evidence need not be stated. *Kensington Electric Lighting Co.* v. *Notting Hill Electric Co.,* (1918) 118 L.T. 532 (538). The court may order further enquiry or may simply give judgment. *In re George,* (1898) 2 Q.B. 136 ; *Page* v. *Kattering,* 87 L.R. 111. But the court cannot make its own finding of facts. *Produce Brokers* v. *Weiss,* 118 L.T. 111. So in England where the arbitrators refused to state a case on the application of two buyers, and also refused to give the buyers an opportunity of applying to the court to order them to state a case, held that such an order is an ouster of the jurisdiction of the court. *Czarnikov* v. *Roth,* (1922) 2 K.B. 478=127 L.J. 824 ; see also, *In re Palmers & Co.,* (1898) 1 Q.B. 131.

653. Distinction between English and Indian Law.—It is unwise to draw any analogy from the English law in determining the power of the arbitrator to refer questions to the court for opinion under the Indian Act. The difference far too great for such an analogy to be at all useful and may be misleading. In the English Law of Arbitration the Arbitrator's freedom in stating a case on any question of law arising in the course of the reference is wider than what it is under the Indian law which has used "involved." He can even be compelled by the High Court to state a case which cannot be done in India. Then again in England no agreement to take away the arbitrator's power to state a case to the High Court for opinion is permissible, whereas it is expressly recognised in S. 13 (*b*) of the Arbitration Act (1922) 2 K.B. 478, referred to.

Further, there is no provision in the English law comparable to S. 33 in the Indian Arbitration Act and the words "the opinion of the court shall be added to form part of the award" found in S. 14 (3) is absent from S. 21 of the English Arbitration Act. *Clive Mills* v. *Swalal,* A.I.R. 1957 Cal. 692. Where an arbitrator under Agricultural Holdings Act (English) 1948, states a case under the provisions of the Act for the opinion of a county court on a question of law, an appeal lies to the Court of Appeal from the decision of the county court. *Re Lower Onibury,* (1955) 2 All.E.R. 409.

Under section 21 (1) (a) of the English Arbitration Act of 1950 the arbitrator has power to state question of law arising in the course of the reference and to enable the court to determine whether the questions of law do or do not arise in the course of the reference, he ought to set out in his case something which shows what has arisen under the reference, and what the contention of the parties are, so as to show the question

of law has arisen. It is not a mere matter of words. The court is not at the beck and call of the arbitrator to answer whetever the arbitrator may want to put to it, and it is not there to indulge in legal exercises. It is there only to answer questions which it is satisfied do arise in the course of the reference and are material to be determined. Therefore, it is important that the arbitrators should when they are stating their case, state enough to make it plain how the question of law arise so that the court can itself judge of their materiality. *Per Devlin, J.* in *Windsor Rural Ristrict* v. *Otterway*. (1954) 3 All.E.R. 721.

654. Stating the award in the form of a special case.—An arbitrator or umpire may state in the form of a special case for the decision of the court, either "any question of law arising in the course of the reference, or an award (*interim* or final, unless he lacks the power to make an interim award) or part of an award--*Russell,* 15th Edn., p. 163. It is not misconduct for an arbitrator or umpire to refuse to state the award wholly or in part, in the form of a special case on any question of law for the opinion of the court. *Russell,* 15th Edn., p. 285. A special case in an interim award, or upon a point of law arising in the course of a reference, may be stated, notwithstanding that proceedings under the reference are still pending, while a case contained in a final award can only be stated after the proceedings are at an end. *Russell,* 15th Edn., p. 163. A final award in the form of a special case must comply with the requirements for a final award, in particular it must be such that the court has merely to decide the law and thereupon automatically one or other alternative decision of the arbitrator comes into operation. *Russell,* 15th Edn., pp. 163-164 ; see also, *Ferguson* v. *Norman,* (1837) 4 Bing. (N.C.) 52 ; *North and South Western* v. *Assessment Committee,* (1888) 13 App.Cas. 592 ; *Cogstad* v. *Newsum,* (1921) A.C. 528 , *Nello Simoni,* (1949) 83 L.I.L. Rep. 157 ; cited in *Ibid.* An award in which judicial decision is reserved to the arbitrators is one event, cannot be treated as a final award. *Cogstad* v. *Newsum,* (1921) A.C. 528=90 L.J.K.B. 1293. *Lord Buckmaster* said : "Unless it can be found that according to its terms, the powers of the arbitrator were so exercised that, in any event, his duties under the arbitration were ended, and that he reserved to himself no further power in any event, then the award cannot be regarded as final."

Appeal—Vide clause (2) of sub-section 1 of section 39 *infra.*

CLAUSE (*c*).

655. Making of conditional award.—This clause is reproduction of sub-section (2) of section 15 of the Indian Arbitration Act of 1899. That sub-section was as follows : "An award may be conditional or in the alternative. *Illustration* :—A dispute concerning the ownership of a diamond ring is referred to arbitration. The award may direct that the party in possession shall pay the other party Rs. 1,000, the said sum to be reduced to Rs. 5, if the ring is returned within fourteen days."

The general rule is that an award ought to be certain, so that no reasnable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties.—*Russell* on *Arbitration,* 13th Edn., p. 207. See also, *Trib and Upperton, In re,* (1835) 3 A. & E. 295 ; *Mortin* v. *Burge,* (1836) 4 A. & E. 973. But it is competent to an arbitrator, who is empowered to decide whether a sale should be set aside, to pass an award seeting aside the sale on the vendor re-paying the purchase money. *Venusami* v. *Chilakuri,*

15 Ind.Cas. 573=(1912) 1 M.W.N. 901. In the above case the court observed : "The matter in dispute before the arbitrator was whether the plaintiff was entitled to have a sale deed set aside. The arbitrator was of opinion that while the plaintiff was entitled to have it set aside she was also bound as a matter of equity to repay the money that she has received in connection with the sale deed. It cannot be said that he acted beyond the limits of his jurisdiction in passing what in substance was a conditional award in plaintiff's favour and the District Munsiff was right therefore in holding that there was no ground under rule 14, Schedule 11, of the Civil Procedure Code, to remit the award". A conditional award may be open to objection that it is not final or definite, but a conditional award may be valid when a provision is made by it for alternative in case the condition is not fulfilled. *Sarkar* p. 160.

656. Alternative award.—An award in the alternative may be sufficiently certain and final.—*Russell,* 13th Edn., p. 205. If an award directs one of two things to be done, and one of them is uncertain or impossible, the award is nevertheless sufficiently certain and final if the second alernative is certain and possible ; and it will be incumbent on the party to perform the second alternative. *Simmons* v. *Swaine* (1809) 1 Taunt. 549, cited in *Russell,* 13th Edn., p. 205. Although it might be impossible for a party to perform certain parts of an award yet if the award in each instance gives an alternative which he could perform it is sufficient *Wharton* v. *King,* 2 B. & Ad. 528=9 L.J. (O.S.) K.B. 271 But an award that A or B shall do a certain act is bad for uncertainty. *Lawrence* v. *Hodgson,* 1 Y. & J. 16=30 R.R. 754. Where a submission was with reference to a breach of contract by the non-delivery of certain goods, an award directing the delivery of the goods or, in default thereof, the payment of a sum of money was held to be a good award. *Gabriel* v. *Langton,* 4 W.R. 249.

In *Olympia Oil and Cake Co.* v. *Mac Andrew,* (1918) 2 K.B. 771=37 T.L.R. 581=82 J.P. (Journal) 581=145 L.T.Jo. 275, by two contracts goods were sold under the conditions of the Association. Arbitrators appointed under these conditions found the sellers in default and made in the buyers' favour. On appeal, the appeal committee of tht Association made a final award in favour of the buyers and alternatively at the request of the sellers stated a special case on question of law. They required, that either party, if they wished to proceed with the special case, should within specified time give the other party notice and set the award down for argument. Otherwise their award was to be final. The sellers moved to set aside the award on the grounds that the arbitrators had no jurisdiction to limit the time within which the sellers could proceed with the special case and thus cut down the sellers' right and that the award was conditional. It was held that the appeal committee had jurisdiction to make the alternative award in such a form and had allowed a reasonable time to take the opinion of the court. *Vide* also, *Lyon* v. *Haddock,* (1919) W.N. 11. But such an award under the English law, in view of the provision of section 9(1) (*b*) of the English Arbitration Act of 1934. would be *ultra vires.*—*Russell,* 13th Edn., p. 287. In the 15th Edn., of *Russell* the following criticism appears "It was the opinion of the previous editors of this book that these cases would not now be followed, in as much as such an award might be taken as attempting to exclude the court's power (newly given by the 1934 Act) to order the award be put to the form of a special case. Such awards have so much to recommend them, however, that it would seem unlikely

that the court would lightly treat the 1934 Act as having abolished them : the proper course for a party not wishing to accept the arbitrators' decision is to go to the court within the time provided. It may be noted that awards in the alternative form have continued to be made since 1934, without objection by the Courts. [See *e.g. Podar Trading Co.* v. *Tagher* (1949) 2 All. E.R. 62 ; *The Kyno* (1939) 63 L.I.L. Rep. 43]. Nevertheless, to avoid any possibility of dispute upon this point, the arbitrator should ask the parties (if a request to put his award into the form of a special case is made to him) whether it would not be more convenient to them that a final award should be included as an alternative ; while the time allowed for taking a special case to the court should not normally be less than the six weeks allowed for applying to set awards aside". *Russell,* 15th Edn., p. 165.

Alternative award made by the arbitrators in the form of a special case is valid. *North Riding of Yorkshire County Council* v. *Middle Borough Council,* (1914) 2 K.B. 847=83 L.J.K.B. 1004.

657. Two ways of taking opinion of Court.—In *In re, Knight and Tubernacle Permanent Building Society,* (1892) 2 Q.B. 613 of P.P. 618. 619, *Bowen L.J.* said : "The arbitrator is a judge both of law and fact with regard to the matter submitted to him. The Arbitration Act, 1889, in order to assist arbitrators, has given power to an arbitrator to take the opinion of the Court in two ways. He may state his award in the form of a special case. When that is done the arbitrator has exhausted his power ; he has made his award in such a state that the opinion of the Court will determine the rights of the parties, and turn the award into one group or the other. Therefore the opinion of the Court is, in that case, an effective determination of the rights of the parties.....But there is another way in which an arbitrator may during the arbitration, take the opinion of the Court. Under S. 19, he may voluntarily take, by means of a special case, the opinion of the Court for his guidance, and as a step for arriving, at his own ultimate award in the matter". See also *In re, Kirkleatham Local Board,* (1893) 1 Q.B. 375, where Bowen L.J. quoted the above passage in support of his judgment. *In re, Dexters Ltd.,* (1926) 1 K.B. 348=95 L.J.K.B. 386, the umpire made three alternative awards, one of which was affirmed by *Roche J.* on a special case. The appellants accepted payment of the amount due under the award which had been affirmed by *Roche J.*: *Held,* that the appellants having acted on and accepted pavment under the award, could not afterwards appeal against it. In the above case *Warrington L.J.* said : "Therefore there are three alternative awards, any one of which may be the ultimate award of the umpire according to the decision of the Court to whom the case is submitted". But see *Lessenden* v. *Bosch Ltd.,* (1940) A,C. 412 (417—9 ; 426).

CLAUSE (*d*),

658. Claus (d).—This sub-section has reproduced clause (*c*) of section 10 of the arbitration Act of 1899, and clause (*c*) of section 7 of the English Arbitration Act of 1889. Under section 15, clause (*c*), the court is also given power to modify or correct an award where the award contains a clerical mistake or an error arising from an accidental slip or omission. Para 12 of the repealed Second Schedule of the Civil Procedure Code also gave similar power to court. (*Vide* para 12 of the Second Schedule of the Civil Procedure Code given in the Appendix). Section 17 of the English Arbitration Act of 1950 runs as follows : "Unless a

contrary intention is expressed in the arbitration agreement, the arbitrator or umpire shall have power to correct in an award any clerical mistake or error arising from any accidental slip or omission."

659. Clause (d)—Scope of.—There can be no doubt that once an arbitrator has given his decision he becomes *functus officio* and he cannot add to it or vary it in any way except to correct any clerical mistake or error arising from any accidental slip or omission. The arbitrators cannot change their decision even to bind the parties or to make the award full. But if there is nothing in the merits but there is an omission in the script of an accidental nature the arbitrator can certainly act to rectify the defect even within the powers given by this clause. *Contumal* v. *Ram Chandra,* I.L.R. (1955) Nag. 100=A.I.R. 1955 Nag. 126.

660. Clerical mistake or error arising from any accidental slip or mission.—In *Suttherland & Co. v. Hannebring Brothers, Ltd.,* 90 L.J.K.B. 225=(1921) 1 K.B. 336, *Rowlet J.* observed : "A point has arisen in the case as to the extent of the powers conferred upon arbitrators by section 7(*c*) of the Arbitration Act, 1889. It is an extremely difficult and important point. The section reads as follows :—"The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power.....(*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission'. Upon the construction of those words as a matter of grammar 'clerical' belongs to 'mistake' only, and 'error arising from any accidental slip or omission' is a second and independent limb of the clause. The words of the clause are similar to those in Order XXVIII, rule II, and in my opinion most of the difficulty has been caused by the extent of the meaning given to the words in that Order. I cannot help feeling that, as applied to arbitrators, the words ought to be construed rather strictly. Before the Arbitration Act was passed it is clear that the courts regarded it as very dangerous to touch their awards after they had been made, and *Mordue* v. *Palmer,* (1870) 40 L.J.Ch. 8=L.R. 6 Ch. 22, is the well-known case on that point. There the error corrected by the arbitrator arose from the mistake of a clerk in copying the draft award, and it was held that the arbitrator could not put the mistake right, being *functus officio.* Such a state of things as that has clearly been altered by section 7(*c*), but the difficulty is to see how far the alternation has gone.

"In the case before us the arbitrator made an award, including therein certain costs between one of the parties and a third party, and the question arose whether the words he had used included all those costs or only some of them. The award went back to him and he told Mr. Lewis, of the firm of solicitors representing the respondents, that he certainly had made an error in writing his award, and he amended it so that it read, as he had originally intended to read.

"Now that was not the correcting of a clerical mistake within the meaning of section 7(*c*) which is something almost mechanical—a slip of the pen or something of that kind. But did he correct an error arising from an accidental slip or omission ? Here we get upon ground which is almost metaphysical. An accidental slip occurs when something is left out by accident. What is an accident in this connection, an accident affecting the expression of a man's thought ? It is a very difficult thing to define, but in this case there nothing omitted by accident: the arbitrator wrote down exactly what he intended to write down, though it is doubtful what that really meant considered from a legal point of view.

But what the arbitrator has really done here is to assume a jurisdiction to expound what he had purposely written down, and that, I think, he cannot do.

McCardie J. observed: "This alternation in his award was a serious matter, and it clearly involves a serious point of law. Under the old law it is quite clear that he could not have made it, for the law was most rigorous as to the limitation of an arbitrator's powers, and from the moment he put forward a paper as his award he was *functus officio,* and could not put right any mistake at all; any alteration was nugatory and the old award stood. *Henfree* v. *Bromlley,* 6 East 309. The question is how far the law has been altered by section 7(*c*) of the Arbitration Act, 1889, which gives an arbitrator power 'to correct in an award any clerical mistake or error arising from any accidental slip or omission.' I think that the word 'accidental' in clause (*c*) applies both to 'slip' and to 'omission'. The sub-clause is taken direct from Order XXVIII, rule 11, and decision under that rule are in point in so far as they are decision on the rule and not as many of them are, decisions based rather on the inherent jurisdiction of the court than on the rule. In *Inland Revenue Commissioners* v. *Hunter,* [84 L.J.K.B. 138=(1914) 3 K.B. 428], *Scrutton J.* said: 'A refree having once issued his award, cannot issue another without the consent of both parties'. 'In saying that I do not think the learned Judge could have had present to his mind section 7(*c*) of the Arbitration Act. In *Oxley* v. *Link,* (1914) 2 K.B. 734=83 L.J.K.B, 602, the Court of Appeal imposed a most stringent rule. In an action against a married woman sued in respect of her separate estate, judgment was by mistake drawn up in the ordinary from against the defendent personally, instead of in the form settled by the Court of Appeal in *Scott* v. *Morley,* 87 L.J.Q.B. 43=20 Q.B.D. 120. The court held that the plaintiff were not wanting to correct a slip, but were seeking to substitute one form of judgment for another, and that consequently Order XVIII, rule 11, did not apply.

"The arbitrator in the present case clearly did not make a clerical mistake, and the question is did he make an accidental slip? I do not think he did. He seems to have put down precisely what he meant to put down, and he did not put in anything that he did not intend to put in nor did he omit anything that he intended to put in. I do not think, therefore, that the arbitrator was, under section 7(*c*), entitled to do what he did." See also, *Pedler* v. *Hardy,* (1902) 18 T.L.R. 591 (*per Channell J.*).

661. When arbitrator becomes functus officio.—In *Ramji Ram* v. *Saligram,* 14 C.L.J. 188=11 Ind.Cas. 481, the question was considered by *Mookerjee J.* when the arbitrators become *functus officio.* In answering the question he observed: "In support of the second objection taken by the defendants, it has been argued, that as soon as the arbitrators signed the joint memorandum, on the 25th September, 1908, their authority came to an end: and they could not resile from the conclusion they had deliberately and unanimously adopted. In support of this proposition, reference has been made to the cases of *Henfree* v. *Bromley,* 6 East 309=8 R.R. 491, *Trew* v. *Burton,* (1833) 1 C. & M. 533, and *Brooke* v. *Mitchel,* (1840) 6 M. & W. 473=9 L.J.Ex. 269. Now, it may be conceded, that when the arbitrator has made, or, as it is said in some cases, made and published, his award as a completed instrument, his power is wholly at an end. He has exhausted his authority, he is thoroughly *functus officio,* he can do nothing more in reference to the

arbitration or the subject-matter. He cannot reopen the case, or make a new or supplemental award, nor alter or amend the award already made, nor file additional, explanatory, alternative or amending documents. What he has done, must stand or fall without further aid or assistance from him ; he can neither support not impeach it. *Bayne* v. *Morris,* I Wallace 97. In other words, as has sometimes been said, if after executing the award the arbitrator exercises a fresh judgment on the case and alters the award in any particular, the alteration is merely nugatory, and his act is like a spoliation by a mere stranger. *Irvine* v. *Elnon*, 8 East 54 ; *Ward* v. *Dean,* 3 B. & Ad. 234 ; *In re Hall & Hinds,* (1841) 2 M. & G. 847 ; *Marduc* v. *Palmer,* (1870) L.R. 6 Ch.App. 22 ; *Davies* v. *Pratt,* 16 C.B. 586 ; *In re Stranger and Railey,* (1901) 1 K.B. 105 ; and *Mountan* v. *Parr,* (1899) 1 Q.B. 805. But the general principle, that after arbitrators have made and delivered their award their functions are at an end and they have no power to correct or alter the award, applies only to cases in which arbitrators have made and delivered the award in its final form ; it is well settled, that until the arbitrators have finally published their award as their final determination, they may make alterations herein. A good illustration of this doctrine is afforded by the case of *Bodge* v. *Hull,* 59 Maine 225, where it was ruled that the delivery to the parties by the arbitrators of a paper, nor as their award, but as a detailed statement of their conclusions, does not terminate the powers of the arbitrators ; and a formal award, subsequently made and published, is binding. See also *Byars* v. *Thompson,* 12 Leigh. 550."

Once an award is made and published and signed by all the arbitrators, it is not open to the arbitrators to substitute another award for it. The authority of the arbitrators ceases from the time they make the award and no action of the parties by way of consent or otherwise would give the arbitrators authority to make a second award, and the second award is absolutely void. *Parshottamdas* v. *Kekhushru,* A.I.R. 1934 Bom. 112=149 Ind.Cas. 324=35 Bom.L.R. 1101=A.I.R. 1934 Bom 6. See also *In re Stringer & Railey Bros.* (1901) 1 Q.B. 105 ; *In re Great Western Rail Co., and the Postmaster-General,* (1903) 19 T.L.R. 636 ; *In re Calvert & Co.,* (1899) 106 ; L.T.J. 288. In *Inland Revenue Commissioners* v. *Hunter,* (1914) 3 K.B. 423=84 L.J.K.B. 135=110 L.T. 825, 975=30 W.R. 363 (C.A.), *Scrutton J.* observed: "It is clear also as stated by the Solicitor-General, that a referee, having once issued his award, cannot issue another without the consent of both parties. If an error is to be corrected, unless the parties assent, it can only be 'done by the court on proper evidence, and proper procedure, and I entirely concur in the remarks which both counsels addressed to me, that it is of great importance, that the referees should exercise their important duties in the future, as I have no reason to doubt they have generally done in the past, with strict observance of all rules of judicial procedure." In *In re Stringer &Railey Brothers (supra), Lord Alvertone C.J.* said: "In my opinion, the old authorities are still binding upon us, and I think that when the umpire had made the first award he was *functus officio.* Having purported, as *Mellish L.J.* puts in *Mordue* v. *Palmer,* L.R. 6 Ch. 22 (31), to sign 'a decument as and for his award he is *functus officio,* and he cannot of his own authority remedy any mistake'. He was, therefore, not in a position to make another award. But I am clearly of opinion that under section 10 of the Arbitration Act, 1889, the court has a general pawer and jurisdiction to remit the matters referred to him for reconsideration."

In *Babulal* v. *Badrilal*, 49 Ind.Cas. 522, *Coutts J.* observed : "He cannot be said to be *functus officio* until the pronouncement is actually made and even if he has signed the award this would not preclude him from further considering the matter and if he thinks fit, recording a note of dissent". In *Anantram* v. *Lala Murlidhar*, 78 Ind.Cas. 195=A.I.R. 1924 Nag. 204, the court observed: "It is only where the submission provides for the making and publishing of the award that the award is not valid unless it is published: see *Armit* v. *Vreame*, (1705) 1 Salk. 76, quoted in *Russell* on *Arbitration and Award*, 10th Edn., p. 436. It is observed by the learned author that this does not seem to be a matter of any practical importance because *an award is generally regarded as 'published' as soon as the arbitrator has done any act whereby he becomes functus officio.* In other words, as soon as the arbitrator has made a complete award is regarded as made and published. It is needless to add that the law casts upon the arbitrator no obligation to stamp the award and he does not usually do so. So the award was complete though it was unstamped and therefore inadimissible in evidence."

In *Parbati* v. *Durga Devi*, A.I.R. 1928 Lah. 170=108 Ind.Cas. 186, the court observed : "The proposition of law is firmly established that an arbitrator becomes *functus officio* as soon as he delivers the award: *Mordue* v. *Palmer*, (1871) 6 Ch. 22=40 L.J.Ch. 8=23 L.T. 752. The reference to him has exhausted itself, his authority is at an end, and he is not at liberty to exercise a fresh mind on the case and to deliver another award. *Brooke* v. *Mitchell*, (1840) 9 L.J. (N.S.) Ex. 269=6 M. & W. 473=4 Jur. 656. Reference may also be made to *Russell* on *Arbitration and Award*, 11th Edn., p. 156 *et seq.*, *Banerji's Law of Arbitration in India*, pp. 237-8, *Ram Ugrah Pande* v. *Achraj Nath Pande*, 38 All. 85=31 Ind.Cas. 899=13 A.L.J. 1175 and *Satish Chandra Bose* v. *Paliram Agarwala*, A.I.R. 1921 Pat. 161=6 P.L.R. 287. It is also beyond question that an arbitrator's authority once exhausted is not resuscitated by the award being set aside or becoming otherwise void, so as to enable him to make a fresh award. As pointed out by *Russell* 'his authority once exercised, though ineffectually, is gone for ever.' For the contrary view Mr. Fakir Chand has cited *Harchand Rai* v. *Chuttan Lal*, 35 P.R. 1884, and *Ralla Ram* v. *Badhawa Mal*, 67 P.R. 1886." See also, *Amar Nath* v. *Ishar Singh*, 43 Ind.Cas. 350=99 P.R. 1917=173 P.W.R. 1917 ; *Sitanath* v. *Baikunthanath*, 9 Ind.Cas. 296=38 Cal. 421.

In *Howard* v. *Wilson* 4 Cal. 231 (234), *Garth C.J.* (*Markby J.* concurring) observed: "There is no question that an arbitrator, after he has made up his mind as to the terms of his award, and has even informed the parties what those terms are, is perfectly at liberty, before the award is actually made to hold another meeting or meetings, if he thinks fit, to discuss any fresh point that may be brought before him ; and there is no objection to either of the parties applying to the arbitrator for a meeting for the purpose of submitting to him any new point that may have arisen.

In Dutto Singh v. *Dosad Bahadur Singh*, 9 Cal. 575 (579), the court observed: "After the award was made and handed over to the parties. the functions of the arbitrator ceased. They had no power afterwards to deal with any application for review."

662. Arbitrator may not re-open award.—Once a final award is made, the arbitrator may not reopen or recall it ; he can only alter it if it is remitted to him by the court. *Russell* 15th Edn., p. 240. But it is competent to the parties to compromise a proceeding for filing an

award by altering or adding to the award. *Dwarka Das* v. *Krishan Kishore,* 51 Ind.Cas. 628=2 Lah. 114; *Beharilal* v. *Dhalan Das,* 5 Ind. Cas. 994=38 P.W.R. 1910.

663. Mistake committed by parties.—This section is confined to clerical errors made by the arbitrators themselves and has no concern with the mistake of parties. *Ram Chand Sarup* v. *Mazhar Hussain,* 51 Ind.Cas. 55=1 U.P.L.R. (H.C.) 69.

CLAUSE (*e*).

664. Clause (e).—This clause is new. In *Kursell* v. *Timber Operators and Contractors, Ltd.,* (1923) 2 K.B. 202=92 L.J.K.B. 607=129 L.T. 21=87 J.P. 79=39 T.L.R. 419=67 So.Jo 557=28 Com.Cas. 376, which was a reference by consent out of court under the English Arbitration Act, 1889, it has been held that the arbitrator has jurisdiction to order either party to make discovery of documents or to answer interrogatories on oath, by virtue of clause (*f*) of the First Schedule to that Act which corresponds to clause 6 of the First Schedule of the present Act, which provides (after certain express directions) that the parties shall 'do all other things which during the reference the arbitrators or umpire may require." By this clause the arbitrators are given explicitly the powers to administer to any party to the arbitration such interrogatories as may, in their opinion, be necessary.

PROCEDURE TO BE FOLLOWED BY ARBITRATOR OR UMPIRE

665. Powers and duties of arbitrator and the procedure to be adopted by them in making award etc.—In *Raminder Singh* v. *Mohinder Singh,* 190 Ind.Cas. 399=A.I.R. 1940 Lah. 186, *Loung C.J.* in the course of his judgment observed: "It was next urged that the award of the arbitrator is very brief; he has not referred to the evidence recorded by the lower court, nor has he given finding on the various issues, and for this reason the award is bad. This contention, too, is devoid of all force. The reference did not require him to record separte findings on the issues which had been framed by the court. On the other hand, the parties in their application had asked for a reference in general terms for settlement of "all our disputes in the case' and they had agreed to accept his award without any objection. It is hardly necessary to say that an arbitrator is not bound by the technical rules of procedure which the courts must follow, nor need he record separate findings on the various points on which the parties are at issue, or write a reasoned judicial decision. All that he is required to do is to give an intelligible decision which determines the rights of the parties in relation to the subject-matter of the reference: *Narpat Rai* v. *Devi Das,* 13 P.W.R. 1911=14 Ind.Cas. 371, and *Nanjappa* v. *Nanjaroa,* 16 Ind.Cas. 478=23 M.L.J. 290. Further, the arbitrator in this case is a near collateral of the contesting parties equally related to them, and it appears that he had been selected by reason of his special knowledge of their affairs to decide the dispute, which had been pending in courts for a period of six years and of which the end was not in sight. Obviously, it was not the intention that he should record a formal judgment like an Appellate Court on the evidence which had been produced by the parties in the court below. He took a broad view of the case and gave an award, which he conceived to be just and equitable in the circumstances. This he was perfectly entitled to do. If any authority is required for this obvious

proposition, reference may be made to the decision of their Lordships of the Privy Council in *Muhammad Nawaz Khan* v. *Alam Khan,* 18 Cal. 414=70 P.R. 1891=18 I.A. 73=6 Sar. 26 (P.C.), where an award given by an arbitrator selected by reason of his special knowledge of the affairs of the family, and not based upon strict rules of law but on a 'broad view' of the dispute, was upheld, it being observed that the arbitrator 'was within his rights in so doing'. In such cases, as remarked by *Lord Cockburn C.J.* in the well-known case in *In re Hopper,* (1867) 2 Q.B. 367=L.J.Q.B. 97=8 B. & S. 100=15 L.T. 566, 'we must not be over ready to set aside awards when the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings."

666. Powers of court to issue process for appearance before arbitration.—*Vide* section 43 and notes thereunder (*infra*).

667. Strict observance of procedure by arbitrators.—An arbitrator must act in accordance with the essential rules of natural justice. The arbitrators are bound, when they are not expressly absolved from doing so, to observe in this proceedings the ordinary rules which are laid down for the administration of justice. *Haigh* v. *Haigh,* (1861) 5 L.T. 507 (508); see also *Re Camilla Eitzen* and *Jewson & Sons* (1896) 40 S. J. 438; *Gregson* and *Armstrong,* (1894) 70 L.T. 106. But in *Andrews* v. *Mitchell,* (1905) A.C. 78 (80) *Lord Halsbury* said: "I feel the force of what *Mr. Lawrence* said, namely that we must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decision. I should be anxious myself, as I have no doubt all your Lordships would, to give effect to their decisions; on the other hand, there are some principles of justice which it is impossible to disregard, and giving every credit to the desire on the part of this arbitration court to do justice, I think it is manifest that they proceeded far too hastily in this case, and apart from imputing to them any prejudice or any desire to do wrong, I think that the mode in which the whole thing arose and was disposed of was so slipshod and irregular that it might lead to injustice." The arbitrators however by consent can depart from ordinary rules observed by a court of justice. *Russell* 15th Edn., p. 107. But an arbitrator should follow as far as possible the fundamental rules of law and justice as well as rules of procedure. Cf. *Oman Hene* v. *Chief of Obnng,* A.I.R. 1934 P.C. 185=151 Ind.Cas. 948.

668. Contract containing arbitration clause—Procedure.—As the rules of a body to which the agreement of arbitration is referred to by the parties should be deemed to have been incorporated in the contract by virtue of the agreement of the parties, it has necessarily to be held that on a matter of procedure the relevant factors should be the rules as existing at the time of the reference and not at the genesis of the contract. *Hussain Kasam* v. *Vijayanagram,* A.I.R. 1954 Mad. 528; *Ramnarain* v. *Liladhar,* 33 Cal. 1237; *Ramnath* v. *Nanju Shamju,* A.I.R. 1953 Cal 787.

669. Procedure to be followed by the arbitrators.—There is no provision in the Arbitration Act which lays down the procedure to be followed by arbitrators in arbitration proceedings. The procedure must therefore be governed by the principles of natural justice and one of them is that no matter should be decided without due enquiry. An arbitrator

may or may not be a person acquainted with procedural law, but he is in the position of a judge selected by the parties in whose sense of justice they have faith and who is therefore asked to do justice between them: His procedure should therefore be such as a reasonable man should follow in deciding the dispute impartially. In the absence of any special procedure agreed or consented by the parties, or justified by the peculiar circumstances of the case, as when the arbitrator is appointed on account of his skill and knowledge of the subject, his procedure should be governed by the principles of natural justice. *Krishna Gopal* v. *Chandi Prosad,* A.I.R. 1953 Nag. 309 ; see also *Hari Singh* v. *Kanknarah Co. Ltd.,* A.I.R. 1921 Cal. 657=34 C.L.J. 39 ; *Per Lord Halsbury* in *Andrews* v. *Mitchell* 78 (80)=74 L.J.K.B. 333 ; *Haney* v. *Shelton* (1844) 7 Beav. 455 (462) ; *Matson* v. *Tower,* (1824) Ry. & Mo. 17 ; *In re Brook,* (1864) 16 C.B.N.S. 403 ; *In re Camillo Eitzan & Jewson* (1896) 40 Sol. Jo. 438 ; *Gregson and Armstrong In re,* (1894) 70 L.T. 106 ; *Haigh* v. *Haigh,* 1861) 5 L.T. 507 (509) per *Lord Justice Turner ; Asis Begum* v. *Badruddin Husain,* A.I.R. 1914 P.C. 105 (107)=36 All. 336.

670. Notification to arbitrators.—The first step in the arbitration proceeding is to request the arbitrator to accept the office, where it is not known that he would accept the same. This request is to be made jointly by the parties or their agents either verbally or in writing. If he accepts the office, or where there is no question as regards his accepting the office, the arbitration agreement is to be deposited with him in case of private arbitration or the order of reference is to be served upon him, where the arbitration is in pending suits. *Vide Hurdwary Mull* v. *Ahmed Mussaji,* 13 C.W.N. 63 (66).

671. Acceptance by arbitrators.—For the perfection of the appointment of an arbitrator or an umpire acceptance by him is necessary. The appointment is not effective unless the person so appointed has agreed either expressly or tacitly to exercise the functions of the office.—*Russell* on *Arbitration,* 13th Edn., p. 335, citing *Ringland* v. *Lowndes,* (1863) 15 C.B (N.S.) 173=33 L.J.C.P. 25. See also, *Fyazuddin* v. *Aminuddin,* 6 A.L.J. 351=1 Ind.Cas. 354. Such acceptance should be by the free will of the arbitrator and must not be forced by the court. *Shib Charan* v. *Rattiram,* 7 All. 20 ; *Lal Khan* v. *Kashmiri,* A.I.R. 1930 Lah. 125 ; *Ghuvia* v. *Bhawani,* 1 A.L.J. 683 ; *Basdeo* v. *Kanhaiya,* 43 All. 109=59 Ind.Cas. 667 ; *Nursing* v. *Nuffer,* 17 Cal. 832. But acceptance after request by court is not invalid. *Keshavlal* v. *Bai Lakshmi,* A.I.R. 1929 Bom. 51. See also, *Joymongal* v. *Mohan Ram,* 23 W.R. 429 (P.C.) ; *Harnarain* v. *Bhagwant,* 10 All. 137 ; *Mahadeo* v. *Badi,* 50 All. 955=A.I.R. 1928 All. 740. As regards appointment of arbitrators by the rules of the Bengal Chamber of Commerce, *vide Hurdwary Mull* v. *Ahmed Musaji,* 13 C.W.N. 63. Acceptance of the office by the arbitrator appears to be necessary to perfect his appointment. *Russell* 15th Edn., p. 134.

672. First duties of arbitrator.—After receiving notice of appointment, the arbitrator or arbitrators should see that the appointment is in order and in case it is not, should have put it in order before he proceeds with the arbitration. *Russell* 15th Edn., p. 134. Another duty of the arbitrator, as soon as the proceedings begin, is to satisfy himself that the disputes which he deals are within the terms of the submission so that his award may not be vitiated for want of jurisdiction. *Ibid.*

673. Appointment of umpire.—"If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later

than one month from the latest date of their respective appointments". —Para 2 of the First Schedule.

674. Subject-matter of decision and procedure by arbitrators.— An arbitrator derives his power from the reference which furnishes the sources and prescribes the limits of his authority. He is bound to make an award in conformity with it both in substance and in form. *Duttaram* v. *R. B. Harjimal,* A.I.R. 1930 Sind. 170=24 S.L.R. 145=121 Ind.Cas. 161. In *Krishna Kanta Paramanik* v. *Bidya Sundari,* 2 B.L.R.App. 25, *Sir Barnes Peacock* observed: "It appears to us that the arbitrators were not authorised, by the terms of the submission, to take any other evidence than that of the widow as to whether or not the plaintig was entitled to an 8-pie share, which according to the ordinary rules of the Hindu law of inheritance, descended to him from his father. It appears from the award that the arbitrators did not consider that the widow's evidence made out the plaintic's claim to 8-pie share. Having decided that the plaintiff's claim had not made out by the evidence of the widow, the arbitrators went into other evidence, and gave the plaintiff a decree of the 8-pie share on the evidence taken by them. The portion of the award which gave the plaintiff the 8-pie share was properly held by the Subordinate Judge not to be binding. If the arbitrators had determined the case according to the terms of the submission, they would have decided that the plaintiff had failed to establish claim to the 8-pie share. We do not think that we ought to remand the case to the Subordinate Judge for the purpose of taking further evidence to enable the plaintiff to establish that which the widow's evidence failed to prove before the arbitrators; for it was the intention by both parties, when they referred the case, that it should be determined upon the evidence of the widow alone." So where there is a procedure laid down in the arbitration agreement, the arbitrators are bound to follow that procedure.

675. Construction of arbitration agreement.—Where an award is challenged on the ground that it deals with subjects which were not referred to arbitration, the court must scrutinise the language of the reference to see if the matter decided was in truth was referred to the arbitrators for decision. It does not matter whether or not the arbitrators genuinely believed the matter was referred and the final decision lies not with them but with the court. *Krottapalli Gopalam* v. *Myneni Suryanarayana,* 23 L.W. 681=95 Ind.Cas. 740=(1926) M.W.N. 445= A.I.R. 1926 Mad. 752=50 M.L.J. 514. See also, *Piercy* v. *Young,* (1879) 14 Ch.D. 200=4 L.T. 710. Where a submission to arbitration, in an action upon a building contract, contained a special provision that the umpire is entitled to form his own opinion in respect of all matters submitted to him from his own knowledge, inspection or examination, or from such other sources as he might deem proper, and it was agreed that his decision should be final, the court should be slow to remit the award, even if there appears to be error on the face of it—which there was not in the present case—as it could not have all the materials upon which the decision was based. and in the absence of misconduct, could have no effect or control over the ultimate decision, if the report were remitted. A submission to arbitration included an enquiry into "all loss to the plaintiff by reason of defective workmanship and materials including the reasonable cost of ascertaining and remedying such defects." *Held* that submission should not be restricted to actual money loss already ascertained, but extended to estimated expenditure necessary to

complete the work. *Att. Gn. for Manitoba* v. *Kelly and Ors.*, (1922) 1 A.C. 268=91 L.J.P.C. 101=126 L.T. 711=38 T.L.R. 281. In the above case *Lord Pamoor* observed: "The jurisdiction of umpire is derived solely from the agreement of the parties contained in the consent judgment. This document is a written document which cannot be explained, and much less varied, by extrinsic evidence of subsequent facts and events. Except so far as the pleadings in the action are of assistance in the interpretation of the document, by showing the surrounding conditions when the agreement was made, none of the evidence adduced before *Curran J.* is admissible or should have been admitted in determining the extent or limitations of the umpire's authority. Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the court and not with the umpire: *Produce Brokers' Co.* v. *Olympia Oil and Cake Co.*, (1916) A.C. at p.p. 327-329=85 L.J.K.B. at pp. 166-168. It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter, which he affects to decide, is within the submission of the parties.....Has the umpire included in his report any items not within the terms of the agreement of reference as above construed ? The report is a written document which speaks for itself, and cannot be interpreted, or varied, or contradicted, by extrinsic evidence. If there is any doubt as to the subject-matter over which the umpire was purporting to exercise jurisdiction, evidence may be given showing what was the subject-matter into which he was enquiring, in order to enable the court to determine whether he had exceeded the limits of his jurisdiction. Such evidence may be given by the umpire himself or by any other competent witness; but it should be limited to the issue of fact, and, in the words of *Lord Cairns* in *Buccleuch (Duke)* v. *Metropolitan Board of Works* (41 L.J.Ex. 157=L.R. 5 H.L. 462), is not admissible to explain or to aid, much less to attenpt to contradict (if any such attempt should be made) what is to be found upon the face of the written instrument." See also, *Champsey* v. *Jivraj*, 47 Bom. 578=50 I.A. 324=A.I.R. 1923 P.C. 66.

Arbitrators were appointed to consider and determine the respective claims of the parties and their disputes in connection with "houses, shops, moneys, etc.". *Held* that the word "et-cet-ra" after the word "moneys" could be read as covering jewellers. *Ti Ti Ma* v. *Mahomed Eusoof*, A.I.R. 1940 Rang. 203. In *Anandilal* v. *Keshavdeo*, I.L.R. (1945) 2 Cal. 526=A.I.R. 1949, Cal. 549, the Court observed: "Where there is jurisdiction to make an award, the award is not bad because the possibility that matter not within the jurisdiction of the arbitrators may have been taken into account, is not in terms excluded on the face of the award. In such a case, the award can be impeached only by showing that the arbitrators did in fact exceed their jurisdiction *(see Falvinham* v. *Victorian Railways Commers.*, 1900 A.C. 452=69 L.J.P.C. 89). In *Maccaura* v. *Northern Assurance Co., Ltd.*, 1925 A.C. 619=94 L.J.P.C. 154, it was held that the Court will not set aside an award on the ground that the arbitrators had exceeded his authority, where a party complaining had made no protest at the hearing before the arbitrator. *A fortiori*, it will not do so when the party complaining agreed at the hearing that the arbitrators should deal with the matter which might not be included in

the submission."

676. Condition of the reference.—On a reference to an arbitrator of an action for work done by a builder, in respect of houses, it is wholly within the discretion of the arbitrator whether he will have a view of the premises. *Munday* v. *Black,* 9 C.B. (N.S.) 557=30 L.J.C.P. 193=7 Jur. N.S. 709. But where it is a condition of the arbitration agreement that the arbitrator is to take a view previously to entering on the reference, that condition must be fulfilled. But when he takes such a view, the non-recital of the view is not objection to his award. *Spence* v. *Eastern Counties Ry.,* 7 D.P.C. 697=3 Jur. 846. Upon a reference as to the terms on which a mine should be let, it is not a valid objection to the award that one of the arbitrators, instead of himself viewing the mine, has acted on the report made to him by another person, or that the arbitrators had refused to examine witnesses. *Eads* v. *Williams,* 4 De G.M. & G. 674=24 L.J.Ch. 531.

677. Nature of enquiry before arbitrators.—In *Tyebbhai* v. *Abdul Husein,* 85 Ind.Cas. 425=A.I.R. 1924 Bom. 149=25 Bom.L.R. 392, the court observed : "The ordinary rule is that the enquiry before the arbitrator is assimilated as near as may be to the proceedings in a trial in the courts. In the ordinary course, at the appointed time and place the parties appear with their witnesses to support their respective cases, as stated in *Russell* on *Arbitration,* 10 Edn., p. 379. This rule has been applied in India. I need only refer to the leading case of *Ganga Sahai* v. *Lekhraj Singh.* (1886) 9 All. 253, and the Privy Council case of *Amir Begam* v. *Badr-un-din Hussain,* 23 Ind.Cas. 625=36 All. 336 (343)=18 C.W.N. 755=1 O.L.J. 249=12 A.L.J. 537=17 O.C. 120=16 Bom.L.R. 413 =(1914) M.W.N. 472=16 M.L.T. 35=27 M.L.J. 181=19 C.L.J. 494 (P.C.), which would amount to no proper hearing of the matters in dispute there could be misconduct sufficient to vitiate the award without any imputation on the honesty and impartiality of the arbitrator'." See also, *Haigh* v. *Haigh,* (1861) 3 D.F. & J. 157=31 L.J.Ch. 420=130 R.R. 73; *Pratap Singh* v. *Krishna Prosad,* A.I.R. 1932 Bom. 68=33 Bom.L.R. 1357=135 Ind.Cas. 806.

678. Notice to parties to adduce evidence.—It is not necessary for an arbitrator to issue formal notice to the parties to adduce evidence. It has only to be seen whether the arbitrator gave he parties sufficient opportunity to be heard or not. *Ramchand* v. *Attmaram,* A.I.R. 1952 Ajmer 6 (1).

679. Giving notice to the parties to enable them to put their case.—In *Purusottum Das* v. *Louis Dreyfus & Co.,* 56 Ind.Cas. 325=47 Cal. 29, *Rankin J.* observed: "As I have said recently, arbitrators when they begin to take upon themselves the burden of their duty, must remember that it is laid upon them to see—not upon anybody else, but upon them as tribunal—that parties have notice to appear before them; if they do not appear before them, to make sure that they have no sort of excuse for not appearing." Therefore where the appointed arbitrators did not appoint a time or place for the hearing of the reference, they would fail in their duty, *Hurdwary Mull* v. *Ahmed,* 13 C.W.N. 63=Ind.Cas. 371. In *Pratap Singh* v. *Krishna Prosad,* A.I.R. 1932 Bom. 68=33 Bom.L.R. 1357=135 Ind.Cas. 174, the court observed: "It is a well-known principle of the law of arbitration that an inquiry before the arbitrator should be assimilated as near as possible to proceedings in a trial in a court of law, and that, therefore, a party to the arbitration must not only have notice of the time and place of the meeting, but he should be

allowed reasonable opportunity of proving his case either by evidence or by arguments or both, and of being fully heard. The notice must be sufficiently long in order to give the party that reasonable opportunity if he wants to be heard. If there is no sufficient notice, there cannot be a proper hearing nor a valid award, it being a well-recognised rule of natural justice that a man's rights cannot be determined without giving him an opportunity of being heard." See also, *Amir Begam* v. *Badrud-din*, A.I.R. 1914 P.C. 125=23 Ind.Cas. 625=17 O.C. 120=36 All. 336 (P.C.). The umpire should also follow the same procedure. *Dhanasingh* v. *Ramchand*, 83 Ind.Cas. 543=17 S.L.R. 172=A.I.R. 1924 Sind 27. In the above case the court observed: "It appears to us that the, umpire in any case is bound along with the notice of appointment or thereafter to fix at least a day of hearing to enable the parties to take up whatever position they choose and to make clear to himself such position particularly in regard to waiver or otherwise.....Speaking for myself, it appears to me, that the parties are entitled to a hearing before an umpire no less than before the arbitrators and it is incumbent on the umpire on appointment to fix a day of hearing and appraise the parties of it." As regards what is reasonable notice, waiver of notice, fixing of time after adjournment, *vide* the judgment of *Maclean C.J.* in *Toolsee Money Dassee* v. *Sudevi Dassee*, 3 C.W.N. 347=26 Cal. 361. Omission to give notice to a party will vitiate an award. *Karam* v. *Jasodhan*, A.I.R. 1927 Lah. 347=100 Ind.Cas. 896; *In re, Enoch, etc.*, (1910) 1 K.B. 327. An arbitrator who does not give a party an opportunity to put his case before him and who does not decide all matters in dispute between the parties, acts improperly and his conduct amounts to misconduct. *Crompton* v. *Mohan Lal*, 25 Ind.Cas. 391. In fixing the place of trial the arbitrator should take all the circumstances into consideration and decide according to the balance of convenience. The chief circumstances to be taken into consideration are, the place where most of the witnesses reside, the situation of the subject-matter of the dispute, and the balance of convenience and expense.—*Russell* on *Arbitration*, 13th Edn., p. 345. See also *Tolsee Money Dassee* v. *Sudevi Dessee*, 3 C.W.N. 361.

When an arbitrator has made an appointment, and one of the parties, although under the mistaken notion that there will be notice of another meeting before an award is made, goes away without tendering evidence, or intimating that he intends to offer it, the arbitrator may proceed *ex parte*, and without further notice make an award. *Tyre* v. *Shaw*, 27 L.J.Ex. 320. A party objected to an award on the ground that he had not had notice of two meetings, at the first of which no evidence was received, but the arbitrator merely adjourned, and at the second of which he attended and handed in a formal protest against the proceedings, upon a ground totally different from that of want of notice. *Held* that he was not entitled to notice of the first meeting, and that he had, by his protest, waived the want of notice of the second. *Morphett, In re*, 2 D. & L. 967=14 L.J.Q.B. 259. After one of the parties has failed to attend a meeting, the arbitrator may, at the next, without a peremptory appointment, proceed in his absence. *Angus* v. *Smythies*, 2 F. & F. 381.

680. Granting of adjournments.—It is a matter entirely in the discretion of an arbitrator whether he will or will not postpone the reference, in order to give one of the parties an opportunity of bringing a material witness from abroad. And the court will not interfere unless the circumstances under which he refuses to do so are such as to amount

to misconduct. *Ginder* v. *Curtis,* 14 C.B. (N.S.) 723. Where an application has been made to arbitrators to afford time to obtain and examine a witness who is absent, and they have honesty (even though erroneously) exercised their discretion as to the materiality of his evidence, and have refused the postponement applied for, their award will not be set aside on that ground. *Larchin* v. *Ellis,* 11 W.R. 281. A party must attend a reasonable appointment. *Fetherstone* v. *Cooper,* (1803) 9 Ves. 67 (68), *per Lord Eldon.* See also *Toolsee Money* v. *Sudevi,* 3 C.W.N. 347=26 Cal. 361.

Where an arbitrator, having fixed a date for the hearing, refused to change the date, although an important witness for one of the parties had arranged to leave England a day or two before that date for a long stay, it was held that his action was no ground for his removal. *Re Whitwham and the Wrenham, Mold and Cannar's Quay Rainl Co.,* (1894) 39 Sol.J. 692, cited in *Russell,* 13th Edn., p. 346. Where a party is misled or taken by surprise by the evidence of the other party his remedy is to ask for an adjournment of the reference in order to enable him to answer the evidence. *Easthan* v. *Tyler,* 2 B.C.Rep. 136. In the above case it has also been held that where either party finds that he is unable to attend an appointment, it is his duty to notify the other side and the arbitrator, so that the arbitrator may fix another day for the meeting.—*Russell,* 13th Edn., p. 347. Where an arbitrator refuses an adjournment to enable one of the parties to adduce relevant evidence on the matters dealt with by the witness he has called, he is guilty of legal misconduct and must be removed. *Enoch and Zoretzky, Beck & Co., In re,* 79 L.J.K.B. 363=(1910) 7 K.B. 327, where *Farwell L.J.* observed : "In my opinion the conduct of the umpire in calling this witness and examining him and admitting the copy of award as evidence is legal misconduct, and I cannot see that the objection to the admission of the document is waived because it was produced by the umpire's witness and it would have been useless to object. Then he actually refused to allow an adjournment in order to enable the appellants to give evidence to test the testimony of the witness whom he had himself called. The facts appear to me to be amply sufficient, even without the other matters which the Master of the Rolls has mentioned, with which I entirely agree."

681. Authority of arbitrators to call for particulars of claim.—The arbitrator has implied power to order each party to deliver particulars of the claim, and of the counter-claim, if there should be one, in order to enable his opponent to know the case he has to meet and to prepare his evidence for the trial.—*Russell,* 13th Edn., p. 338. But "what particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them they will have to meet when the case comes on for trial." It is for the arbitrators to decide what are reasonable particulars and a time must be fixed by them for supplying the particulars by a party. It is the duty of the arbitrator, whether the parties particularly wish it or not, to obtain a clear statement of the disputes which are submitted to him for his decision.—*Russell* on *Arbitration,* 13th Edn., p. 338.

But in *Mian Nathu* v. *Abdul Ghani,* A.I.R. 1930 Lah. 22=119 Ind. Cas. 726. *Bhide J.* observed: "As regards the first ground, it is true that the disputes between the parties were not detailed in the agreement.

but the parties were examined at length by the arbitrators at the very outset and the nature of the disputes was made sufficiently clear. It is not suggested that the parties have in any way been prejudiced by the absence of the details in their agreement in writing."

Any arbitration agreement between the parties should clearly set forth what are the matters in difference between the parties on which the arbitrators are required to arbitrate. Such points should be set forth clearly in the form of issues. *Kunwar Puran Singh* v. *Bahal Kunwar,* A.I.R. 1930 All. 319=125 Ind.Cas. 583.

682. Questions of limitations.—*Vide* section 37 and notes thereunder.

683. Arbitration against a firm.—Where the reference to arbitrators does not embrace the question as to who were the partners in a particular firm, the law does not allow them to assume jurisdiction over question which are not referred to them. It is not necessary for the arbitrators to decide who the partners are. It is only necessary for them to inquire who the partners are because they have to serve notices of meetings and of the making and of the filing of the award upon the partners. There can be an award just as there can be a decree against a firm. When a party elects to go against a firm the question whether a particular person is or is not a partner of such firm and is bound by the decree or the award, as the case may be, is a question which can be dealt with either in execution proceedings or in a separate suit. *Babu Kriparam* v. *Jawahar Singh,* A.I.R. 1932 Bom. 375=34 Bom. 737=140 Ind.Cas. 761.

684. Discovery of documents.—Para. 6 of the First Schedule enacts: "The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writing and documents within their possession or power respectively, which may be required or call for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require." In clause (*f*) of the First Schedule of the English Act of 1889, the words used are "subject to any legal objection" for the words "subject to the provisions of any law for the time being in force."

In *La Societe Les Affreteurs Reunis* v. *Shipping Controller* 90 L.J.K.B. 812=(1921) 3 K.B. 1, it has been held that in an arbitration between the Crown and a claimant relating to disputes arising out of a contract entered into with the claimant by a Minister representing the King, the arbitrator has no power under rule (*f*) of the First Schedule to the Arbitration Act, 1889, to order an affidavit to be made for discovery of documents in the possession of the Crown. *Darling J.* observed. "It is said for the claimants that these words, 'do all other things'—that is, other than producing books, and so on, which the umpire or arbitrator may require—give the umpire here power to order the shipping controller to make an affidavit as to documents. But it is objected by the Crown that all these things are subject to any legal objection. I do not think that these words 'subject to any legal objection' are limited, as has been argued by counsel for the claimants, to the production of any particular document because of something in the character of that document. I think they mean what they say—'subject

to any legal objection'." *Avery J.* said. "I agree that the learned umpire in this case was right in refusing to make an order for discovery. I also agree as to the interpretation already given of rule (*f*) of the First Schedule of the Arbitration Act, 1889—namely, that the words 'subject to any legal objection' govern the concluding words of that rule, that the parties are to do other things which the arbitrators or umpire may require. The question, therefore, is whether there is in this case a legal objection on the part of the Crown to doing that which it is suggested that the umpire ought to require them to do—namely, to make discovery of the documents in their possession." *Grear J.* observed: "I wish further to say a word about the construction of the clause in the First Schedule to the Arbitration Act, 1889, not with a view of adding anything to my reasons for my decision in this case, but of saying that I am not personally satisfied that the power to order discovery, either by way of affidavit of documents or by interrogatories, is one of the powers conferred upon an arbitrator by rule (*f*) of the First Schedule." An arbitrator under a written submission by the parties has jurisdiction (*i*) to direct that a party to the arbitration should make an affidavit of documents as to the subject-matter of the arbitration; (*ii*) to direct that a party to the arbitration should answer interrogatories by oath. *Kursell* v. *Timber Operators and Contractors, Ltd.*, (1923) 2 K.B. 202=92 L.J.K.B. 607. See also *Sutton* v. *Great Northern Ry.*, (1909) 79 L.J.K.B. 81=(1909) 2 K.B. 791.

For Court's power to order discovery and inspection cases after reference to arbitrators, vide *Penvice* v. *Williams*, 23 Ch.D. 35.

685. Power of arbitrator to call for pleadings and allow amendments.—"In some cases it may be desirable that pleadings or points of claim and defence shall be delivered so that each party may know the exact issues which have to be tried and the case he has to meet. Points of claim and defence are similar to pleadings in an action. The arbitrator has a discretion to order them, and after hearing the parties he should do so if he thinks that they are necessary for properly defining the issues to be tried."—*Russell*, 15th Edn., p. 135. Where points of claim and points of defence have been delivered by the parties to an arbitration the arbitrator is not bound to allow an amendment by the defendant setting up a defence not disclosed by the points of defence. It is within the discretion of the arbitrator to admit or refuse to allow such an amendment, but he must exercise his discretion on judicial principles. *Crighton & Law Car and General Insurance Cor.*, 80 I.J.K.B. 49=(1910) 2 K.B. 738. In the above case *Lord Coleridge J. observed*: "In this case we have to decide a question of some importance in regard to the discretion of an arbitrator to allow one of the parties during the course of an arbitration to add another ground of defence to the defences already disclosed in the points of defence ordered to be delivered by him. The arbitrator was asked to hold as matter of law that he was bound to amend, and had no discretion to refuse to allow the amendment to be pleaded. He said, however, that, if the matter was within his discretion, he refused to allow the proposed amendment. The question which we have to determine is whether an arbitrator was right in his view of the law. The matter has not been the subject of distinct and definite decision, but there are cases which bear upon the point at issue. In *Lloyd Ltd.* v. *Sturgeon Falls Pulp Co.*, 85 L.T. 162, the question arose whether certain documents referred to in a paragraph of the case alone constituted the point in dispute in reference to the contract, or were in the

nature of pleadings or particulars which were capable of amendment by the arbitrator, and whether the arbitrator could amend the pleadings so as to order the rescission of the contract. The decision of the court was that the documents in question were in the nature of pleadings and particulars, and that they were therefore capable of amendment by the arbitrator. 'We are of opinion', said *Mr. Justice Bruce,* in delivering the considered judgment of the court, 'that it is in the discretion of the arbitrator to allow amendments on such terms as he may think fit in order to allow the parties to raise such points, and that if the claimants claim such rescission of the contracts it will be open to the arbitrator to make any amendment he may think fit to enable the claimants to give evidence of facts which entitle them to rescind the contract. Therefore, so far as the court decided the point, it seems to me that the case is a guiding case, if, indeed, it is not decisive of the matter. The argument that the arbitrator is bound to admit an amendment is very much weakened by the admission which was perforce made by counsel, that the arbitrator must come to a stage in the proceedings at which it is obvious that no amendment could be allowed, and, if so, it seems to us to be very strong argument in favour of a discretion existing in the arbitrator to allow or refuse amendments of this class.....We are of opinion that the arbitrator had a discretion to admit it or to refuse permission to make the amendment. Whether he exercised his discretion wisely or justly is not for us to decide. But I should like to point out in the fewest possible words the principle which should guide the arbitrator in admitting amendments of this class. Very strong language has been used by the courts in favour of the making of amendment where it can be done without manifest and grave injustice to the other side. *Lord Justice Bowen,* in *Cropper* v. *Smith,* 53 L.J.Cr. 891=26 Ch.D. 700, said : 'I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance, where a person had made a mistake in his pleadings which has put the other side to such a disavantage as that cannot be cured by the application of that healing medicine ; and in *Indigo Co.* v. *Ogilvy,* (1891) 2 Ch. 31, *Lord Justice Lindley* gave effect to the same doctrine ; and further, in the case of *Hubback* v. *Helms,* 56 L.J.Ch. 536, *Mr. Justice Stirling* (as he then was), following the decision in *Cropper* v. *Smith,* 53 L.J.Ch. 891=26 Ch.D. 700, said that an amendment ought not to be refused even if it amounts to an entire change of the nature of the action, yet it was one which ought to be allowed. In these circumstances we think that the arbitrator was not bound to make the amendment. We think it was within his discretion to refuse to make it ; but we wish to point out the governing principles of law which ought to guide him in the exercise of his discretion". See also, *Thompsett* v. *Bowyer,* 9 C.B. (N.S.) 284=30 L.J.C.P. 1 ; *Lloyd* v. *Sturgeon,* 85 L.T. 162. Where an entire suit has been referred to arbitration, the arbitrator has power to allow an amendment of the plaint in order to correct a mistake in a date given therein, when the amendment is one which the court had power to allow it if it tried it, even though the court had refused such amendment on previous occasion. *Tejpal* v *Kedarnath,* 20 P.L.T. 700= (1939) P.W.N. 703=A.I.R. 1939 Pat. 597=185 Ind.Cas. 273.

686. Amendment altering terms of submission.—Where an arbitrator was appointed having all the powers of a judge at *nisi prius* and of a Judge at Chambers, he has no powers to strike out or add claims so as to alter the terms of the submission under which his powers arise, but

must make a final end and determination of all the matters before him. *Wilson* v. *Conde D'Ex Ky.*, 51 J.P. 230. The court will not allow an amendment so as to introduce a new cause of action, where a cause has been referred by consent under an order which does not reserve power to the arbitrator to amend. Nor will they permit the plaintiff to revoke the submission where there is no suggestion of any breach of faith on the part of the defendant. *Smurthwaite* v. *Richardson,* 15 C.B. (N.S.) 463.

687. Principle to be followed by arbitrators in allowing amendment.—In dealing with amendments generally the arbitrator should follow the principles adopted by the court.—*Russell,* 15th Edn., p. 137. Under rule 17 of Order VI of the Civil Procedure Code, "the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties". In interpreting a similar rule, *Amir Ali J.* in *Shmu Patter* v. *Abdul Kadir.* 16 Ind.Cas. 250 (252)=16 C.W.N. 1009=23 M.L.J. 321=12 M.L.T. 338=(1912) M.W.N. 935=10 A.L.J. 259=14 Bom.L.R. 1034=35 Mad. 607=16 C.L.J. 596 (P.C.), observed : "The first part of the section leaves it in the discretion of the court to frame such additional issues as it thinks fit, whilst the latter makes it imperative on the Judge to frame such additional issues as may be necesasry to determine the controversy between the parties". In *Turabalishah* v. *Bibi Naju,* 25 Ind.Cas. 863=8 S.L.R. 28, *Boyd A.J.C.* said : "Now amendments may be divided into two classes, (*i*) cases in which the plaintiff wishes to correct a clerical mistake or a *bona fide* wrong description due to some ignorance or carelessness, and (*ii*) cases in which he tries to add, by proving some new cause of action, to the dispute which already exists. Cases of latter class would not fall within rule 17 of Order VI ; for the determination of the determination of the new questions so raised would not be necessary to the settlement of the controversy which existed when the suit was brought.....The said rule is an exact copy of rule 1 of Order XXVIII of the Rules of the English Supreme Court, 1883 ; and it has been often held that we should be guided by the best English decisions on the question. Here are a few of the best known dicta. In *Teldesley* v. *Harper,* (1878) 10 Ch.D. 393 (396), *Bramwell L.J.* said : 'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide,* or that by his blunder, he had done some injury to his opponent which could not be compensated for by costs* or otherwise. In *Weldon* v. *Neal,* (1887) 19 Q.B.D. 394 (396)=56 L.J.Q.B. 621, it is said : 'However negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side'. Again in *Cropper* v. *Smith,* 26 Ch.D. 700 (710)=53 L.J.Ch. 891, *Bowen L.J.* says that the court should correct any kind of mistake if it can do so without injustice ; and in other cases it is pointed out that the party desiring amendment at the late stage can be mulcted in costs." In *Steward* v. *North Metropolitan,* 16 Q.B.D. 556 (558) *Lord Esher* said : "A rule has been enunciated by the court which is rather a rule of conduct than a rule of rigid law such as can never be departed from ; because I take it that the court might depart from it if there were very exceptional circumstances in any parti-

**Vide* the observation of *Bowen L.J.* in *Cropper* v. *Smith* (1884) 26 Ch.D. 700 (744), where the abserved: "There is one panacca which treats every sore in litigation, and this is cost".

cular case leading the court to think that it could not be right to apply it. It is nevertheless a rule of conduct which must be generally followed". The power is discretionary but the discretion must be exercised judicially. *Ramjiram* v. *Shaligram*. 11 Ind.Cas. 481 (491)=14 C.L.J. 188 ; *Damodar* v. *Gopal*, 7 All. 79 (83).

688. Hearing counsel.—It is competent to arbitrators under the Friendly Societies Act, to decline to hear counsel. *Macqueen and Nottingham Caledonian Society, In re*, 9 C.B. (N.S.) 793. All arbitrators have a like discretion. *Ibid.* But generally, the enquiry before an arbitrator is assimiliated as near as may be to the proceedings on a trial in the courts. The parties are usually attended or represented by their solicitors or counsel, who conduct the proceeding on behalf of their respective clients, and it would not be safe for any arbitrator to object to such recognised procedure, or to refuse to permit solicitors or counsel to appear for either party.—*Russell* on *Arbitration*, 15th Edn., p. 142. On a case being referred, the plaintiff attended before the arbitrator by counsel, without giving the defendant notice of his intention so to do. The defendant requested an adjournment to give him time to instruct counsel ; but the plaintiff refused to consent unless the defendant paid the cost of the day. The arbitrator proceeded *ex parte*, and certified in favour of the plaintiff. The court stayed the certificate, and referred the matter back to the arbitrator, and disallowed the plaintiff his cost of the day. *Whatley* v. *Morland*, 2 C. & M. 347=2 Dowl.Pr.C. 249=4 Tyr. 255=3 L.J.Ex. 58. *Bayley B.* observed : "It is not reasonable that one party should have the assistance of counsel, and the other not, without at least having the option of employing counsel or not, at his discretion. *Distinct notice ought to have been given* ; and I think, therefore, that the plaintiff was not entitled to the costs of the day." In *Ganga Sahai* v. *Lekhraj Singh*, 9 All. 253 (264), the court observed quoting from *Russell* on *Arbitration* : "There may be ample misconduct in a legal sense to make the court set aside an award, even where there is no ground for imputing the slighest improper motive to the arbitrator. Thus the award will be set aside, if the arbitrator refuse to postpone a meeting for the purpose of allowing a party time to get counsel on his part, where the other side unexpectedly appears by counsel". It is not safe for an arbitrator to exclude a counsel from the meeting where a party is expected to get substantial help from him. *Vide Haigh* v. *Haigh*, (1861) 3 D.F. & J. 157=31 L.J.Ch. 420=8 Jur. (N.S.) 893=130 R.R. 73 (a case of disallowing a party's son)

689. Whether arbitrator himself call for witnesses.—In *Re Enoch and Zaretzky etc.* (1910) 1 K.B. 327=79 L.J.K.B. 363, *Fletcher Moulton L.J.* said : "In *Coulson* v. *Disborough* (1894) 2 Q.B. 316 *Lord Esher M.R.* said : 'If there be a person whom neither' party to an action chooses to call a witness, and the Judge thinks that that person is able to elucidate the truth, the Judge in my opinion, is himself entitled to call him.' If that means that the Judge is entitled to call him when either side objects, I am satisfied that there is no basis for that dictum..... But the *dictum* certainly does not lay down, in my opinion, and it is certainly not the law, that a Judge, or any person such as an arbitrator in a judicial position, has any power to call witnesses to fact : himself against the will of either of the parties". See also *Russell*, 15th Edn., p. 144. On the basis of the above case the learned author said : "The arbitrator would be guilty of a breach of duty if, contrary to the will of the parties, he called a witness to fact. The will of the parties may

be expressed during the proceedings or in the submission, but, unless with the consent of the parties, an arbitrator has no right to call a witness himself." *Ibid.* Commenting on the above passage *Sarkar in his Law of Arbitration* said that in India by reason of order 16 rule 14 of the C. P. Code of 1908, the Court has power to call a witness not called by either party, if it thinks necessary, and there is no requirement in the rule for getting the consent of the parties and hence according to him the above statement of law is not applicable to India, as here the arbitrator has the right to examine witnesses even if objected to by the parties. *Sarkar* p. 179 ; see also 145 Ind.Cas. 1=14 P.L.T. (*Sup.*) 1=12 Pat. 359= A.I.R. 1927 Pat. 306 : 159 P.L.R. 1911 ; 2 Ind.Cas. 347=5 L.B.R. 1.

690. Duty of arbitrator to hear witnesses produced by the party. —The award may be impeached if the arbitrator make his award without having heard all the evidence or having allowed the party reasonable opportunity of proving his whole case. *Ganga Sahai* v. *Lekhraj Singh,* 9 All. 253 (264). The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the court to set aside his award, though he may think that he has sufficient evidence without them. *Phipps* v. *Ingram,* 3 D.P.C. 669. See also, *Johnston* v. *Cheape,* (1817) 5 Dow. 247. Where arbitrators promised to hear witness but made the award before, the award was set aside. *Earl* v. *Stocker,* 2 Vern. 251. Where an arbitrator refused to receive further evidence, tendered by the plaintiff after the close of his case, in consequence of the defendant declining to call evidence of his, and urging that no case had been made out, the court refused to set aside the award on the ground. *Hanning* v. *Parker,* 13 L.T. 795=14 W.R. 328.

The general rule is that arbitrator should hear all the evidence material to the question which the parties choose to lay before him as on a trial before a tribunal. It has been said that he may exercise some discretion as to the quantity of evidence he will hear.—*Russell* on *Arbitration*, 9th Edn., p. 143. See also, *Nickalls* v. *Warren,* 6 Q.B. 615= 14 L.J.Q.B. 75, *per Lord Lenman C.J. ; Maplin Sands, In re,* 71 L.T. 56, 594. Improper rejection of evidence may be a ground for setting aside an award. *Johnstone* v. *Cheape,* 5 Dow., 247 : *Samuel* v. *Cooper,* 2 A. & E. 753 ; *William* v. *Wallis,* (1914) 2 K.B. 478 ; *Reddell* v. *Sutton,* 5 Bing. 200 ; *Phips* v. *Ingram,* 3 Dow.C. 669.

The first and most important question in this case is, what was the subject in dispute between the parties when this arbitration was had recourse to ? That is a subject upon which, according to all the authorities, parol evidence may be received, and of course must be received, because otherwise arbitrators might to taking upon themselves to determine matters which had never been in any way submitted to them." *Per Fry J. in Green & Co. and Balfour & Co.,* (1890) 63 L.T. 325 (327). See also, *Re Mounder,* (1883) 49 L.T. 535 ; *Pepper* v. *Gorham,* 4 Moo. 148 ; *Sugar Supply* v. *Trade Society,* 38 T.L.R. 684 ; *Ramsden & Co.* v. *Jacobs,* (1922) 1 K.B. 640 ; *Badruddin* v. *Amir Begam,* 13 Ind.Cas. 520 (523), on appeal *Amir Begam* v. *Badruddin,* 23 Ind.Cas. 625=36 All. 336 (P.C.) : *Ramchand* v. *Butaram,* A.I.R. 1931 Lah. 65=130 Ind.Cas. 833 ; *Harisingh v. Kankinara Co.,* A.I.R. 1921 Cal. 1657=66 Ind.Cas 389=34 C.L.J. 39 ; *Hardwary* v. *Ahmad,* 13 C.W.N. 63.

691. Duty of umpire to hear evidence from the parties.—*Prima facie* the duties of an umpire are the same as those of arbitrators. The umpire must hear the evidence of the parties and their witness. if application is made to him to do so by either party, notwithstanding that

the same evidence has already been adduced before the arbitrators. The umpire is not justified, in the face of an objection by either party, in taking any part of the evidence from the notes of the arbitrators unless there are specific provisions in the submission permitting him to do so. *Sitaram* v. *Susil Chandra*, 64 Ind.Cas. 706=3 U.P.L.R. (A.) 60 ; *Karamchand* v. *Jasodhan*, A.I.R. Lah. 347 ; *Jenkins* v. *Leggo*, 11 L.J.Q.B. 71 ; *James Finlay* v. *Asudamal*, 5 S.L.R. 89=12 Ind.Cas. 637 ; E. *Miller* v. *Dhana Singh*, 63 Ind.Cas. 141=15 S.L.R. 68. It is legal misconduct on the part of the umpire to decide the case without giving notice to the parties or hearing their comments on the evidence produced or on the evidence recorded by the arbitrators. *James Finlay & Co.* v. *Asudamal*, 5 S.L.R. 89=12 Ind.Cas. 637. See also. *Firm Dhanasing* v. *Firm of Ramchand*, A.I.R. 1924 Sind 27 ; *In re Brook*, (1864) 33 L.J.C.P. 246=10 Jur. (N.S.) 704=16 C.B.N.S. 403=143 E.R. 1184=10 L.T. 378 ; *Salked, In re*, 12 A. & E. 767=4 P. & D. 732. But the objection to the umpire proceeding without re-hearing the witnesses may be waived by the conduct of the parties. *Salked, In re* (*supra*). See also, *Tunno and Bird, In re*, 5 B. & Ad. 488=3 L.J. (N.S.) K.B. 5 ; *Half* v. *Lawrence*, 4 T.R. 589 ; *Re Jenkin's & Leggo*, 1 Dowl. N.S. 276 ; *Re Howley & North Stapps Ry. Co.* 64 E.R. 15 ; *Chatturbhuj* v. *Deokram*, 79 Ind.Cas. 769=26 Bom.L.R. 84=A.I.R. 1924 Bom. 370.

692. Evidence must be Tendered.—In *Craven* v. *Craven*, 7 Taunt. 644=1 Moore 403=18 R.R. 623, *Gibbs C.J.* observed: "Next, whether the arbitrator's conduct requires the award to be reviewed. I agree with the defendant's counsel, that it is not sufficient to put an abstract proposition to an arbitrator, and upon his answer, decline to give evidence, or prefer a claim, and then complain of it. but he should tender a specific case and specific evidence." See also, *Glazebrook* v. *Davis*, 5 B. & C. 534 ; *In re Marsh*, (1847) 16 L.J.Q.B. 330 (333).

693. When arbitrator can refuse to take evidence.—In *Johnstone* v. *Cheape*, 5 Dowl. 247, the arbitrator, well-known to the parties for his skill in the subject of reference, acting under a submission reciting that the parties has "confidence in him as a fit person," and had "confidence in his judgment" to carry into effect certain improvements upon lands, and apportion expenses among the parties, refuses to communicate the notes of his opinion, or a draft of the award, before it was pronounced to one of the parties applying for such notes or drafts, and refuses to receive proof of alleged material facts laid before him by the same party : he being himself a competent judge of the subject, and chosen for that reason, and having no doubt in his mind, the award was held good notwithstanding that refusal....*Lord Eldon L.C.* said: "The parties knew who the arbitrator was ; and I see nothing in the proceeding to show that he acted corruptly or even improperly."

In *Eads* v. *Williams*, 4 De M. & G. 674=1 Jur.N.S. 193=3 W.R. 98, by an agreement for the lease of a coal mine it was stipulated that the rent and terms of working the mine should be determined by R.H. and J. S. and in case of their not agreeing then the same should be determined by a person nominated by R. H. and J. S. before entering upon the reference: R. H. and J. S. chose J. P. as umpire, entered upon the reference, but refused to examine any witnesses : and award was ultimately made signed by R. H. J. S. and J. P., with which the intended lessee was dissatisfied. A suit was filed by the lessor for the specific performance of the contract, various grounds of objection were raised by the lessee and one of them was that the arbitrators refused to examine the witness. In

holding that the objection was not valid, *Lord Cranworh L.C.* observed: "I do not however agree in the suggestion, that it was incumbent on the referees to examine witness. I do not think, that when a matter is referred to surveyors or other persons of skill to fix the value of property to be brought or let, that the meaning is that they are necessarily to examine witness; they are entrusted from their experience or observation to form a judgment which the parties referring to them agree shall be considered satisfactory. I do not therefore think that in the present case it is an objection that the referees did not examine witnesses, provided they *bona fide* meant to say that they know enough of the subject to decide properly without doing so." See *Russell* on *Arbitration*, 13th Edn., p. 353, citing *Battomley* v. *Ambler*, (1878) 38 L.T. (N.S.) 345; *Wright* v. *Howson*, (1888) 4 T.L.R. 386; *Jordeson & Co.* v. *Kopparbergs Aktiebolag*, 41 Ll.Re. 201. No evidence need be taken when arbitrators are authorised to decide the dispute on their own knowledge or without taking evidence. *Lachmi* v. *Sheonath*, 54 Ind.Cas. 443=42 All. 185=18 A.L.J. 78; *Ram Lal* v. *Mahadeo*, A.I.R. 1925 Oudh. 741=89 Ind.Cas. 832; *Chidambaram* v. *Ayyappa*, A.I.R. 1935 Mad. 152; *Venkata* v. *Ramiah*, A.I.R. 1935 Mad. 184=155 Ind.Cas. 381; *Daulat* v. *Ratna*, A.I.R. 1926 Bom. 527=28 Bom. L.R. 986=97 Ind.Cas. 673 (F.B.); *Ramchand* v. *Govindram*, 53 Ind.Cas. 337; *Basiro* v. *Mahomed*, 24 Ind. Cas. 264=7 S.L.R. 113.

In other cases the arbitrator should hear all the relevant evidence which the parties choose to place before him. But he has some discretion to regulate the quantity of evidence. *Nickalls* v. *Warren*, (1844) 6 Q.B. 615 (618); *Maplin Sands, In re*, (1849) 71 L.T. 56 (594).

694. Refusal to take evidence in other cases.—The refusal by the arbitrators to admit evidence which was unnecessary and which would not have in any way influenced their decision, does not amount to misconduct. *Louis Drefus* v. *Araromal Shivdayal*, 3 S.L.R. 164=4 Ind.Cas. 1151. So also the failure of the arbitrator to ask the parties whether they desire to produce any witnesses for examination is just such a slip in his procedure which does not go to the substance of his decision. *U Po Kyaw* v. *U Shwe Mya*, A.I.R. 1935 Rang. 308=158 Ind.Cas. 832. Any party wishing to set aside an award on the ground that the arbitrators in ariving at an unfair award either refused to hear somebody or heard the matter without giving notice of the hearing, undertakes the burden of satisfying the court that this is what really happened. *Gobind Singh* v. *Bhirgunath*, 82 Ind.Cas. 16=46 All. 686=A.I.R. 1924 All. 788=22 A.L.J. 676. Parties had submitted their accounts to an arbitrator and a report had been made, and a meeting was fixed to close the accounts. At the meeting one of the parties tendered in evidence fresh documents which he had discovered relating to the accounts, and the arbitrator after looking at them, declined to go into them. *Held*, it was not misconduct affecting the validity of the award, but a rejection of evidence was within the arbitrator's authority. *In re Marsh*, 16 L.J.Q.B. 330.

But refusal by an arbitrator to admit material evidence is evidence of misconduct. *Williams* v. *Wallis & Cox*, (1914) 2 K.B. 478=83 L.J.K.B. 1296. There *Atkin J.* said: "It is clear that the evidence tendered by the appellant was material, and if in fact the arbitrator did reject it, that, in my opinion, would be evidence of misconduct entitling the County Court Judge to set aside the award."

In *Hurdwary Mull* v. *Ahmed Musaji*, 13 C.W.N. 63 (70), *Fletcher J.* said: "Whether the arbitrators should or should not hear evidence and

the parties by counsel or otherwise must depend on the particular circumstances in every case. The rule vests a discretion in the arbitrator which, like every other discretion vested in a person exercising judicial functions, must be exercised in a judicial manner. Thus, there are many arbitrators where the arbitrators are experts where it is not necessary for them to hear evidence or the parties, as the arbitrators have themselves the expert knowledge rendering them capable of deciding the matter without hearing evidence of parties. On the other hand, the reference may be such that the arbitrators cannot decide the matter in dispute without hearing evidence and the refusal to hear evidence, in such a case, would amount to misconduct on the part of the arbitrators."

695. Recording of evidence in the Presence of Parties.—An Arbitrator must record evidence in the presence of both parties, allowing each to examine and cross-examine the witnesses produced by the other. Where an arbitrator records the evidence of one party in the absence of the other party, he is guilty of judicial misconduct and his proceedings are vitiated. *Mohammad Afzal* v. *Abdul Hamid,* 88 Ind.Cas. 161=A.I.R. 1925 Lah. 570=7 L.L.J. 463=26 P.L.R. 706. The well-known rule is that the arbitrator cannot refuse a hearing deliberately or to take evidence of one party behind the back of the other. *Sitaram* v. *Susil,* 64 Ind.Cas. 706; *Abdul* v. *Ismail,* 86 Ind.Cas. 773=A.I.R. 1925 Pat. 465=6 P.L.T. 544; *RoRyal Commission* v. *Trading Society,* (1922) 38 T.L.R. 684; *Ramsden* v. *Jacobs,* (1922) 1 K.B. 640=91 L.J.K.B. 432; *Bache* v. *Billinbham,* (1894) 1 O.B. 107 (110); *Harvey* v. *Shelton,* 7 Beav. 455; *Tidswell, In re,* 33 Beav. 213; *Drew* v. *Drew,* 2 Macq. 1; *Hick, in re,* 8 Taunt. 694; *Dobson* v. *Groves,* 14 L.J.Q.B. 17; *In re, Plews and Middleton,* 6 Q.B. 845; *Oswald* v. *Grey,* 24 L.J.Q.B. 69; *Braddick* v. *Thompson,* 8 East 344; *Phipps* v. *Ingram,* 3 Dowl. 669; *Re O'Conor & Whitlaw,* 88 L.J.K.B. 1242; *Sharpe* v. *Bickeridge,* 3 Dowl. 102; *In re Brein & Brien,* (1910) 2 I.R. 84; *In re Gregson & Armstrong,* 70 L.T. 106; *Walker* v. *Forbisher,* 6 Ves. 70; *Re Fuerst Bros.* (1951) 1 *Lloyd's* Rep. 429. But the above rule is not always observed in commercial or mercantile arbitration. *Vide French Government* v. *Tsurushima Maru,* (1921) 37 T.L.R. 961; but see *Harvey* v. *Shelton,* 7 Beav. 455=13 L.J.Ch. 466; *Matson* v. *Trower,* 1 Ry. & Moo. 17; *Brook and Dalcomyn, In re,* 16 C.B. (N.S.) 403=33 L.J.C.P. 246; *The Warwick,* (1890) 15 P.D. 189.

Where in arbitration proceedings, one of the parties is in jail, and the fact of his being in jail is an obstacle, known to all the parties concerned, to the examination of one party in the presence of the other parties, it cannot be said that the examination of one party by the arbitrator in the absence of the others amounts to misconduct which will vitiate his award. *Ramakoteswara* v. *Suryanarayana,* (1940) M.W.N. 808=52 L.W. 373=A.I.R. 1940 Mad. 905=(1940) 2 M.L.J. 356.

696. Admission of inadmissible evidence by arbitration.—In *D. Graham* v. *Kewelram,* 4 S.L.R. 196=9 Ind.Cas. 712 (715), the court observed: "They (arbitrators) may have to take evidence outside the jurisdiction of the subject which they have to decide but if their award is within their jurisdiction, the fact that they had taken evidence which proved to cover matters outside their jurisdiction would not necessarily invalidate the award or make their proceedings improper. *Falkingham* v. *Victoria Railway's Commissioners,* (1900) A.C. 452 (464)=69 L.J.P.C. 89=2 L.T. 506." See also, *Aisabai* v. *Essaji,* 19 Ind.Cas. 934=38 Bom. 60. In the first case referred to above. *Lord Davey* said: It was then argued that the award was shown to be bad because it appeared from the

evidence that the arbitrators had spent some days in taking evidence on the claims which were admittedly not referable. The dictum of *Cheasley B.* quoted was, that a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction quite independent of the judgment eventually given.' This was no doubt right as applied to the circumstances of that case. But if it was intended to lay down that an award cannot be maintained whenever it is made to appear that the arbitrator took evidence on matters which turned out not to be within his jurisdiction (as contended by the appellants) their Lordships cannot agree. It may be necessary to take evidence in order to ascertain whether the matter is within his jurisdiction or not, and where the claims referred are so mixed up together as in the present case it is impossible to say that the evidence might not be received." See also *Howard* v. *Wilson,* 4 Cal. 231. *B. Das* v. *The Broach E. S. & D. Co.,* 108 Ind.Cas. 18=A.I.R. 1928 Bom. 55; *Eastern Counties Ry.* v. *Robertson,* 6 Man. & G. 38.

It is no ground for impeaching an award that the arbitrator has been mistaken in point of law as to the admissiblity of certain evidence. *Armstrong* v. *Marshall,* 4 Dow.Pr.Cas. 593=1 H. & W. 643; *Hagger* v. *Baker,* 14 L.J.Ex. 227. If a cause is referred to a barrister and he improperly admits evidence, the court will not disturb his award. *Perryman* v. *Steggal,* 22 L.J.C.P. 150=9 Bing. 679. An arbitrator's decision on the admissibility of evidence before him is final. *Symes* v. *Goodfellow,* 2 Bing. (N.C.) 352=5 L.J.C.P. 153. See also, *Wilson* v. *King,* (1835) 2 C. & M. 689=3 L.J. (N.S.) Ex. 212; *Campbell* v. *Twanlow,* 1 Price 81; *Fariell* v. *Eastern Counties Railway Co.,* 2 Ex. 344=17 L.J.Ex. 223. A plaintiff tendered in evidence books containing entries made by himself, which being objected to as inadmissible, the arbitrator stated that the same strictness was not required as on a trial and received the books. *Held* no ground for setting aside the award for misconduct on his part. *Hagger* v. *Baker,* 2 D. & L. 856=14 M. & W. 9=14 L.J.Ex. 227. In the above case *Pollock C.B.* observed: "If an arbitrator intending to act according to law makes a mistake, which is not apparent on the face of his award, the party injured thereby has no redress, and there is no difference between a mistake as to law and one as to facts". See also, *Hunting* v. *Railing,* (1840) H. & W. 2; *King & Duven, In re,* (1913) 2 K.B. 32 (36); *Absalam* v. *Great Western,* 102 L.J.K.B. 648=(1933) A.C. 592.

697. Receiving inadmissible evidence which goes at the root of the case.—A contract for the sale of sugar contained no provision for the suspension of deliveries "if the production by the sellers was prevented or lessened by causes beyond their control." nor any similar clause. Owing to a cause beyond their control, the production by the sellers was "prevented or lessened," and they suspended delivery. Disputes having arisen, recourse was had to arbitration. A former contract between the parties containing such a suspension clause as to the above was produced to the arbitrator by the sellers. The arbitrator made an award simply that "the sellers are entitled to suspend delivery under this contract. The court was satisfied that, in making this award, the arbitrator was influenced by the terms of the earlier contract. In holding that the contract must be set aside *Lush J.* observed: "There is another way in which this conclusion might be justified. It may be that the rules of evidence which are acted on in there courts may not be strictly enforced in proceedings before a lay arbitrator. It is unnecessary to express an opinion whether that is so or not. But when it appears that an umpire allows to be

given, and acts upon, evidence which is absolutely inadmissible, and which goes to the very root of the question before him, this court has ample jurisdiction to set the award aside on the ground of legal misconduct on the part of the umpire." *Walford Baker* v. *Macfie & Sons,* (1915) 84 L.J.K.B. 2221. See also, *Aisabai* v. *Essaji,* 38 Bom. 60 = 15 Bom. L.R. 392 = 19 Ind.Cas. 934.

698. Refusal of offer without prejudice, if evidence.—Discussions with a view to settlement at a preliminary meeting before the arbitrator must be deemed to have been without prejudice. The arbitrator cannot permit his judgment to be influenced by the fact that an "offer without prejudice" had been made and refused. Letters or conversations "without prejudice" cannot be taken note of by the arbitrator. *Storesbury* v. *Turner,* (1943) 1 K.B. 370 = 112 L.J.K.B. 365.

699. Power of arbitrators to take evidence of parties and witnesses.—Under section 43 of this Act the court is to issue the same process to the parties and witnesses when the arbitrator or umpire desires to examine them as the court issues in suits tried before it. Under that section the expression "process" includes summonses and commissions for the examination of witnesses and summonses to produce documents. *Vide* section 43 (*post*).

700. Unstamped document.—Section 35 of the Indian Stamp Act enacts that "no instrument chargeable with duty, shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped." In *Hardway Mull* v. *Ahmed Musaji,* 13 C.W.N. 63 (68) = 1 Ind.Cas. 371, *Fletcher J.* observed: "The arbitrators, even though the parties do not take objection, are bound by the Indian Stamp Act to take notice of any omission or insufficiency in the stamping of any document produced before them. They are also to require under the proviso (*a*) to section 35 of the Indian Stamp Act, before they receive in evidence or act under the submission, the payment of the necessary duties and penalties (see *Russell* on *Arbitration,* 9th Edn., p. 137). In the present case, the arbitrators being persons having, by the consent of the parties, authority to receive evidence, acted upon the two submissions to arbitration without the same being duly stamped contrary to the provisions of section 35 of the Indian Stamp Act." See also, *Russell* on *Arbitration,* 15th Edn., p. 149. But where they have admitted the document in evidence such admission cannot be called in question. Section 36 of the Stamp Act is a bar. *Kali Charan* v. *Mani Mohan,* 28 C.W.N. 87 = 82 Ind.Cas. 416 A.I.R. 1924 Cal. 794. *Russell* thus states the English law: "The arbitrator or referee, even though the parties do not take the objection, is bound by the Stamp Act, 1891, to take notice of any omission or insufficiency in the stamping of any document produced before him. *Maritime Insurance Co.* v. *Assecuranz Union Von* 1865 (1935) 79 Sol.Jo. 403 = 52 Ll.L. Rep. 16. He is also to require payment of the necessary duty and penalties before receiving it in evidence." *Russell,* 15th Edn., p. 143.

701. When arbitrator can proceed ex parte.—The arbitrators are bound to appoint a time and place of the hearing. *Hardwary Mull* v. *Ahmed Musaji,* 13 C.W.N. 63 (70). An enquiry before an arbitrator should be assimilated as near as possible to proceedings in a trial in a court of law and therefore a party to the arbitration must not only have

notice of the time and place of the meeting but he should be allowed reasonable opportunity of proving his case either by evidence or by arguments or by both and of being fully heard. The notice must be sufficiently long in order to give the party that reasonable opportunity if he wants to be heard. If there is no sufficient notice, there cannot be a proper hearing nor a valid award, because a person's legal rights cannot be determined without giving him an opportunity of being heard. *Pratap Singh* v. *Krishna Prasad,* 33 Bom.L.R. 1357=135 Ind.Cas. 174= A.I.R. 1932 Bom. 68. In *Udai Chand* v. *Debibux,* 60 Ind.Cas. 987=47 Cal. 951, *Mookerjee J.* said: "As regards the second point, reliance has been placed by the appellant upon the decision in *Gladwin* v. *Chilcote,* 9 Dowl. P.C. 550=5 Jur. 749=61 R.R. 825. That case is an authority for the proposition that in general the arbitration is not justified in proceeding *ex parte* without giving the party absenting himself due notice. It is advisable to give notice in writing to each of the parties or their solicitors, and the notice should express the arbitrator's intention clearly otherwise the award may be set aside: *Waller* v. *King,* 9 Mod. 63=88 E.R. 317; *Wood* v. *Leake,* 12 Ves. (Jur.) 412=33 E.R. 156; and *Hall* v. *Anderson,* (1840) 8 Dowl. P.C. 326. There is no statutory rule, however, that if an arbitrator proceeds *ex parte* without giving notice of his intention to proceed in that manner, the award made by him must be set aside. In the absence of such an inflexible statutory provision, the procedure commended in *Gladwin* v. *Chilcote,* 9 Dowl. P.C. 550=5 Jur. 749=61 R.R. 825, and the cases mentioned can be regarded as a rule of prudence and convenience. *As Lord Denman C.J.* put it in *Scott* v. *Vondon,* (1844) 6 Q.B. 237=8 Jur. 1114=115 E.R. 92, the law is that, if either party, after the arbitrator has given him sufficient notice and proper opportunities of attending, will not appear, the arbitrator may proceed in his absence. There is obvious good sense in the view that notice that the arbitrator will proceed with the reference on a certain day is notice that he will then proceed *ex parte* if one of the parties absents himself without sufficient reason. But let us assume that when an award has been made *ex parte,* the absent party may *prima facie* be deemed to have been prejudicially affected thereby; surely, it is open to his adversary to rebut that presumption. If, for instance, it is made fairly clear that notwithstanding the service of notice upon him, that in his absence the arbitration would proceed *ex parte,* he would not have entered appearance, it cannot reasonably be urged that the omission to serve such notice has invalidated the award.....The true test is, has the complainant, who takes exception to the validity of the award, been in fact prejudiced by the omission of the arbitrator to serve the special notice on him. If it is established that, notwithstanding such warning, he would not have appeared before the arbitrator, he has really no grievance and cannot invite the court to set aside the award on account of the alleged defect in procedure." See also, *Louis Dreyfus* v. *Purusottom,* 47 Cal. 29=56 Ind.Cas. 325; *Gokul Chand* v. *Girdhari Lal,* (1866) N.W.P.S.D.A. 83; *Long* v. *Holl,* 27 Ind.Cas. 526; *Hemchandra* v. *Jnanendra* A.I.R. 1926 Cal. 116; *Toolsimony* v. *Sudevi,* 3 C.W.N. 361; *Bhowani Das* v. *Horsukhdas,* 27 C.W.N. 933; *Ramnarain* v. *Liladhar,* 33 Cal. 1237; *Subraya* v. *Manjunath,* 29 Mad. 44; *Sitaram* v. *Susil,* 64 Ind.Cas. 706; *Abdul Halim* v. *Ismail,* 86 Ind.Cas. 773=A.I.R. 1925 Pat. 465=6 P.L.T. 544; *Ramdhan Das* v. *Shankar Das,* A.I.R. 1936 Lah. 492; *Grahams* v. *Chandulal,* A.I.R. 1935 Sind 228=159 Ind.Cas. 324; *Damodarji* v. *Ramnath,* 33 Ind.Cas. 467; *Nga Hla* v. *Miyo,* 27 Ind.Cas.

31. Where a party gives notice to the arbitrator that he refuses to call witness the arbitrator can proceed *ex parte*. *Haridas* v. *Baidya*, 21 C.W.N. 895.

702. Power of arbitrator to make an ex parte award.—Though the arbitrators are not entitled to proceed *ex parte* if one or both of the parties are absent, unless they have previously given notice that they intend to do so even if the parties or any of them fails to appear, they are not bound to give such a notice, if they are satisfied that a particular party does not intend to appear and is deliberately keeping away. Such a notice is not also necessary in the case of *ex parte* decision on the first date fixed by the arbitral tribunal if the Bengal Chamber of Commerce for holding the arbitration, as the first notice issued by arbitral court of the Chamber always contains such a clause. *Prem Chand* v. *Fort Glouster*, A.I.R. 1959 Cal. 620. *Russell* on *Arbitration* (Fifteenth Edition) at page 144 observes: "Every arbitrator is authorised by nature of his office, to proceed *ex parte* for good cause. It is unnecessary, though not unusual to give him the power in express terms in submission. No application to the court is necessary to warrant him so proceeding, but the arbitrator is to judge for himself of the discretion of the exercising of the power." "This appears to be an observation by Moulton L. J. in *In re, Enoch and Zaretzky Book & Co.*, (1910) 1 K.B. 227 at p. 333. There is no provision for issuing a notice also that the proceeding would be taken *ex parte*". *Dulari* v. *Rajendra*, A.I.R. 1959 All. 711 (716). See also *Juggi Lal* v. *General Fiber Dealers*, A.I.R. 1955 Cal. 354. In the last named case the learned Chief Justice had observed: "The procedural rule applicable to arbitration proceedings is more tolerant than the rule followed in courts of law. Broadly stated, the principles governing the arbitrators' right to proceed *ex parte* are: If a party to an arbitration agreement fails to appear at one of the sittings' the arbitrator cannot or at least ought not proceed *ex parte* against him at that setting where the non-appearance was accidental or casual, the arbitrator ought ordinarily to proceed in the ordinary way, fixing another date of hearing and awaiting the future behaviour of the defaulting party. If, on the otherhand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the reference, the arbitrator should issue a notice that he intends at specified time and place to proceed with the reference and that if the party concerned does not attend, he will proceed in his absence. But, if after making such a peremptory appointment and issuing such a notice the arbitrator does not in fact proceed *ex parte* on the date fixed but fixes another subsequent date, he cannot proceed *ex parte* on such subsequent date, unless he issues a similar notice in respect of the date as well. If he issues a similar notice and the party concerned does not appear an award made *ex parte* will be in order. But if he does not issue such a notice on the second occasion, but nevertheless proceed *ex parte*, the award shall be liable to be set aside inspite of a notice of a peremptory hearing having been given in respect of the earlier date, subject, however, to the condition that prejudice was caused to the party against whom the *ex parte* order was caused. But the duty to give notice of an intention to proceed *ex parte* is not an absolute duty." See also *Subraya* v. *Munju Nath*. I.L.R. 29 Mad. 44.

703. Power of arbitrator to alter amend or modify award.—When the arbitrators gave their original award they become *functus*

officio and they had no jurisdiction to alter amend or modify the award once pronounced. *Deep Singh* v. *Dhaneshwari,* 1959 Pat. L.R. 262= 1959 B.L.J.R. 723=A.I.R. 1960 Pat. 201 relying on A.I.R. 1941 Pat. 215).

704. Notes to proceedings whether should be kept by arbitrators. —In *Amir Begum* v. *Khwaja Saiyed Badruddin,* 18 C.W.N. 755=36 All. 336 (P.C.)=A.I.R. 1914 P.C. 105=23 Ind.Cas. 625 (P.C.), *Lord Pamoor* observed : "Further, severe comment was made that the arbitrator did not make and retain any adequate notes of the proceedings. No doubt it is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him; but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which she was not satisfied". In *Badruddin* v. *Amir Begam,* 13 Ind.Cas. 520 (522) O.C. 308, from the decision of which case the appeal was preferred to the Judicial Committee of the Privy Council, the Judicial Commissioners of Oudh, *Mr. B. Lindsay* and *Mr. Mohammad Rafique* observed : "Subject to the limitations contained in the instrument of his appointment and to any statutory directions as to the manner in which he ought to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit so long as he acts in accordance with the principles of justice, equity and good conscience. He is not fettered by the rules of practice which courts of law adopt for general convenience. He is not bound, for example, (as the lower court appears to think he was) to record statements or admission of the parties, to take deposition of witnesses, to mark and file document and to behave in other respects as if he were a Judge of a civil court bound by the adjective law laid down in the Civil Procedure Code. He is not under any obligation to make notes of his proceedings, though it is advisable for him to do so; and if he does elect to keep such notes they are his own property and he cannot be compelled to produce them in court". See also, *Kanshi Ram* v. *Harnam Das,* I.L.R. 1940 Lah. 599=188 Ind.Cas. 493=A.I.R. 1940 *Lah.* 73; *Ram Bahadur* v. *Sree Kant Jha,* A.I.R. 1943 Pat. 285=22 Pat. 108.

705. Examination of witnesses by commission.—Where parties to a dispute refer it to a private arbitration without intervention of a Court has no jurisdiction to issue a commission for the examination of witnesses in the matter referred to arbitration. *James Mackintosh* v. *Scindia Steam Navigation,* 75 Ind.Cas. 221=24 Bom.L.R. 853=A.I.R. 1922 Bom. 444=47 Bom. 250. But now see sub-section (3) of section 43 *infra* and notes thereunder.

706. Power of arbitrator to order for security for costs.—Where in an arbitration the plaintiffs are a foreign corporation carrying on business abroad and not possessed of any assets in this country, the arbitrator has no power to order that before the arbitration is proceeded with the plaintiffs shall give security for costs. *Lanza* v. *Wiener,* (1917) 2 K.B. 558=86 L.J.K.B. 1236=117 L.T. 337=61 S.J. 526. *Viscount Reading C.J.* observed: "The arbitrator doubted whether he had power to make order asked for, and in my opinion he had no such power. The power might have been, but was not, given by express agreement in the submission; if it exists at all it must be given by the Arbitration Act, 1889. The defendants rely, first, on the judgement of *Mr. Justice Scrutton* in *Creighton* v. *Law Car and General Insurance Corporation,*

80 L.J.K.B. 49=(1910) 2 K.B. 738, in which he refers to the arbitrator's inherent powers as a judicial officer, but I do not think that by that phrase *Mr. Justice Scrutton* meant it to be understood that an arbitrator was in the position of a Judge, or had all the powers of a Judge. The fact that the arbitrator in that case was held to have the power to order amendment of pleadings is not enough to support the defendant's contention here. Then the words in sub-section (*f*) [=clause (6) of the First Schedule] on which reliance is placed, do not show that there is any power to order a stay of proceedings pending the giving of security for costs; they are only words of general import giving the arbitrator power to do anything that may be needful for ascertaining the facts or the law, so that he may properly decide the dispute between the parties. Obviously, they do not give him all the powers of a Judge; for instance, it is not contended that he has power to commit for contempt. The words at the end of sub-section (*f*), are 'do all other which.....the arbitrator may order the parties to do everything which he needs to assist him in determining the dispute'. Now the dispute can be determined whether security for costs is given or not; an order to give security merely puts an obstacle in the way of the plaintiff, and has nothing to do with the ascertainment by the arbitrator of the true position between the parties". But see *In re Bjornstad and another*, (1924) 2 K.B. 673=93 L.J.K.B. 977, where in the case of a foreign company, the Court of Appeal made an appointment conditional on the applicant giving security for costs. Now this defect has been removed by section 8(1) and clause (1) of the First Schedule of the English Arbitration Act of 1934, which empowers court to make orders for security for costs.

707. Power and Discretion of arbitrator as to costs.—In an appeal from a preliminary decree from dissolution of partnership and accounts, the court directed that the costs should follow the result. The case was then referred to arbitration. The arbitrators passed an award by which it was directed that each party should bear their own costs. The question for consideration was whether the question of costs was within the jurisdiction of the arbitrator. In answering the question in the affirmation *Sir John Beaumont* said: "Their Lordships are of opinion that the learned Judge was wrong also on this point. The direction that the costs should follow the result necessarily involved that when the whole case was referred to arbitration the arbitrator should have power to deal with the costs, and the arbitrator was acting within the scope of his authority in directing that each party should pay his own costs". *Mohd. Akbar Khan* v. *Attar Singh*, A.I.R. 1945 P.C. 170=49 C.W.N. 776=47 Bom.L.R. 956=(1945) 2 M.L.J. 224 (P.C.): see also *Mohanlal* v. *Nathuram*, 1 B.L.R. 144; but see *Mohendra* v. *Motilal*, 27 C.L.J. 104. But the discretion of the arbitrator to deal with costs is identical with that of a judge and must be exercised judicially. *Stotesbury* v. *Turner*, (1943) 1 K.B. 370=112 L.J.K.B. 365. "The 'cost of reference' include all the expenses properly incurred by the parties in the course of the whole enquiry before the arbitrator". *Russell*, 15th Edn. p. 232.

708. Effect of giving false evidence or fabricating false evidence.—By section 21, clause (b). "Every arbitrator or other person to whom any cause or matter has been referred for decision by any Court of Justice, or by any other competent public authority" is a public servant. Arbitrators empowered by law to give a definition judgment are included in

the term Judge in S. 19 of the Penal Code. *Ratan Lal*, 13th Edn., p. 49. Section 191 of the Indian Penal Code enacts: "Whoever, being legally bound by an oath, or by any express provision of law, to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence." Section 192 enacts: "Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement, may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry, or false statement, so appearing in evidence, may cause any person who, in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said to 'fabricate false evidence'." Under section 193, intentionally giving false evidence and fabricating false evidence are punishable. Where a person is alleged to have given false evidence, before an arbitrator, an application under section 476, in the court in which the suit was instituted, is necessary. But the question whether a preliminary inquiry is necessary or not will depend upon the facts and circumstances of each case. Where the application is supported not by oral evidence, but only by documents, no further preliminary inquiry is necessary beyond that which the court makes on the material before it. It is necessary, in such cases, that a notice should be given to the person against whom the order is sought on an application under section 476. *H. C. Ganti* v. *F. L. Harcourt*, 58 Cal. 215=132 Ind.Cas. 93=32 Cr.L.J. 826=(1931) Cr.C. 588=A.I.R. 1931 Cal. 436. See also, *Moolji* v. *Ranjan*, A.I.R. 1930 Cal. 678, on appeal from *Ranjan* v. *Moolji*, A.I.R. 1929 Cal. 521= 118 Ind.Cas. 889=30 Cr.L.J. 974=56 Cal. 932. See also *R.* v. *Vreones*, (1891) 1 Q.B. 360.

709. Power of arbitrator to delegate.—In *Jugobandhu* v. *Chand Mohan*, 22 C.L.J. 237=31 Ind.Cas. 33, *Mookerjee J.* said: "As regards the first ground, it appears that when the award had been submitted, objection thereto was taken by the petitioner on the allegation that the arbitrator had delegated his authority to a stranger and that the award was in essence not the act of the arbitrator but of that person. This was a serious charge of judicial misconduct, and, if established, would invalidate the award, for it cannot be disputed that an arbitrator has no authority to delegate his functions, except possibly the performance of what are called 'ministerial acts'. *Lingood* v. *Eade*, (1742) 2 Atk. 501 (504); *Emery* v. *Wase*, (1801) 5 Ves. 846 (847); *Little* v. *Newton*, 9 Dowl. 437; *Tandy* v. *Tandy*, (1841) 9 Dowl. 1044; *Whitmore* v. *Smith*, (1861) 9 Dowl. 937; *Eads* v. *Williams*, (1854) 4 De G.M. & G. 674. The Subordinate Judge states in his judgment that the arbitrator was authorised to take assistance in technical matters; that, indeed, was permissible to him, in so far as such assistance was necessary for the discharge of his duties. *Caledonian Ry. Co.* v. *Lokhart*, (1860) 3 Macquen, 808; *Emery* v. *Wase* (*supra*); *Hopcraft* v. *Hickman*, (1824) 2 S. & S. 130; *Anderson* v. *Wallace*, (1835) 3 Cl. & F. 26. But this would not entitle him to delegate his powers practically to another person. The decision must ultimately be his own judgment in the matter, although in the process of formation

of that conclusion he may take the assistance of experts: *Nanjappa* v. *Nanjappa,* (1912) 23 M.L.J. 290."

An arbitrator must not, generally speaking, delegate his duties. *Delegatus non potest delegare.*—*Russell* on *Arbitration* 13th Edn., p. 369. The principle underlying the rule is thus stated: "One who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this, being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done." Bact. Ab. 'Authority', D., Vol. I.—*Russell* on *Arbitration,* 15th Edn., p. 116. See also, *Sureebjeet* v. *Gource,* 7 W.R. 269; *Jamna Kunwar* v. *Nasib Ali,* 24 All. 312 (313); *Eardley* v. *Steers,* 4 Dowl. 423; *Sheo Karan Kanhaiya,* 152 Ind.Cas. 1023=A.I.R. 1935 Lah. 113=37 P.L.R. 18. Where the arbitrator after having examined the books of the parties in their presence discovers that one item of a fairly big amount looks suspicious on the face of it, but instead of calling the parties and asking them to explain the suspicious entry, he calls a third person to ask his opinion, his conduct amounts to judicial misconduct. *Ramchand* v. *Butta Ram,* 130 Ind.Cas. 833=A.I.R. 1931 Lah. 65. A partial delegation of authority by the arbitrator will make the award bad, if the defective part cannot be separated from the rest. *Johnson* v. *Latham,* (1850) 19 L.J.Q.B. 329; *Sarkar* p. 184. An arbitrator has no authority to delegate his authority even to a co-arbitrator. *Sarkar,* 183; *Little* v. *Newton,* (1841) 9 Dowl. 437.

710. Ministerial duties may be delegated.—It seems that an arbitrator may delegate to another the performance of acts of a ministerial nature only. *Thorp* v. *Cole,* (1835) 2 C.M. & R. 339 (380); *Butta* v. *Municipal Committee,* 29 Cal. 854=29 I.A. 168; *Manindra* v. *Mahananda,* 15 C.L.J. 360; *Motilal* v. *Giris,* 12 C.L.J. 346; *Juggobandhu* v. *Chand Mohan,* 22 C.L.J. 239. See also, *Muhammad* v. *Abdul,* 93 Ind.Cas. 261=4 Pat. 670=A.I.R. 1925 Pat. 810; *Higgins* v. *Long,* (1736) 2 Stra. 1025; *Threfall* v. *Franshawe,* 19 L.J.Q.B. 334. But it is not always easy to ascertain what acts are included under the head of ministerial acts.—*Russell* on *Arbitration,* 13th Edn., p. 370, citing *Stevenson* v. *Watson,* (1879) 4 C.P.D. 148=48 L.J.C.P. 338. Reference for cost to be taxed will not vitiate an award. *Lingwood* v. *Eade;* 2 Atk. 501 (504); *Metropolitan District* v. *Sharpe,* (1880) 5 App.Cas. 425. Even where arbitrators depend on other people's opinion, he must form his own judgment and take that opinion in the light of evidence. *Hopcroft* v. *Hickman,* (1824) 2 S. & S. (136). See also, *Eads* v. *Williams,* (1854) 24 L.J.Ch. 531; *Eastern Counties Ry., in re,* (1863) 3 De G.J. & S. 610; *Gray* v. *Wilson,* (1865) 35 L.J.C.P. 123; *Anderson* v. *Wallace,* (1835) 3 Cl. & Fin. (42); *Emery* v. *Wase,* (1801) 5 Ves. 846 (847). In *Juggobandhu* v. *Chand Mohan,* 31 Ind.Cas. 33=22 C.L.J. 237, the court observed: "It cannot be disputed that an arbitrator has no authority to delegate his functions, except possibily the performance of what are called 'ministerial acts' *Lingood* v. *Eade,* 2 Atk. 501 (504)=26 E.R. 702; *Emery* v. *Wase,* 5 Ves. 846; *Tandy, In re,* (1841) 9 D.P.C. 1044; *Little* v. *Newton,* (1841) 9 D.P.C. 437; *Whitmore* v. *Smith,* (1861) 7 H. & N. 509; *Eade* v. *Williams,* 4 Deg. M. & G. 674. The Subordinate Judge states in his judgment that the arbitrator was authorised to take assistance in technical matters; that indeed, was permissible to him, in so far as such assistance was necessary for the discharge of his duties: *Caledonian*

Ry. Co. v. *Lokhart,* (1860) 3 Macq. H.L. 808=6 Jur. (N.S.) 1311=119 R.R. 1101 ; *Emery* v. *Wase, Supra, Hopcraft* v. *Hickman,* (1824) 2 S. & S. 130 ; *Anderson* v. *Wallace,* (1835) 3 Cl. & F. 26. But this would not entitle to him to delegate his powers practically to another person. The decision must be ultimately his own judgment in the matter, although in the process of formation of that conclusion he may take the assistance of experts. *Nanjappa* v. *Nanja Rao,* 16 Ind.Cas. 478=23 M.L.J. 290= 12 M.L.T. 133". *Russell* says: "It seems that an arbitrator may delegate to another the performance of acts of a ministerial character only, e.g., the measurement of the number of acres in a field or the surface of a lake are acts of such a character. *Thorp* v. *Cole,* (1935) 2 C.M. & R. 367, per *Parke* Bat. p. 380" 15th Edn., p. 117. But such delegation is not invalid where there is an express authority in the arbitration agreement or allowed by consent of parties.

711. Appointment of arbitrators—uberrima fides all round is necessary.—Where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appointment and every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitrament of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. *Firm of Motharam* v. *Firm of Mayadas,* A.I.R. 1925 Sind 150=19 S.L.R. 251.

712. Implied authority to get professional assistance.—Arbitrators may be impliedly authorised, depending upon the subject-matter referred to them for their decision, to obtain such assistance as may be necessary to enable them to perform their duties.—*Russell* on *Arbitration,* citing *Anderson* v. *Wallace,* (1835) 3 C. & F. 26 ; *Russell* on *Arbitration,* 13th Edn., p. 374. It is not *ultra vires* of an arbitrator to remit to an expert. He may consult men of science, or call in a valuer to assist him, unless prohibited by the terms of the contract. *Caledonian Ry.* v. *Lokhart,* 3 Macq.H.L.Cas. 808=6 Jur.N.S. 1311=3 L.T. 65. The arbitrators, by adopting in terms the opinion of such person, do not constitute him an umpire, but make his opinion their own ; and their award cannot be impeached on that account. *Anderson* v. *Wallace* (*supra*). See also, *Hopcroft* v. *Hickman,* 2 Sin. & S. 130 ; *Emery* v. *Wase,* 5 *Ves.* 848. Where, by the terms of a submission, an arbitrator is allowed the assistance of an accountant, or any other person for a particular purpose, the arbitrator must not delegate his authority to such assistant, or permit him to interfere in any way with the award. *Haigh* v. *Haigh,* 31 L.J.Ch. 420=8 Jur.N.S. 983=6 L.T. 507. In *Ellison* v. *Bray,* 9 L.T. (N.S.) 730 ; *Spee J.* said: "It is clear that an arbitrator or umpire is allowed to consult others if he wishes to inform his own mind, but he must not substitute the opinion of another for his opinion." See also, *Proctor* v. *Williamson,* 29 L.J.C.P. 157 ; *Dobson* v. *Groves,* 14 L.J.Q.B. 17 (21) ; *Threfall* v. *Franshawe,* 19 L.J.Q.B. 334. The extent to which an arbitrator may seek outside advice upon matters of law is difficult to prescribe in general terms. Where the language of the award indicated no more than that the umpire took advice upon the general rules of law bearing upon the case and did not mean that he left to an outside the burden of deciding any issue in the case instead of his exercising his own

judgment thereon, the umpire cannot be said to be guilty of misconduct and the case against him in this respect is not strengthened merely because the umpire in the exercise of his discretion refused to state a special case. *Louis Drefus & Co.* v. *Arunachala,* 35 C.W.N. 1287=34 L.W. 676=33 Bom. L.R. 1536=54 C.L.J. 372=134 Ind.Cas. 1080=8 O.W.N. 1066=A.I.R. 1931 P.C. 289=61 M.L.J. 623 (P.C.) (*per Lord Tomlin*). An arbitrator can take legal advice from independent lawyers. *Rolland* v. *Cassidy,* 13 App. 770; *Re Underwood and the Bedford,* 31 L.J.C.P. 10; *Abdul Halim* v. *Ismail Momin,* 86 Ind.Cas. 773.

713. Power of arbitrator to refuse evidence.—The arbitrator may give his reasons for shutting out certain amount of evidence sought to be tendered. *Tisath* v. *Isher,* 49 P.L.R. 120.

714. Power to decide pauperism.—Whether the party is possessed of the means to pay courtfees if questioned by the other raises a dispute between the parties and there is no bar preventing the arbitrators from deciding it if this dispute is referred to them, which should be raised at the earliest stage. *Roshan Lal* v. *L. Barkat Ram,* 60 Punj. L.R. 433.

715. Power of Arbitrator to challenge the validity of submission.—The Arbitrator has no power to decide the disputes as to the legal validity of the arbitration agreement as to the existence of facts which render it illegal and void which must be decided by the court alone. *Suwalal Jain* v. *Clive Mills Ltd.,* A.I.R. 1960 Cal. 90.

Awards to be signed and filed.

14. (*1*) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(*2*) The arbitrators or umpire shall, at the request of any party *to the arbitration agreement* or any person claiming under *such party or if so directed by the Court* and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, *together with any depositions and documents which may have been taken and proved before them,* to be filed in Court, and *the Court shall thereupon give notice to the parties of the filing of the award.*

(*3*) Where the arbitrators or umpire state a special case under clause (*b*) of section 13, the Court, *after giving notice to the parties and hearing them, shall pronounce* its opinion thereon and such opinion shall be added to, and shall form part of, the award.

716. N.B.—Section 14 relating to the procedure in filing an award, reproduces section 11 of the 1899 Act with two small changes in sub-section (2): the provision of paragraph 10 of the Second Schedule to the Code, requiring the depositions and documents shall accompany the award, is included, and the notice of filing is to be issued by court and not by the arbitrators in 1899 Act.—*Notes on Clauses.* "A printing error has been corrected in sub-clause (2). In sub-clause (1) we have provided that notice to be given to the parties shall be in writing and in sub-clause

(3) that the court before pronouncing its opinion shall give notice to and hear the parties."—*Report of the Select Committee.* There is no corresponding section in the English Arbitration Act.

717. Clause 11 of the Indian Arbitration Act of 1899.—Section 11 of the repealed Arbitration Act (IX of 1899), ran as follows : "(1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice to the parties of the making and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award. (2) The arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charge of filing the award. cause the award, or a signed copy of it, to be filed in the Court ; and notice of the filing shall be given to the parties by the arbitrators or umpire. (3) Where the arbitrators or umpire state a special case under section 10, clause (*b*), the Court shall deliver its opinion shall be added to, and shall form part of the award."

718. Paragraph 10 of the Second Schedule of the Civil Procedure Code.—Paragraph 10 of the Second Schedule of the Civil Procedure Code which has been repealed by this Act ran as follows :

"Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them ; and the notice of the filing shall be given to the parties."

719. Present and previous law.—Before the coming into force of the Arbitration Act, 1940, a valid award was an operative award by itself. There were two ways in which it could be enforced : (1) it might be made rule of court by an application under the C. P. Code or under the Arbitration Act, 1899, as the case might be, or the party might be, or (2) the party might treat it as an independent source of title and enforce it by suit. In either case it was open to the opposite party to challenge the valility of the award. After coming into force of the Arbitration Act of 1940, the remedy by suit is taken away by S. 32 of the Act. Further the Act insists that within the time limited by Art. 178, Limitation Act 1908, an application must be made in court for the filing of the award. And the award becomes operative only when it is made a rule of court. Thus, the legal effect of the award as a decree finally determining the rights of the parties does not remain inforce unless the procedure prescribed by the Act is followed and a judgment is pronounced followed by a decree of the court under section 17. *Sia Kishore* v. *Bhairavi,* A.I.R. 1953 Pat. 42.

720. Scope.—Under this Act, the only provision prescribed for filing award is that contained in s. 14 (2). The existence of an agreement in writing is the foundation of the jurisdiction of the court to direct the arbitrators section 14 (2) to cause the award to be filed. *Gouri* v. *Ramlochan,* A.I.R. 1948 Pat. 430=25 P.L.T. 105=3 D.L.R. (Pat.) 26.

721. Award—Validty of.—If there is a rule or a bye-law of an Association specifically providing for the hearing of the dispute by a fluctuating body of arbitrators then, the plea that the same arbitrators have not heard the dispute would not invalidate the award. *Shiv Omkar* v. *Bansi,* A.I.R. 1956 Bom. 456=58 Bom.L.R. 3=I.L.R. (1956) Bom. 459=58 Bom. L.R. 3=I.L.R. (1956) Bom. 100. Where arbitration is referred to international chamber of commerce or other association, rules

of such association are binding on the parties. *Vide Muray Exportation* v. *Khaitan,* A.I.R. 1956 Cal. 644; see also *Co-operative* v. *Ganesh Sugar,* A.I.R. 1956 All. 601=1956 A.L.J. 711=1956 All.W.R. (H.C.) 477; *Varadan* v. *Narshi,* A.I.R. 1956 Bom. 720; *Prataprai* v. *Sheonarain,* A.I.R. 1956 Bom. 644; A.I.R. 1954 Cal. 11; *Shriram* v. *President,* I.L.R. (1954) Nag. 126=1954 Nag.L.J. 262=A.I.R. 1954 Nag. 236; *Bhiwindiwala* v. *Lakshmandas,* A.I.R. 1954 All. 750; *Nandlal* v. *Ambalal,* A.I.R. 1956 Cal. 476=60 C.W.N. 810; A.I.R. 1956 Cal. 238=97 C.L.J. 149=60 C.W.N. 578.

Where agreement of reference is bad for indefiniteness and uncertainty, award is vitiated. A.I.R. 1955 Nag. 116. But where parties to arbitration are major or minor the arbitration is not void. A.I.R. 1955 Punj. 235. As regards arbitration agreement in printed forms of contract, vide *Bharat Construction* v. *Union of India,* A.I.R. 1954 Cal. 606.

722. Sections 14, 41, 42 and 44.—Section 14 contemplates a case where the arbitrators or umpire file the award in Court in the absence of both the parties. It is for this reason that provision is made in sub-section (2) requiring the court to give notice to the parties of the filing of the award. The terms of the section do not contemplate that notice has to be given even the parties had knowledge of the filing of the award. Section 42 provides the procedure for notice which is required to be served otherwise than through court. So far as proceedings in court are concerned, the High Court is empowered to make rules under S. 44. In the absence of such rules the ordinary procedure under the Code of Civil Procedure is to be followed. The only aim is to bring the proceedings to the notice of the persons concerned and where such person had already due notice there is no need to issue a formal notice. *Kawal Singh* v. *Baldeo Singh,* A.I.R. 1957 Nag. 57=I.L.R. (1956) Nag. 680.

Arbitration Rules framed by the Punjab High Court under S. 44, do not expressly authorise a party to submit an application for filing of the award into court. *Banarsi* v. *Om Prakash,* A.I.R. 1957 Punj. 301. Authority to file award must be proved. *Ibid.*

SUB-SECTION (1).

723. Requisites of a valid award.—An award, in order to be valid. must be final, certain, consistent and possible, and must decide the matters submitted, and no more than the matters submitted.—*Russell* on *Arbitration,* 13th Edn., p. 395. This award is to be made by the arbitrator or umpire after making proper inquiry of a judicial nature. An award must be the result of judicial decision. *Vadilal* v. *Thakerelal,* 55 Bom.L.R. 629. An award continues to be so notwithstanding that parties accept it and agree to abide by it. *Narbadubai* v. *Natverlal,* A.I.R. 1953 Bom. 386=I.L.R. 1953 Bom. 651=55 Bom.L.R. 408. An arbitrator is not bound to give reasons for his decision. The award need not be in any particular form in the absence of any special clause in the agreement of reference as to the form in which the award is to be made. I.L.R. (1961) cut. 544; *Ramsahai* v. *Harish Chandra,* 1962 M.P.C. 345=1962 Jab. L.T. 1099=A.I.R. 1963 M.P. 143=1963 M.P.L.J. 121.

724. Basis of arbitration—Absence of difference between the parties.—The legal basis of all proceedings in arbitration is the existence of a difference or dispute between the parties to the arbitration proceedings. Where it appears to the court that there is no genuine reference to arbi-

tration, and there is no real difference between the parties, but that the application is a mere device to stifle enquiry in a criminal proceeding, it must be held that such a reference is invalid and the award would be inoperative. *Motumal* v. *Haji Ibrahim,* I.L.R. (1943) Kar. 390. The existence of disputes and differences contemplated by an arbitration clause is an essential condition of an pre-requisite to the exercise of the jurisdiction by the Arbitrator. A dispute implies an assertion of a right by one party and repudiation thereof by another party. *Nandram* v. *Raghunath,* A.I.R. 1954 Cal. 245.

725. "When the arbitrators or umpire have made their award." —Generally the arbitrators are to make the award. But in case of difference the umpire is to make the award. The ordinary meaning of the word "umpire" is a person who is to decide upon disagreement. *Louis Dreyfus* v. *Hemandas,* 187 Ind.Cas. 267=A.I.R. 1940 Sind 37. In a case where the arbitrators disagreed on the matters referred to them, and the necessity for umpire became established, it may well be that the omission of the arbitrators to appoint an umpire before they entered upon the submission would be fatal to the whole proceedings. But when no disagreement between the arbitrators occurred, the omission to make the appointment of umpire is not a defect amounting to legal misconduct on the part of the arbitrators and sufficient to vitiate the award. *Ibid.*

726. Making of award by arbitrators.—Even where there are more arbitrators than one, they must sit together and act judicially. In *Enoch and Zaretzky, Beck & Co., In re,* (1910) 1 K.B. 327 (334)=79 L.J.K.B. 363= 101 L.T. 801 (C.A.), *Farwell, L.J.* observed : "Where a case is referred to two arbitrators and an umpire, I think it is well understood that the arbitrators act as counsel who try to settle a case without going into court but an umpire or a single arbitrator occupies a judicial position and exercises judicial powers, and is bound, as far as practicable, to follow legal rules,....." But this statement of *Farwell, L.J.* was disapproved by *Swinfen Eady, M.R.,* in *Roff* v. *British French Chemical Manufacturing Co.,* (1918) 2 K.B. 677=119 L.T. 436=34 T.L.R. 485=87 L.J.K.B. 996 (997). *Swinfen Eady M.R. said:* "It is said by counsel for the respondent that arbitrators often take up the position of advocates of parties by whom they were appointed. This court has frequently laid it down that that is not a proper position for an arbitrator to take up." See also, *Fatherstone* v. *Cooper,* 9 Ves. 76 ; *Maule* v. *Maule,* 4 Dowl. 363 ; *Watson* v. *Duke of Northumberland,* 11 Ves. 153 ; *Cooper* v. *Shuttleworth,* (1856) 25 L.J.Ex. 114 ; *Oswald* v. *Earl Grey,* (1855) 24 L.J.Q.B. 69. Even in appointing an umpire the arbitrators must act judicially. *Pescod* v. *Pescod,* 58 L.T. 76 ; *Lord* v. *Lord,* (1856) 26 L.J.Q.B. 34.

After their appointment the arbitrators must decide the dispute impartially between the parties. *Gopalji* v. *Morarji,* 50 Ind.Cas. 411= 43 Bom. 809. In *Gajanand* v. *Phulchand,* A.I.R. 1930 All. 675 (677)= (1930) A.L.J. 1373, *Niamatulla, J.* observed: "They and those who appoint them (arbitrators) ought to understand that an arbitrator nominated by one of the parties is not 'his arbitrator' to whose care the party nominating him commits his interests. Once the arbitrator is appointed by a party and undertakes to discharge his duty as such, he becomes a judge in the case and is bound to act impartially and with scruplous regard to the ends of justice. He should in no sense consider himself to be the advocate of the cause of the party appointing him, nor is such party to be deemed as his client. He should refrain from

identifying him with the interests of such party and from looking forward to future employment as arbitrator, an office, which, it should be mentioned, carries emoluments. This case is a sad commentary on what the arbitrators thought to be their duty. Each did his utmost, in utter disregard of propriety and sense of proportion, to try to further the interests of the party nominating him." Once parties have referred their disputes to a domestic forum, it is that domestic forum alone that can decide the dispute. The forum may decide upon those disputes by adjudicating those disputes, it may decide those disputes if the parties consent to take a decision on agreement. *Narbadabai* v. *Natvarlal*, 55 Bom.L.R. 408=A.I.R. 1953 Bom. 385=I.L.R. (1953) Bom. 851. Where the arbitration clause starts with the words: "No claim shall be entertained by the seller unless made within seven days from the date of the delivery of the goods" and these provides that in the event of any dispute arising, if these cannot be settled, other party shall have the right to call for arbitration, the dispute referred to in the clause which are to be arbitrated upon are disputes which have nothing to do with the question relating to non-delivery of the goods. *Karanji* v. *Indo-China*, 58 C.W.N. 763. As regards construction of award, vide *Hanutmull* v. *Fateh Chand*, A.I.R. 1954 Cal. 1.

727. Section 14(1)—Applicability—Arbitration through Court—Section 25.—As s. 25 of the Act lays down that the provisions of the other chapters shall (including chapter II in which S. 14 appears) so far as they can be made applicable be applied to arbitrations in suits, clause (1) of S. 14 will apply even to arbitration in pending suits. *Ram Bharosey* v. *Pearey Lal*, A.I.R. 1957 All. 265=1957 All.W.R. (H.C.) 117.

728. Omission to give notice—Validity of award.—The validity of the award does not depend upon the notice of the same being given to the parties. Where an award is duly made, signed and filed in court it is a valid document. If notice is ultimately given by the court under clause (2) the parties have full opportunity of filing objections to the validity of the award and omission of the notice by the arbitrators under clause (1) is therefore immaterial. *Ram Bhasosay* v. *Peary Lal*, A.I.R. 1957 All. 265=1957 All.W.R. (H.C.) 117: see *Ramkrishnamma* v. *Lakshmibayama*, A.I.R. 1958 Andh.Pra. 497=(1958) 2 Andh.W.R. 90=I.L.R. (1958) Andh.Pra. 166 (for full discussion whether the provision is mandatory) failure to send a notice of the making of the award does not affect the validity of the award made. *Chogalal* v. *Dhapubai*, 1957 M.P.R. (Notes) 194: A.I.R. 1957 Nag. 198.

729. Arbitrators—whether committes are.—Where according to the contract between the parties, a dispute was referred firstly to arbitrators, then to an umpire and then to a Committee of appeal from him. *Held*, that the committee are really a fresh set of arbitrators called in by the parties and the award of the committee can be filed in court. *Heeralal* v. *Joakim*, A.I.R. 1927 Cal. 647=31 C.W.N. 730=55 Cal. 180, see also *Suraj Mull* v. *Chand Mull*, A.I.R. 1927 Cal. 601=31 C.W.N. 686=103 Ind.Cas. 634: *Fazalally* v. *Khimji*, A.I.R. 1934 Bom. 476=36 Bom.L.R. 1005.

730. Retrospective effect.—The Arbitration Act of 1940 has no retrospective effect and does not apply to awards made long before the coming into force of that Act. *Lachuman* v. *Makar*, A.I.R. 1954 Pat. 27.

731. Jurisdiction of arbitrators—depending on existence of custom.—Where the jurisdiction of the arbitrators depends on the

existence of custom, they cannot decide the question on which would be founded their jurisdiction. *Sohanilal* v. *Thomas,* I.L.R. (1949) 1 Cal. 350.

732. Arbitrators must act together.—In *Abdul Hamid* v. *Golam Sarwar,,* 40 Ind.Cas. 422=25 C.L.J. 396=22 C.W.N. 301, the court observed: "It is now firmly settled, as ruled in *Nand Ram* v. *Fakir Chand,* 7 All. 523=(1885) A.W.N. 139, that when a case has been referred to arbitration, the presence of all the arbitrators at all the meetings and above all at the last meeting, when he final act of arbitration is done, is essential to the validity of the award. There the case had been referred by the court to the arbitration of three persons and the parties agreed to be bound as to the matters in dispute by the decision of the majority. One of the arbitrators subsequently refused to act and withdrew from the arbitration. *Oldfield and Mahmood J.J. held* that the award of the majority was not binding. A similar view was taken in *Sreenath Ghosh* v. *Rajkumar Paul,* 8 W.R. 71. Our attention, however, has been drawn to the earlier decision in *Kazee Syed Naser Ali* v. *Musammat Tinoo Dossia.* 6 W.R. 95, as an authority for the contrary proposition. We are of opinion that this case is clearly distinguishable, and is an authority only for the proposition that an award of arbitrators cannot be set aside on the ground that it is erroneous for that only two out of three arbitrators signed the award when the parties agreed to abide by the decision of the majority. There is nothing to indicate that the arbitrator who did not sign the award had not taken part in the deliberations. The principle which underlies the view we take is best stated in the words of *Russell,* which have now become classical, quoted as they were with approval in *In re Beck and Jackson,* (1857) 1 C.B. (N.S.) 695=107 R.R. 861, and *Khelut Chunder Ghose* v. *Tarachurn Koondu,* 6 W.R. 269 (272): 'As the arbitrators must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties entitled to have recourse, to the arguments, experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving at a just decision.' The same point of view had been emphasised in *Dalling* v. *Matchett,* (1740) Wills. 215=125 E.R. 1138, where the Court of Common Pleas observed as follows: 'It has often been said that if that one had been present', that is, the arbitrator who did not attend, 'he could not by his vote have turned the majority the other way, when all the rest were unanimous; yet it has always been received this answer that every one has a right to argue and debate as well as to give his vote and it is possible at least that the person absent may, if he had been present at the meeting, have made use of such arguments as may have brought over the majority of the rest to be of his opinion.' The matter was put substantially in the same way in *Pering and Keymer, In the Matter of,* (1935) 3 Ad. & E. 245=42 R.R. 376=111 E.R. 406. *Lord Denman* observed: 'Any two, under such submission as this, that is, a submission which provides for a valid award by the majority, may make a good award. But then it must be after discussion with the other arbitrator. If after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him'. *Coleridge, J.* added: "The parties

have not got what they stipulated for. They stipulated that two at least should make the award; but no two could make it till each arbitrator had been consulted'. This view accords with that adopted in *Paterson* v. *Ayre,* (1854) 14 C.B. 665=23 L.J.C.P. 129=98 R.R. 805; *White* v. *Sharp,* 1 Car. & K. 348; *Templeman, In re* (1842) 9 D.P.C. 962=6 Jur. 324; *Burton* v. *Knight,* (1705) 1 Eq.Ca.Abr. 50=21 E.R. 866; *Margan* v. *Boult,* (1863) 7 L.T. 671; and *Dobson* v. *Morgan,* (1903) 34 Can.Sup.Ct. 125.

"We adopt the principle that inasmuch as the parties to the submission have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving at a just conclusion, it is essential that there should be an unanimous participation by the arbitrators in consulting and deliberating upon the award to be made; the operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to make a majority award; even where less than the whole number of arbitrators may make a valid award, they cannot do so without consulting the other arbitrators". See also, *Little* v. *Newton,* (1841) 2 M. & G. 351=10 L.J.C.P. 88; *Stalworth* v. *Inns,* (1844) 13 M. & W. 466=14 L.J.Ex. 81; *Gajanand* v. *Phulchand,* A.I.R. 1930 All. 675 (677)=(1930) A.L.J. 1373; *Fazalally* v. *Khimji,* AI.R. 1934 Bom. 476=36 Bom.L.R. 1005; *Thammiraju* v. *Bapiraju,* 12 Mad. 113; *Babulal* v. *Badrilal,* 49 Ind.Cas. 522 (526); *Ram Sunder* v. *Kulwant,* 20 A.L.J. 392=66 Ind.Cas. 499=A.I.R. 1922 All. 233; *Benodelal* v. *Pran Chandra,* 14 C.L.J. 143=11 Ind.Cas. 898; *Kali Charan* v. *Gopinath,* 45 Ind.Cas. 34=16 A.L.J. 307; *Basantrai* v. *Girdhari,* (1848) N.W.P.H.C. 93; *Gandamal* v. *Fateh Ali,* 55 P.R. 1882; *Mamidi* v. *Yedan,* 47 Ind.Cas. 595=(1918) M.W.N. 477=24 M.L.T. 102; *Parmeswar* v. *Hari Nain,* 7 N.W.P. 357; *Dwitar* v. *Dharanidhar,* A.I.R. 1929 Cal. 831; *Beharee* v. *Doorga,* 14 W.R. 211; *Joy Mongal* v. *Mohun Ram,* 23 W.R. 429; *Sankata* v. *Jagannath,* 69 Ind.Cas. 712=26 Oudh Cas. 1; *Lekha* v. *Bodel,* 30 Ind.Cas. 384=2 O.L.J. 365; *Ramdhar* v. *Santadar,* 178 Ind.Cas. 29=A.I.R. 1938 Nag. 492. For a final award by arbitrators to be valid, it is essential that all the arbitrators should have been present at all the meetings including the last, that witnesses should have been examined in the presence of all and that all should have consulted together as to the form that their award should take. *Mamidi* v. *Yedan,* (1918) M.W.N. 477=24 M.L.T. 102=8 L.W. 171.

In *Nand Kishore* v. *Kishori Lal,* 74 Ind.Cas. 299=10 O.L.J. 29=9 O. & A.I.R. 544=A.I.R. 1923 Oudh 181=26 O.C. 350, the court observed: "As stated by *Russell,* in a reference to several arbitrators together, where there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator; for, as the office is joint, if one refuses or omits to act, the others can make no valid award (*Russell* on *Arbitration,* 9th Edn., p. 168). In *United Kingdom Mutual Steamships Assurance Association* v. *Houston Co.,* (1896) 1 Q.B. 567=65 L.J.Q.B. 484, it was held that where a matter in dispute was referred to the decision of three arbitrators, it was necessary that all the three must concur in the making of the award and that the award made by two of them only was bad. In *Gurupathappa* v. *Narasingappa,* (1884) 7 Mad. 174, and *Muhammad Abid* v. *Mahammad Asghar,* 8 All. 64=

(1886) A.W.N. 2, it was similarly held that in the absence of a provision that a decision by a majority of the arbitrators should be binding or that an umpire could be appointed in case of difference of opinion between the arbitrators, as award made by some of the arbitrators could not be upheld. In *Lala* v. *Abdus Samad,* 17 Ind.Cas. 320=16 O.C. 94. *Gur Bakhsh Singh* v. *Chutta Singh,* 47 Ind.Cas. 960=5 O.L.J. 471, and *Lachman Prasad* v. *Pran Nath,* 65 Ind.Cas. 339=8 O.L.J. 585=A.I.R. 1922 Oudh 108, a similar view taken." See also, *Suryanarayan* v. *Sorabjee,* 79 Ind.Cas. 173 (F.B.); *Cameron* v. *Cuddy,* 83 L.J.P.C. 70= (1914) A.C. 651.

Where in an agreement to refer a matter in dispute to arbitration of four arbitrators it is expressly laid down that the parties would abide by the award of the majority of them, an award by three out of the four arbitrators, made without final discussion with and in the absence of the fourth and to which he does not agree, is not binding on the parties. *Ma Sui* v. *Ma Pu,* A.I.R. 1930 Rang. 136=7 Rang. 715=121 Ind.Cas. 792. See also, *Abdul* v. *M.U.R.S. Firm & Sons,* A.I.R. 1924 Rang. 153; *Dwitiar Chand* v. *Dharanidhar,* A.I.R. 1929, Cal. 831; *Ramnarain* v. *Lalji,* A.I.R. 1929 Pat. 178; *Ramdas* v. *Judaji,* 107 Ind.Cas. 532=A.I.R. 1928 Pat. 231; *Perring & Keymer, In re,* (1935) 3 A. & E. 245.

In *Fazalally* v. *Khimji,* A.I.R. 1934 Bom. 476=36 Bom.L.R. 1005, *Rangnekar, J.* observed: 'If there is one proposition which is firmly established by authorities more than any other in regard to arbitration, it is this that where there are several arbitrators all must act together and each must act in the making of the award and this is not denied. Indeed Mr. Setalvad concedes it. Every stage of the proceedings must be in the presence of all, and every judicial act to be done by two or more must be completed in the presence of all who do it. In *Morgan* v. *Boult,* (1863) 11 W.R. Eng. 265=7 L.T. 671, the facts were that the umpire and one of the arbitrators in the absence of the other arrived at a decision, though they informed him of it and afforded him an opportunity of objecting thereto before finally and formally making their award. 'The court consisting of *Cockburn, C.J., Crompton* and *Blackburn, J.J.* observed as follows: '.....it would be dangerous to allow an award to stand under such circumstances. It was not a mere communication of the decision, which was sufficient, for it was not easy to eradicate an impression once produced and allowed to sink in the mind. There ought to have been a meeting of all three, for the purpose of mutual discussion of the matter, before arriving at any decision. It was essential to the right exercise of the judicial function by several persons, that there should be this joint consideration and discussion of the matter, before any of them arrived at a decision upon it. In this case the arbitrator of the applicant ought to have been allowed an opportunity of hearing what was urged by the other, and of making any answer to it, and arguing any arguments in support of the opposite view before the umpire had formed an opinion upon the question. It would be a most dangerous precedent to allow an award to stand which had virtually been arrived at and resolved on by the umpire on the *ex parte* statements of one of the arbitrators, in the absence of the other. On that ground therefore the award must be set aside.....'" See also, *Re Plews and Middleton,* (1845) 6 Q.B. 845. In the above case *Coleridge, J.* observed (at page 852): "To uphold this award would be to

authorise a proceeding countrary to the first principles of justice. The arbitrators here carried on examination apart from each other, and from the parties to the reference; whereas it ought to have been conducted by the arbitrators and umpire jointly, in the presence of the parties." The observations of *Lord Denman, C.J.* are also to the same effect.

In *Lord* v. *Lord,* (1855) 5 El. & Bl. 404=26 L.J.Q.B. 34=3 W.R. 553 (Eng.), *Coleridge, J.* observed at page 406 of 5 El. & Bl.: "It is now clearly established that every judicial act, to be done by two or more, must be completed in the presence of all who did it; for those who are to be affected by it have a right to the united judgment of all up to the very last moment." See also, *Beck and Jackson,* (1857) 1 C.B. (N.S.); *Little* v. *Newton,* (1841) 9 D.P.C. 437=2 Man. & G. 351; *Statworth* v. *Inns,* (1844) 13 M. & W. 466=9 Jur. 285=14 L.J.Ex. 81. For the making of an award it is enough that the arbitrators act together and finally make up their minds and express their decision in writing. The writing must be authenticated by their signatures. *Janardhan Prosad* v. *Chandra Sekhar,* I.L.R. (1950) Nag. 983=A.I.R. 1951 Nag. 198. The award is thus made and signed and is complete and final so far as the arbitrators are concerned. *Ibid.*

In *Ramayya* v. *Katragadda,* A.I.R. 1926 Mad. 1183=51 M.L.J. 440=24 M.L.W. 384=97 Ind.Cas. 824, court observed: "It is well settled that when a reference is made to two or more arbitrators, the award is not valid unless it is concurred in by them all. This was laid down in *United Kingdom Mutual Steamship Assurance Association* v. *Houston,* (1896) 1 Q.B. 567=65 L.J.Q.B. 484, and was assumed in *Cameron* v. *Cuddy,* (1914) A.C. 651=83 L.J.C.P. 70=110 L.T. 89. It is also laid in *Baboo Surubjeet Narain Singh* v. *Baboo Gouree Pershad Narain Singh,* 7 W.R. 269, *In the matter of Junglee Ram* v. *Ram Heet Sahoy,* 19 W.R. 47, and *Nem Roy* v. *Bharat Roy,* 22 W.R. 129. It is true that in these cases one or more of the arbitrators did not sign the award and on that ground it was held not to be valid, but the reason given for such a conclusion is that all the arbitrators had not concurred in the award." Where reference is made to a number of arbitrators and some of them record evidence and then the award is sent to the absentee arbitrator who gets himself acquainted with the evidence the award is not invalidated. *U Po Hlang* v. *Daw Ngwe,* A.I.R. 1941 Rang. 22. But the subsequent embodiment of the decision of the arbitrators in certain papers, which already bore the signature of one of them and were subsequently by others vitiates the award. *Benode* v. *Pran,* 14 C.L.J. 143=11 Ind.Cas. 898.

Where one of several arbitrators agrees to an award but at the instance of one of the parties wilfully refuses to sign it though there is a legal flaw in the award, the party who procured it cannot take advantage of it, because the general principles of law must be applied to arbitration matters as to all others. *Ram Sundar* v. *Kulwanti,* 66 Ind.Cas. 499=20 A.I.J. 392. See also, *Tara Prasad Singh* v. *Raja Singh,* 152 Ind.Cas. 929=4 A.W.R. 117=A.I.R. 1935 All. 90. But the failure of one of several arbitrators to sign an award may have a different effect in different cases, but if one of the arbitrators withdraws from the arbitration altogether and refuses to co-operate with his colleagues, and they neverthless proceed to give award without his help, that must amount to misconduct. *Tara Prosad Singh* v. *Raja Singh* (*supra*); but see *Kamta Prosad* v. *Jodhan Singh,* 7 Ind.Cas. 99=7 A.L.J. 890; *Mansaram* v. *Kartaram,* 76 Ind.Cas. 1007=A.I.R. 1923 Lah. 411; *Dhram Singh* v. *Surat Singh,* 88 Ind.Cas. 547=A.I.R. 1925 Oudh 712. The absence of one of the arbitrators at a meeting in which nothing material was done and no enquiry was made

will not invalidate the award. *Varanashi* v. *Kilamsette,* 60 Ind.Cas. 181 =12 M.L.W. 505.

733. When an appointment of umpire becomes effectual.—The appointment of an umpire does not become effectual unless he accepts the office. *Trippet* v. *Eyre,* 3 Lev. 263 ; *Ringland* v. *Lowndes,* (1863) 15 C.B.N.S. 173 (196). An umpire need not be a single person. A committee such as a trade association may be validly appointed an umpire. *Re Varipati,* (1914) W.N. 208 ; *Keighley, In re,* (1893) 1 Q.B. 405.

734. Award by person not authorized to make it.—If what purports to be an award was made by a person who had no authority to make it, it is not an award and no decree in terms of it can be passed. *Jai Dayal* v. *Chunilal,* A.I.R. 1951 All. 359.

735. Powers of appeal committee in commercial arbitration—"The agreement may provide for an appeal : this it is not uncommon in certain commercial arbitrations to provide for an appeal from the umpire to the appeal committee, and where this is done the award of the appeal committee will be treated by the courts as if it were an award of an ordinary umpire. *Russell,* 15th Edn., p. 263, citing *Brian Smith Ltd.* v. *Wheatsheaf Mills Ltd.,* (1939) 2 K.B. 302 ; *N. V. Meyer* v. *Anne,* (1939) 3 AllE.R. 168.

736. What matters are to be decided by umpire.—If "all or any of the matters in difference between the parties) are referred to arbitrators, who disagree, but only as to costs, yet the umpire must adjudicate on the whole question. *Weeks* v. *Cox,* 11 Jur. 542. Where arbitrators determined on five points in dispute, and referred a sixth to an umpire whom they were authorised to choose, the award made by the arbitrators and umpire was bad, the arbitrators not being authorised by the terms of the submission to make the award upon some points in dispute, and refer others to the umpire. *Tollit* v. *Saunders,* 9 Price 612=23 R.R. 732 ; *Winterringham* v. *Robertson,* 27 L.J.Ex. 301. When an umpire has once been summoned, the jurisdiction of the arbitrators is gone. *Westminster and Brymbo Coal* v. *Clayton,* 13 W.R. 134=11 L.T. 366. See also, *Morgan* v. *Bolt,* 7 L.T. 671=11 W.R. 265. An award by the umpire as to costs is good, although, by the submission, they are in the discretion of the arbitrators. *Taylor* v. *Dutton,* 1 L.J. (O.S.) K.B. 158.

737. Duties of umpire.—*Prima facie,* the duties of an umpire are the same as those of the arbitrators. The umpire must hear the evidence of the parties and their witnesses, if the application is made to him to do so by either party, notwithstanding that the same evidence has already been adduced before the arbitrators. The umpire is not justified, on the face of an objection by either party, in taking any part of the evidence from the notes of the arbitrators unless there are specific provisions in the submission permitting him to do so. *Sitaram* v. *Sushil,* 64 Ind.Cas. 706=34 P.L.R. (A.) 60 ; *Jenkins* v. *Leggo,* (1841) II L.J.Q.B. 71=6 Jur. 397. Where matters are referred to arbitrators, and if they disagree, to an umpire, and the arbitrators, after hearing witnesses, disagree, the umpire must rehear the witnesses. *Salkeld, In re,* 12 A. & E. 767=4 P. & D. 732=10 L.J.Q.B. 22. An umpire may make his award on the notes of the arbitrators if no objection is taken. *Jenkins* v. *Leggo* (*supra*). In the above case *Patterson, J.* observed : "I do not see that you can carry the proposition, attempted to be laid down in support of the award, any further than this, that an umpire may make his award on the notes of the arbitrators, if no objection is taken." See also, *Tunno* v. *Bird,* (1833) 3 L.J.K.B. at page 6. Objections to such proceedings by the umpire may be waived ; but to prevent the award being set aside, clear proof must be given of the waiver. *Salkeld, In re,* 12 A. & E. 767=4 P. & D. 732=

10 L.J.Q.B. 22. But where under the arbitration agreement the umpire was authorised to act on the notes taken by the arbitrators or by somebody else on behalf of the arbitrators, the umpire is entitled to act on such notes, even when he was asked by one of the parties to examine witnesses on his behalf and he refused. *Firth and Howlett, In re,* (1850) 19 L.J.Q.B. 167. See also, *James, In re,* 2 N. & M. 328=5 B.Ad. 488. Whether there is or not any general rule that an umpire need not receive evidence or be active in summoning the parties, where the witnesses of one party have not been heard before the arbitrators owing to the non-attendance of that party's arbitrator at the hearing, the umpire ought to make no award without giving the party an opportunity of producing evidence before him and addressing him, although he may be an expert and competent to decide from personal observations. *Harvey and North Staffordshore Ry., In re,* 2 De G. & Sm. 33=12 Jur. 389. Sections 10 to 15 of the Arbitration Act are general sections applying to all awards under the Act whether the provisions of the First Schedule are applicable to the particular arbitration, whether they are excluded by the expressed intention of the parties or not. Unless therefore the meaning of the word "umpire" itself in the Act can be enlarged beyond its ordinary meaning, there is no recognition to be found in the Act for an award by a tribunal superior to the umpire. It would be impossible to hold that "umpire" meant "umpire or any high domestic tribunal" before which, the parties may agree. *Heera Lal* v. *Joakim,* 31 C.W.N. 446=102 Ind. Cas. 395=A.I.R. 1927 Cal 391 ; but see A.I.R. 1927 Cal. ; 647 ; A.I.R. 1927 Cal 601 and A.I.R. 1934 Bom. 476.

738 Whether an umpire can sit with arbitrators and hear evidence.—Where arbitrators have power, if they should not agree, to appoint a third person to be umpire in or to concur and join with them in considering and determining all or any of the matters referred, such third person, when so appointed, is not a third arbitrator, but an umpire, and the effect of his appointment is, that he is to sit with the arbitrators, and hear and consider the matters referred, and if they do not agree in an award upon all matters referred, and not merely upon those in which they do not agree.*Winteringham* v. *Robertson,* 27 L.J.Ex. 301. But where the power to appoint an umpire was in same terms, it was held that an award made by the umpire alone not binding. *Beddal* v. *Page,* 5 L.J. (O.S.) K.B. 101. Where a matter in difference is referred to two, one to be named by each of the parties, with a proviso that if they disagree they shall name an umpire, and that he shall make the award, and the two disagree and appoint an umpire, it is no ground of objection to the award that all three have sat and heard the evidence together, and then the umpire has made the award. *Flaglane Chappel* v. *Sunderland Cor.,* 5 Jur. (N.S.) 894. See also, *Potter* v. *Newman,* (1835) 4 D.P.C. 504 ; *Ellison* v. *Ackroyd,* 1 L. M. & P. 806.

739. Duty of impartiality.—In *Thomas William Brook and F. and A. Delcomyn, In re,* 16 C.B.N.S. 403=10 Jur.N.S. 704=10 L.T.N.S. 378=139 R.R. 547, the umpire, without calling any of the parties before him, but professing to proceed upon the statements and documents so submitted to him, made an award directing that the seller should take back the cargo, and repay the buyer the amount of the invoice price, which he has paid. The seller having afterward discovered that the umpire had, without any notice to him or to A, his arbitrator, inspected samples of the seed at the country-house of B, the other arbitrator, and also had communications with the persons by whom the cargo had been inspected and the samples taken,—moved to set aside the award. The court made

the rule absolute, on the ground that the conduct of the umpire was a violation of the universal principle of justice, *Erle, C.J.* observed: "This is not a technical objection. It is one of the first principles in the administration of justice, that the tribunal which is to decide must hear both sides and give both an opportunity of hearing the evidence upon which the decision is to turn. I am not by any means deciding this case on a point of form, but upon a matter of substance, and one of the last deepest importance. It may be said that in doing this I am setting up my own individual imperfect sense of right against the opinions and usages of mercantile men on a purely mercantile question. But I find the master minds of every century are conscientious in holding it to be an indispensable requirement of justice that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him. Much leaning is to be found in the books upon this subject from the time of *Lord Coke* downwards, which it would be waste of time to cite. (3 Ins. 35). I will only refer to one case which occurred whilst I was a member of the Queen's Bench. *Reg.* v. *The Archbishop of Canterbury,* 117 R.R. 331=1 El. & Bl. 545. There, the Archbishop on an appeal against the revocation of a curate's licence, under the 1 & 2 Vict. c. 106, section 98 had confirmed the revocation without a hearing; but merely upon the statements made by the curate in his petition of appeal, and the written documents referred to in such petition; and the court issued a *mandamus* commanding him to hear the said appeal and decide the merits thereof. *Lord Campbell* said: 'It is one of the first principles of justice, that no man should be condemned without being heard. We do not say whether the Archbishop's decision was right or wrong. We only say that he has not heard the petition'." See also, *Hawley v. North Staffordshire,* (1848) 2 Jur. 389; *James Finlay* v. *Arudamal,* 5 S.L.R. 89=12 Ind.Cas. 637; *Dhana Singh* v. *Ram Chand,* 83 Ind.Cas. 543=17 S.L.R. 172=A.I.R. 1924 Sind 27; *Miller* v. *Dhanal Singh,* 63 Ind.Cas. 141=15 S.L.R. 68; *Karamchand* v. *Jasadhan,* 100 Ind.Cas. 896=A.I.R. 1927 Lah. 347; *Sitaram* v. *Susil,* 64 Ind.Cas. 706; *Chatturbhuj* v. *Deokram,* 26 Bom.L.R. 84=A.I.R. 1924 Bom. 370=79 Ind.Cas. 769.

740. Foreign awards—Enforcement—Procedure.—Foreign awards where there are two separate submissions in respect of separate items, the arbitrators can make two awards and must not confine them into one. *Gulzarilal* v. *Busi,* A.I.R. 1953 Cal. 623. The mere fact that the awards in respect of the three contracts have been typed on three consecutive sheets of paper would not make them one award. It is proper for the arbitrator to get the three awards typed on three separate sheets of paper, appending his signature at the foot of each award. But his failure to do so would not convert the three awards into a single award. *K. C. Mehre* v. *Union of India* A.I.R. 1960 H.P. 20.

One arbitration agreement cannot produce one or more awards and the law of arbitration does not nurse any dogma to say that it can never do so under any circumstance because of some fancied universal doctrine of legal merger of the arbitration agreement in the award. *Pushraj* v. *Clive Mills,* A.I.R. 1960 Cal. 180.

741. Foreign awards—Enforcement—Procedure.—Foreign award are dealt with the Arbitration (Protocol and Convention) Act VI of 1937. Under this Act foreign awards can be enforced by filing them in Indian Courts, and S. 7 lays down conditions under which they can or cannot bc enforced. A foreign award cannot be enforced in this country by an application under the Arbitration Act, 1940. When the provi-

sions of the 1932 Act do not apply to it, sections 14 and 31(4) of the Arbitration Act, 1940, and S. 20 C. P. Code have no application to foreign awards. There can be no doubt that valid award creates an obligation on the part of one party towards the other to do what the award orders and direct him to do. The party in whose favour the award is given can bring an action on the award without going back the original cause of action, and this principle is equally applicable to foreign award. Where this course has not been adopted the trial court had no jurisdiction to take the foreign award on the file and then after hearing objections proceed to make it a rule of court. *Lochman* v. *Parmoshri,* A.I.R. 1958 Punj. 258.

742. Award must be in writing.—According to para. 3 of the First Schedule of this Act an award by the arbitrators must be in writing. As regards an award by an umpire para. 5 of the same Schedule states, "the umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow." In that clause it is not stated whether an award by an umpire should also be in writing. But this section states that "when the arbitrators or umpire have made their award, they shall sign it." This implies that an award by an umpire should also be in writing. Under the repealed Acts oral award was valid [vide *Amir Bibi* v. *Arogyam,* 45 Ind.Cas. 813; *Fateh* v. *Amar,* A.I.R. 1933 Lah. 777=147 Ind.Cas. 858= 35 P.L.R. 21; *Muhammad* v. *Muhammad,* A.I.R. 1939 Nag. 233 (F.B.)], but under this Act oral award is no longer valid. In *Laljee Jaisingh* v. *S. P. Tewari,* 3 Bur.L.J. 102=A.I.R. 1924 Rang. 319=82 Ind.Cas. 802, the court observed: "An award under the Act must, by section 11, be in writing and signed. Before reducing their award to writing the arbitrators must no doubt arrive at their decision; but having done so, they are bound to make an award in writing and signing of the award is not a mere formality. *Gotha Krishnaswami* v. *Thatha Seetharam Chetty,* 5 Ind.Cas. 374=7 M.L.T. 355=(1910) M.W.N. 53." In *Ramdas Sahu* v. *Judaji Lohad,* A.I.R. 1928 Pat. 231=107 Ind.Cas. 532. *Kulwant Sahay, J.* observed: "In my opinion the writing out of the award cannot be treated to be a ministerial act. The award embodies the decision to which the arbitrators came and the writing of the decision in a case cannot be treated to be a ministerial act. Even if the writing out of the award be a ministerial act, it does not become an award until it is signed by the arbitrators. It was open to them to change their mind upon further consideration when the written award was placed before them for signature." See also, *Rambilas Singh* v. *Brinch Singh,* 11 Pat 131=12 Pat.L.T. 733=135 Ind.Cas. 518=A.I.R. 1932 Pat. 60. Where an award originally written on a rough paper is freshly written on a stamp paper for the purpose of registration and this is no difference between these two, there being no subsequent alteration or modification of the original award, it is merely a ministerial act and does not affect the validity of the award. *Sitaram* v. *Thakursi,* 1959 Pat. L.R. 299= A.I.R. 1960 Pat. 315=1960 B.L.J.R. 15(2).

Section 14 contemplates only a written award and though an oral award is not capable of enforcement according to the Scheme and provision of the Arbitration Act such an award is not illegal and can form a valid consideration for a promissory note or cheque on a like instrument upon the basis of which a suit is maintainable. *Verma O.P.* v. *Lala Gehrilal,* I.L.R. (1961) 11 Raj. 103=A.I.R. 1962 Raj. 231. An award originally made on plain paper by five arbitrators is re-written on stamped paper and presented for registration with only four arbi-

trators signing it is set aside as invalid. *Srinivasa Rao* v. *Venkata,* (1963) 1 An. W.R. 45.

743. They shall sign.—Under this section the signatures of all arbitrators to their award is absolutely necessary. *Ramdas* v. *Judaji,* A.I.R. 1928 Pat. 231); *Ramesh* v. *Karunamoyo,* 33 Cal. 498 ; *Nemichand* v. *Kesarimull,* A.I.R. 1929 Mad. 31=56 M.L.J. 35=29 M.L.W. 227=114 Ind.Cas. 818. The only question is whether they should all sign at the same place and time. In *Joy Mungal Singh* v. *Mohun Ram,* 12 W.R. 397, this question arose and *Norman J.* answered the question as follows: "We do not desire to more than point out to the Judge the principle of the law on this subject. That principle is stated by the Chief Justice in Vol. VI, *Weekly Reporter,* p. 272, and Vol. IX *Weekly Reporter,* p. 29, and the rule applicable to arbitrators is shortly expressed in the passage already cited from *Roscoe* on *Evidence,* p. 324. The Judge appears to have understood that. because he remitted the award to the arbitrators in order that they ought to sign it conjointly. But this they did not. The Judge will consider whether it would not be proper again to send back the papers signed in pursuance of his former suggestion, that an award may be duly and regularly signed by the arbitrators in the presence of each other." This is in accord with the English law. Where there are two or more arbitrators all should execute the award at the same time and place. If they fail to do so, it may invalidate the award.—*Russell* on *Arbitration,* 13th Edn., pp. 380-81, citing *Lord* v. *Lord* (1855) 5 E. & R. 404=26 L.J.Q.B. 34 ; *Stalworth* v. *Inns,* (1844) 13 M. & W. 466=14 L.J.Ex. 81 ; *Eads* v. *Williams,* (1854) 24 L.J.Ch. 531 ; *Wade* v. *Wowling,* (1854) 4 E. & D. 44 ; *Anning* v. *Hartley,* 27 L.J.Ex. 145 ; *Goodman* v. *Sayers,* (1820) 20 J. & W. 249.

The case of *Joymangal Singh* v. *Mohan Ram (supra),* was referred to in *Manindra* v. *Mohananda,* 13 Ind.Cas. 161=15 C.L.J. 360. In the above case the court observed: "In support of the sixth ground, which is of a highly technical character, it has been argued that the award is void, because it was not signed by the arbitrators at the same time and place. In support of this argument, it has been contended that the signing of an award is a judicial act and like other judicial acts it must be performed jointly by the arbitrators concerned ; and reference has been made to the cases of *Wade* v. *Wowling (supra)* ; *Wright* v. *Graham.* 3 Exch. 131=18 L.J.Ex. 29 ; *Anning* v. *Hartley (supra)* ; *In re Jai Mangal Singh,* 11 W.R. 433=3 B.L.R.A.C. 82 ; *Jai Mangal Singh* v. *Mohan Ram (supra)* ; and *Benode Lal Pakrasi* v. *Pran Chandra Pakrasi,* 14 C.L.J. 143=11 Ind.Cas. 898. In so far as the case of *Wade* v. *Dowling (supra)* is concerned, no doubt, it supports the contention of the appellants. But we observed that, so far back as 1871, *Mr. Justice Phear,* in the case of *Bhopo Sundari* v. *Makhan Lal Dey,* 8 B.I.R. 128, declined to adopt the English rule on the subject. as not founded upon principles of justice. equity and good conscience. The view taken in the last case mentioned has been adopted by the Madras High Court in *Muthu Kutti Nayakan* v. *Acha Nayakan,* 18 Mad. 22. The case of *In re Jai Mangal Singh (supra),* the head note to the report whereof is misleading. is really not an authority in support of the contention of the appeallants ; while. so far as he decision of *Jai Mangal Singh* v. *Mohan Ram Marwari,* 12 W.R. 397=8 B.L.R. 319 *(n),* is concerned the learned Judge were upon this point equally divided in opinion. With regard to the case of *Benode Lal Pakrasi* v. *Pran Chandra Pakrasi (supra),* it is sufficient to observe that the award there was invalidated on the ground that one of the arbitrators had not attended all the sittings and had subsequently

signed blank papers upon which the award was drawn up and written out by his colleagues. The position, therefore, is, so far as this court is concerned, that the opinion expressed by *Mr. Justice Norman* in *Joy Mungal Singh* v. *Mohan Ram Marwari* (*supra*), is in favour of the appellants, whereas the opinion expressed by *Mr. Justice Jackson* in the same case and the view adopted by *Mr. Justice Phear* in *Bhobo Sundari Dasi* v. *Makhan Lal Dey* (*supra*), is opposed to their contention. *Ardesar* v. *Secretary of State*, 9 B.H.C.R. 177. Under these circumstances, we are free to decide the matter as one of principle and we are clearly of opinion that the rule laid down in *Wade* v. *Dowling* (*supra*), ought not to be adopted in this country. We may add that even in England the contrary view has sometimes been maintained. See for instance, the cases of *Little* v. *Newton*, 9 Dowl. 437=10 L.J.C.P. 88=5 Jur. 246=2 Man. & G. 35, and *In re, Hopper*, 2 Q.B. 367 (376)=36 L.J.Q.B. 97=8 B. & S. 100=15 L.T. 566. We may further observe that the English rule [*Stalworth* v. *Inns*, 13 M. & W. 466=14 L.J.Ex. 81=9 Jur. 285; *Eads* v. *Williams*, 24 L.J.Ch. 531=4 De G.M. & G.....74=1 Jur. 285; 193] has not been adopted in the American courts, on the ground that it is of a highly technical character and not conducive to the ends of justice [*Maynard* v. *Fredrich*, (1851) 7 Cahsing 247]. It has rightly been remarked that the rule that an award is invalid unless it has been signed by all the arbitrators at the same sitting, is clearly a rule carried to a point beyond what reason would seem to require, and it is more than probable that so rigid a doctrine would throw out many awards which justice would require should be upheld. In the case before us, it is conclusively established that the actual decision is the joint adjudication of all the arbitrators. That decision was subsequently engrossed by one of the clerks and the document in its final form was signed by different arbitrators on different occasions. That, in our opinion, does not invalidate the award.' See also, *Phiran* v. *Bahoran*, 7 N.W.P. 367.

The same view was taken by the Bombay High Court in the case of *Parshottamdas* v. *Kekhushru*, A.I.R. 1934 Bom. 6=35 BomL.R. 1101 =149 Ind.Cas. 324, where *Baker, Ag.C.J.* said: "The actual making of the signature by an arbitrator at different time to the other arbitrators does not invalidate the award in this country although the law in England appears to be stricter, as laid down in *Muthu Kutti Nayakan* v. *Acha Nayakan*, 18 Mad. 22, and *Abdul Rahaman* v. *Sahabuddin*, A.I.R. 1920 Lah. 228=1 Lah. 481=55 Ind.Cas. 883=85 P.W.R. 1920. But both those cases make it clear that it is necessary that all the arbitrators should agree to the terms of the award, although there is no provision of law requiring them to sign it in the presence of each other; what has been laid down repeatedly as necessary is that all the arbitrators should apply their minds to the making of the award." But see *Fatimabai* v. *Collector of Surat*, 8 B.H.C.R.A.C.J. 79; *Bhagwan* v. *Shiv*, 92 P.R. 1913 =22 Ind.Cas. 811 (*obiter*).

The failure of one of several arbitrators to sign an award may have a different effect in different cases, but if one of the arbitrators withdraws from the arbitration altogether and refuses to co-operate with his colleagues, and they nevertheless proceed to give an award without his help, that must amount to misconduct. But if the arbitrators had arrived at a decision but merely waited to sign the award, and in the interval between the decision and the signing of the award one of them changed his mind and refused to sign it, it does not necessarily follow that the arbitrators have been guilty of misconduct in framing the award and filing in court. *Tara Prasad* v. *Raja Singh*, A.I.R. 1935 All. 90= 152 Ind.Cas. 929=A.I.R. 1934 A.L.R. 1017=(1934) A.L.J. 1233. See

also, *Ram Sundar* v. *Kulwanti,* A.I.R. 1922 All. 233=66 Ind.Cas. 499=44 All. 642. Where there is an agreement in the reference to the arbitrators that the award might be pronounced by all the arbitrators or by majority of them, the failure by one of the arbitrators to sign the award does not affect the validity of the award, when the arbitrator who did not sign arbitration which resulted in the award. *Dasarathi* v. *Ramaswamy,* (1955) 2 M.L.J. 693=1955 M.W.N. 882.

The omission of one of several arbitrators to sign the award does not vitiate the award where the arbitration proceedings took place in the presence of all the arbitrators. *Sricharan* v. *Makhan Lal,* 51 Ind.Cas. 378; *Raghubir* v. *Kamlesar,* 23 Pat. 719=A.I.R. 1945 Pat. 140; *Darayao Singh* v. *Ratan Lal,* 1944 A.W.R. (Rev.) 164=1944 R.D. 325; *Ram Narain* v. *Pati Ram,* A.I.R. 1916 Pat. 156=1 Pat.L.J. 90=34 Ind.Cas. 105; *Kazee Syed* v. *Tinoo Dossia,* 6 W.R. 95; *Sricharan* v. *Makhan Lal,* A.I.R. 1919 Cal. 42=51 Ind.Cas. 378; *Abu Hammid* v. *Golam,* A.I.R. 1918 Cal. 865=40 Ind.Cas. 422; *Abinash* v. *Parasuram,* 44 C.W.N. 866; *Ram Sunlar* v. *Kul Wanthi,* 66 Ind.Cas. 499=A.I.R. 1922 All. 233=44 All. 642; *Dandekar* v. *Dande Kar,* 6 Bom. 663; *Johora Bibi* v. *Md. Sadik,* 64 L.W. 600=A.I.R. 1951 Mad. 997=(1951) 2 M.L.J. 56. So also where an award is arrived at by the arbitrators of both parties and represents their decision, the failure of the arbitrator of one party to sign it does not render it invalid. *Manphool* v. *Sahi Ram,* 43 Ind.Cas. 154. But mere signature of all the arbitrators to an award where arbitration proceedings was not attended by all, will not validate an award. *Ramgutty* v. *Thakoor Das,* 22 W.R. 418. Under section 11 of the Arbitration Act, the award must be signed by all the arbitrators who join in making the award. But the omission on the part of some of them to sign it is a mere irregularity capable of being rectified. *Fazalally* v. *Khimji,* 36 Bom.L.R. 1005=A.I.R. 1934 Bom. 476. See also, *Binodelal* v. *Pranchandra,* 11 Ind.Cas. 898=14 C.L.J. 143; but see *Bagaya* v. *U. Paduma,* 12 Rang. 128=149 Ind.Cas. 1083=A.I.R. 1934 Rang. 24; *Raghubir* v. *Kaulesor,* A.I.R. 1945 Pat. 140=218 Ind.Cas. 275.

An award duly made and signed by the arbitrator but intended to be fair-copied on a stamped paper is valid and the defect as to stamp can be cured. *Ramchand* v. *Gobindram,* 13 S.L.R. 75=53 Ind.Cas. 337; *Kalu Nagabushanam* v. *Kula Seshachalam,* 1 M.H.C.R. 178.

744. Making award and delivery of judgment.—There is a fundamental difference between the making, signing and delivery of a judgment and making, signing and giving notice of an award. In the case of judgment all three must be simultaneous acts and parts of the same transaction. In the case of award the first two may be simultaneous and the notice of the award can be postponed. The award is not invalid because notice of the making of it has not been given. *Janardhan Prosad* v. *Chandra Sekhar,* A.I.R. 1951 Nag. 198=I.L.R. (1950) Nag. 823. It is not open to a defendant to set up an award as a bar to a suit filed on an original cause of action, where the award was not filed and all proceedings relating thereto had not been gone through as required by Arbitration Act. *Pamandass* v. *Nagappa,* 1959 Andh.L.T. 639=(1959) 2 Andh. W.R. 187 (F.B.).

Where in a suit the defendant files an application under S. 14, Arbitration Act alleging the marking and pronouncement of the award by the arbitration the court has jurisdiction under S. 14 read in the context of SS. 25, 31, 32 and 33 of the Act, to inquire into the existence of the alleged award and to ask the parties to produce evidence, oral or documentary, in the matter and decide the question, *Ambika Prosad* v.

Shiva Parsan 1960 B.L.J.R. 509=1960 Pat L.R. 185=A.I.R. 1960 Pat. 587.

745. Specific questions of law referred to arbitrator—Finality of decision.—Where a certain question of law is specifically referred to an decided by the arbitrator, the arbitrator's decision on it is final however he may have erred. *Kuruvilla* v. *Kuruvilla,* 1959 Ker.L.J. 397=1959 Ker. L.T. 445; see also A.I.R. 1959 Ker. 174; A.I.R. 1955 S.C. 468=1955 S.C.J. 445=(1955) 2 M.L.J. (S.C.) 23.

746. In case of majority award—where the minority refuses to sign.—There is a distinct statutory provision that the award must be signed by the persons who made it. The want of signature of some of the arbitrators from the award invalidate the award. *Ramdas Sahu* v. *Judagi Lohar,* A.I.R. 1928 Pat. 231=107 Ind.Cas. 532. In the above case the court observed: "In *Ramesh Chandra Dhar* v. *Karunamoyi Dutt,* 33 Cal. 498, one of the dissenting arbitrators who did not agree to the award had not signed the award and the award was filed in court without the signature of the dissenting arbitrator, even then it was held that the award was invalid because it did not bear the signature of the arbitrator. This decision was referred to in this court in *Khudiram Mahto* v. *Chandi Mahto,* (1916) 1 Pat.L.J. 306=35 Ind.Cas. 358=2 P.L.W. 377, and apparently accepted as correct. Reference is made on behalf of the opposite party to the decision in *Ram Narain* v. *Pati Ram,* (1916) 1 P.L.J. 90=34 Ind.Cas. 105=2 P.L.W. 411, where it was held that when the parties nave agreed to abide by the decision of the majority of the arbitrators, an award cannot be set aside on the ground that it has not been signed by the minority..... In *Dandekar* v. *Dandekar,* 6 Bom. 663, three out of the seven arbitrators did not sign the award and their Lordships observed that the omission to take the signatures of the minority of the arbitrators to the document which formed the record of their award would not be fatal to the award.....I am unable to agree to the proposition that the want of signatures of some of the arbitrators from the award does not invalidate the award. I am of opinion that this defect is fatal to the award and the award cannot be accepted and a decree cannot be passed in accordance therewith."

Where the minority of the arbitrators appointed refrain from having anything more to do with the further proceedings in arbitration and render intructuous the award by the majority, the award will not be set aside merely on that ground. *Sanjivappa* v. *Venkatanarappa,* A.I.R. 1927 Mad. 436=52 M.L.J. 357=100 Ind.Cas. 634. Where one of the several arbitrators agrees to an award but at the instance of one of the parties wilfully refuses to sign it, though there is a legal flaw in the award, the party who procured it cannot take advantage of it. *Ram Sundar* v. *Kulwanti Kunwar,* 66 Ind.Cas. 499=20 A.L.J. 392; see also. *Taraprosad Singh* v. *Raja Singh,* A.I.R. 1935 All. 90=152 Ind.Cas. 929=(1934) A.L.J. 1233.

Where in an agreement to refer a matter in dispute to arbitration to four arbitrators it is expressly laid down that the parties would abide by the award of the majority of them, an award by three out of the four arbitrators, made without final discussion with and in the absence of the fourth and to which he does not agree is not binding on the parties. The arbitrators must be regarded as having been guilty of misconduct. *Ma Sin* v. *Ma Pu,* A I.R. 1930 Rang. 136=7 Rang. 715=121 Ind.Cas. 792. See also, *Nand Ram* v *Fakir Chand,* 7 All. 523=(1885) A.W.N. 139; *Abdulla* v. *M. V. R. S. Firm & Sons,* A.I.R. 1924 Rang. 153; *Dwitiar* v. *Dharanidhar,* A.I.R 1929 Cal 831

In *Kamata Prosad* v. *Jodha Singh,* 7 Ind.Cas. 99=7 A.L.J. 890, the

parties to a suit referred their disputes to arbitration. Four arbitrators were appointed, two by the plaintiff and two by the defendent, and an umpire. In the event of disagreement, the decision of the majority was to prevail. The two arbitrators appointed by the plaintiff retired before an award was made on the ground that the view of the majority was against them. The arbitrators appointed by the defendant and the umpire drew up an award, signed it and sent it on to the court. The court passed a decree in accordance with it. It holding that the award is a legal award the court observed : "The withdrawal of the two arbitrators at the very last moment, when they found the decision of the majority against them, was a mere trick either to save their wounded pride or due to some less honourable motive. The arbitrators who withdrew themselves admitted that there was no misconduct of any kind on the part of the others." See also, *Mansa Ram* v. *Karta Ram,* 26 Ind. Cas. 107 = A.I.R. 1923 Lah. 411 ; *Dharam Singh* v. *Surat Singh,* 88 Ind. Cas. 547 = A.I.R. 1925 Oudh 717 ; *Bhoj Nath* v. *Shiva Nandan,* A.I.R. 1930 Oudh 389. Now section 10 (3) provides that "where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the umpire shall, unless the arbitration agreement otherwise provides, prevail." So from this sub-section as well as sub-section (2) of section 10 it is clear that an majority of the arbitrators is called a majority award. Now it is settled that in a majority award no signature of the dissenting arbitrator or arbitrators is required. See also, *Bhojnath* v. *Shiva Nath,* A.I.R. 1930 Oudh. 389 = 7 O.W.N. 541 = 127 Ind.Cas. 254 ; *Ram Narain* v. *Pati Ram,* 34 Ind.Cas. 105 = Pat.L.J. 90 = 2 P.L.W. 411 ; *Nisar Ali* v. *Tinor,* 6 W.R. 95 ; *Mohamed Ali* v. *Secretary of State.* 41 Ind.Cas. 264 = 42 Bom. 668 = 19 Bom.L.R. 618 A cause and all matters in difference were referred to the arbitration of three persons, the award of the three, or of any two of them, to be final. The award purported on the face of it be made by all three, but was executed by two only, the third having refused to sign it when requested to do so. *Held,* that the award was good as the award of the two. *White* v. *Sharp,* 12 M. & W. 712 = 1 D. & L. 1039 = 1 Car. & K. 348 = 8 Jur. 344 = 13 L.J.Ex. 348. Where the parties to a reference to an arbitration agree that the decision of the majority of the arbitrators should prevail, the fact that the award was not signed by the arbitrator who differed from the opinion of the majority does not affect its vandity. *Abinash* v. *Parashuram,* 44 C.W.N. 866. See also, *Beni Datt* v. *Baij Nath,* 174 Ind.Cas. 369 = A.I.R. 1938 Oudh 125 = (1938) O.W.N. 480. The award of a majority of arbitrators, where it is provided that the decision should rest with the majority, is not invalid merely because no separate opinion is given by the dissenting arbitrators. *Kanhaya Lal* v. *Seth,* 112 P.R. 1885. Where the award in an arbitration on a reference to five arbitrators, is signed by only three of them, the other two having refused to sign it the award should not be accepted by the court and made a rule of court in the absence of any material to show that all the arbitrators had sat and deliberated together before coming to this conclusion. *Deonarain* v. *Sheobar,* A.I.R. 1952 Pat. 461 ; see also *Kuppuswami* v. *Anantharamier,* 1947 M.W.N. 371 = 60 L.W. 244 = (1947) 1 M.L.J. 297.

747. Effect of not signing by all the arbitrators.—Under the old rule where a matter in dispute is referred to the decision of three arbitrators. all three must concur in the making or the award ; an award made by two of them only is bad. *United Kingdom* v. *Housion,* (1896)1 Q.B. 567. See also, *Ayyaswami* v. *Appadurai,* 54 Ind.Cas. 912 = 38 M.L.J. 145.

But that rule is no longer in force. Section 10 (2) enacts that "where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (1), the award of the majority shall, unless the arbitration agreement otherwise provides, prevail." See also sub-section (3) of section 10. Now it is not necessary that in a majority award all the dissenting arbitrators should also sign.

In *Romesh Chandra Dhar* v. *Karunamoyi Dutt*, 33 Cal. 498, two out of three arbitrators agreed in making an award, but the third did not agree, and the award was filed in the court of first instance without the signature of the dissident arbitrator, who however subsequently came into court and signed it. The court thereupon made a decree in accordance with the award. On appeal to the subordinate judge, however, this decree was set aside on the ground that such an award was invalid and illegal. In upholding the decision of the lower appellate court the High Court observed: "It seems to us that as soon as the award was made and filed in court, the powers of the arbitrators came to an end; they become *functus officio*, and it was not open to the dissentient arbitrator to come in afterwards and sign the award, nor had the court any power to allow him to sign it. In this view of the matter, the award is not a valid and legal award." See also *Utoomal* v. *Haridas*, 7 Ind.Cas. 595=4 S.L.R. 26, on revision *Haridas* v. *Utoomal*, 16 Ind.Cas. 881=6 S.L.R. 89. But under the present Act such an award is a valid and legal award being the decision of the majority of the arbitrators. The signature of the third arbitrator being a mere surplusage does not invalidate the award and specially under the circumstances of the above case, where the court allowed such signature. See also, *Khudiram* v. *Chandi*, 35 Ind.Cas. 358=1 P.L.J. 306; *Ramdas* v. *Judagi*, 107 Ind.Cas. 532=A.I.R. 1928 Pat. 488; *Nemichand* v. *Kesarimall* A.I.R. 1929 Mad. 31=56 M.L.J. 35=114 Ind.Cas. 818=29 M.L.W. 227; *Ramnarain* v. *Lalji*, A.I.R. 1929 Pat. 178=118 Ind. Cas. 696, all of which cases have been affected by sub-section (2) and (3) or section 10. Now the law is clear that an award which is signed by the majority of the arbitrators after hearing and considering all the evidence produced by the parties and after full discussion on merits, is a valid award. But it is not proper compliance with this section, where after the signature or the arbitrators in blank paper, their decision was embodied in it. *Benode Lal* v. *Pran Chandra*, 14 C.L.J. 143=11 Ind.Cas. 898. See also, *Benode* v. *Pran*, 2 C.W.N. cxciv. Under this section an award must be in writing and must be signed by the arbitrators whose award it is.

748. Arbitration clause—Ambiguity—Power of court.—It was intended that at the time of execution of each contract either the "Chief Engineer" or the "Additional Chief Engineer" was intended to be retained by striking off the other. It was not the intention of the parties that the Chief Engineer in the first place and if he was unable or unwilling to act, then the Additional Chief Engineer would act. The arbitration agreement in the instant case showed on its face that the author had expressed alternative intentions without deciding in favour of either. *Seth Kesorimal* v. *Union of India*, A.I.R. 1959 Cal. 430.

749. Additions made in award.—Additions made in an award with the consent of all the arbitrators after it is signed by them and before it is published will not affect the validity of the awards. Arbitrators cannot be said to be *functus officio* until the pronouncement of the award is actually made, even if they have signed the award. *Harphool* v. *Prabhu Dayal*, A.I.R. 1950 E.P. 266=52 P.L.R. 128.

750. Decision taken in the absence of some arbitrators—Irregularity can be waived.—The general rule that the meetings of the arbitrators must be attended by all the arbitrators and the decision arrived at must be decision of all. If some formal decision has been made in the absence of some of them the irregularity may be waived. It has been deemed to have been waived if the decision is put at a subsequent meeting before all the arbitrators and the presence of all the parties. *Bai Laxmibai* v. *Shridhar,* A.I.R. 1943 Bom. 221; *Patel* v. *Menakshi,* A.I.R. 1942 Bom. 239=44 Bom.L.R. 485; *Dobson* v. *Groves,* (1844) 6 Q.B. 637.

751. Oral award whether valid.—In *Porshottamdas* v. *Kekhushru,* A.I.R. 1934 Bom. 6(8), it has been held that an award may be oral. See also, *Amir Bibi* v. *Arokyam,* 45 Ind.Cas. 813; *Dandekar* v. *Dandekar,* 6 Bom. 663; *Savalappa* v. *Deo-Chand,* 26 Bom. 132=23 Bom.L.R. 691; *Ma Mya* v. *Ko Pora,* A.I.R. 1924 Rang. 60=79 Ind.Cas. 742=2 Bur.L.J. 163; *Kula* v. *Kula,* 1 M.H.C.R. 178; *Dilipat* v. *Kashi,* A.I.R. 1914 Oudh 149=24 Ind.Cas. 542=17 O.C. 118; *Fateh Mohammad* v.*Amarnath,* A.I.R. 1933 Lah. 777=35 P.L.R. 211=147 Ind.Cas 858; *Ram Bilas* v. *Birich Singh,* A.I.R. 1932 Pat. 60; *Mathura Das* v. *Mangalall,* A.I.R. 1934 Bom. 79=36 Bom.L.R. 47; *Tara Prosad* v. *Raja Singh,* A.I.R. 1935 All. 90=152 Ind.Cas. 929=(1934) A.L.J. 1233; *Unni* v. *Marakarutti,* A.I.R. 1936 Mad. 713; *Mohammad Azizuall* v. *Mohammad Noorulla,* A.I.R. 1939 Nag. 233 (F.B.); *Lalji Jaisingh* v. *S. P. Tewari,* 82 Ind.Cas. 802=A.I.R. 1924 Rang. 319. But the above cases have been made obsolete by this section An award must be in writing and must be signed by all the arbitrators or umpire whose award it is. In *Fateh Mohammad* v. *Amarnath,* A.I.R. 1933 Lah. 777=147 Ind.Cas. 858; *Dilip Sinch J.* observed: "I do not see how an oral award could be signed." This section corresponds to section 11 of the Indian Arbitration Act of 1899. In *Laljee Jaisingh* v. *S. P. Tewari,* 82 Ind.Cas. 802=3 Bur.L.J. 102=A.I.R. 1924 Rang. 319, the court observed: "An award under the Act must, by section 11, be in writing and signed. Before reducing their award to writing, the arbitrators must no doubt arrive at their decision; but having done so, they are bound to make an award in writing and signing of the award is not a mere formality. *Gotha Krishnaswami Chetty* v. *Thatha Seetharam Chetty,* 5 Ind.Cas. 374=7 M.L.T. 355=(1910) M.W.N. 53." See also *Vema D.P.* v. *Lala Gehrilal* I.L.R. (1961) 11 Raj. 103=A.I.R. 1962 Raj. 231.

752. "Made their award."—By para. 3 of the First Schedule the arbitrators are allowed four months' time to "make their award." In *Lala* v. *Abdus,* 17 Ind.Cas. 320, the court observed: "The order of supression cannot, however, be passed where an award has already been made and completed or, in other words, delivered within the time fixed, though it may reach the court afterwards, for, as observed in *Sita Ram* v. *Bhawani Din,* 26 All. 105=(1903) A.W.N. 205, and *Asadulla* v. *Muhammad Nur,* 27 All. 459=2 A.L.J. 201=(1905) A.W.N. 47, it is sufficient if the award be made, that is, completed and signed by the arbitrators within the period fixed by the court and it is not necessary to the validity of such award that it should actually reach the hands of the court within such period." See also, *Bhagatram* v. *Gunda Singh,* 89 P.R. 1907. In *Asadulla* v. *Muhammad Nur* (supra), the court observed: "Obviously, the word 'made' is used in the untechnical sense, because the award cannot be considered as made unless it is authenticated by the signature of the persons who made it. 'Made' means that the mind of the arbitrator has been declared, and such declaration requires authentication by signature."

See also, *Akhoy Kumar* v. *S. C. Das*, A.I.R. 1935 Cal. 359=38 C.W.N. 784=156 Ind.Cas. 165; *Sewdatrai* v. *Tata Sons, Ltd.*, A.I.R. 1921 Cal. Cal. 576=77 Ind.Cas. 769; *Srilal* v. *Arjundas*, 23 Ind.Cas. 223=13 C.W.N. 1325; *Umersi* v. *Shanji*, 13 Bom. 119; *Debendra* v. *Sarbamangala*, 8 C.W.N. 916. Where the court granted time till the 28th of February, 1941, for "filing" the award, and the arbitrators made an award in the Hindi language on that date and also signed the same, but instead of filing it on that day had the same rendered into English and filed the same on the 2nd of March following, *held* the word "filing" in the court's order was a clerical error and since the Hindi award was "made" within the time fixed by court, it did not matter that the award rendered into English was prepared and filed two days later: the requirements of the law had been satisfied and the award was a good one. *Srilal* v. *Arjundas* (*supra*). Under this section "the making of an award" and "signing it" are two distinct acts. The word "made" means that the mind of the arbitrators has been declared in writing and the next step is that such declaration is to be signed by the arbitrators.

753. Ss. 14(2) and 30(c)—Filing award beyond time—No misconduct.—The making of an award is a judicial act, while the filing of the award is a mere ministerial act. The filing of an award beyond the time allowed for filing it does not amount to misconduct for which the award is liable to be set aside, for, in such a case, the court has always power to extend the date of filing the award. *Padmabati* v. *Panna Lal*, A.I.R. 1959 Cal. 156; see also *Nalini Ranjan* v. *Union of India*, A.I.R. 1958 Cal. 624.

754. Unfiled award, if nullity.—No section of the Arbitration Act says that an unfiled award is a nullity. S. 14(2) of the Arbitration Act compels the arbitrators to file the award 'at the request of any party to the arbitration agreement.' If the agreement for arbitration itself stipulates that the award, subject of course to the rules of exception to the award recognised by the arbitration agreement or for the grounds permitted by the Arbitration Act, remains binding as part of the agreement even though it is not filed. *Pushraj* v. *Clive Mills* A.I.R. 1960 Cal. 180 (see also grounds for setting aside). Where the award is not filed in court under S. 14 and no decree is granted in terms of the award under S. 17, the defendant cannot rely on such award by way of defence in a suit. *Habibo Khatoon* v. *Nawab Lal*, 1961 B.J.L.R. 94=1961 Pat. L.R. 46=A.I.R. 1961 Pat. 372.

755. Making of an award, what amounts to.—Under s. 14 an award is made when it is written out or at least when it is written out and signed. Having regard to the language of section 14, there is no reason for thinking that anything more than the recording of the decision of the arbitrators and signing of it is required to constitute its making. The contention that the word "made" and "delivered" is not warranted by the language used. *Nalini Ranjan* v. *Union of India*, A.I.R. 1958 Cal. 624. S. 14 is sufficient answer to an argument that an award is not made in law till it is made known to third parties or at least till some step is taken with regard to it which makes it impossible for the arbitrator to make any alteration therein, whether by communicating the contents of the award to the parties or filing it in court or in some other way. Whatever the making of an award may mean the bare failure of an arbitrator to make an award within the time limited by law or extended by the court does not involve the consequence that the award, if challenged, must necessarily be set aside on the ground of misconduct.

regardless of the other circumstances of the case. *Nalini Ranjan* v. *Union of India,* A.I.R. 1958 Cal. 624. Failure to send notice of the making of the award does not affect the validity of the award made. *Chogalal* v. *Dhupabai,* 1957 M.P.L.J. (Notes) 194.

756. Suit to enforce an award—Parties.—Where a person was *Co-nominee* not a party to the reference to arbitration proceedings, he could not have been impleaded as a party to the proceedings to enforce the award and so the court would have no jurisdiction to appoint a Receiver in respect of his properties. *S. K. Mahomed* v. *Noor* (1958) 1 M.L.J. 94 = A.I.R. 1958 Mad. 14.

757. Award.—Once parties have referred these disputes to a domestic forum, it is that domestic forum alone that can decide upon those disputes. The forum may decide upon those disputes by adjudication of those disputes; it may decide those disputes if the parties consent to take a decision on an agreement. *Narbodubhai* v. *Natverlal,* A.I.R. 1953 Bom. 386. "Award" means an arbitration award. *Vide section* 2 (*b*). The decision of the arbitrator or arbitrators or an umpire is callled an "award." —*Vide Banerjee's Law of Arbitration,* 4th Edn., p. 2. In *Bhajahari* v. *Behary,* 4 C.L.J. 162 = 33 Cal. 881 (888), *Mookerjee, J. observed* : "The award is in fact a final adjudication by a court of the parties' own choice, and until impeached upon sufficient grounds, in an appropriate proceeding, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted unless possibly the parties have intended that the award shall not be final conclusive. See *Commings* v. *Heard,* (1869) L.R. 4 B. 669 = 10 B. & S. 606. *Sweet* v. *Morrison,* (1889) 116 N.Y. 19 = 15 Am.St.Rep. 376, and *Harris* v. *Social M. Co.,* (1864) 41 R.I. 133 = 5 Am.Rep. 549. To put the matter in another way, as the ordinary rule, a valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand; see *Curley* v. *Deam.* (1822) 4 Bom. 259 = 10 Am.Dec. 140; *Walsh* v. *Glinor,* (1813) 3 Harris & Johnson 383; and *Clegg* v. *Dearden,* (1813) 3 Harris & Johnson 383." See also. *Thakurdas* v. *Jaswant Rai,* I P.R. 1904; *Zaif-un-nissa* v. *Shafiquz,* 75 Ind.Cas. 626 = A.I.R. 1929 Oudh 185 = 26 O.C. 33. Where the parties have treated a document evidencing agreement of partition as their own act and the *panchas* merely signed it as attesting witnesses, the document would not be regarded as an award merely because it bears the signature of the *panchas.* *Rudragouda* v. *Basangouda,* A.I.R. 11938 Bom. 257 = 40 Bom. L.R. 202 = 175 Ind.Cas. 361. In the above case *Wassoodew, J.* said : "With regard to the alternative suggestion, I do not think that those documents can be looked upon as awards merely or intended to operate as such. There is indeed a reference to the decision of a *panch* therein. But the parties apparently have made that decision the basis of their agreement when they signed it. It is true that the *panchas* have also signed the deed, and there is authority for the view that an award merely because it is signed by the parties to the reference is nonetheless an award. See *Yemnava* v *Revanshiddappa.* A.I.R. 1927 Bom. 656 = 101 Ind.Cas. 351 = 29 Bom.L.R. 297. But the question would be in what character the parties or the *panchas* executed the document. If the parties treated the document as their own act and the *panchas* merely signed it as attesting witnesses. I do not think the document would be regarded as an award merely because it bears the signature of the *panchas.*"

See also, *Kishan Narain* v. *Puran Chand* 28 Ind.Cas. 298=48 P.L.R. 1915; *Sricharan* v. *Makhan,* A.I.R. 1919 Cal. 42=51 Ind.Cas. 378. In *Narbadobhai* v. *Natverlal,* A.I.R. 1953 Bom. 386 *Chagla,* C.J. observed: "There is no plea of any agreement subsequent to the award. The plea was that the award accepted and agreed to. At the highest this plea can only mean that the parties agreed not to challenge the award and to abide by the award. But the acceptance of the award and the agreement to abide by the award cannot change the pattern of the award. If it is an award it continued to be an award notwithstanding the fact that the parties have accepted it. It is difficult to accept the contention that merely on the parties abiding by the award and accepting the award the nature of the award changed and it became an agreement and that the award was merged in the agreement.....One parties have referred this disputes to a domestic forum, it is the domestic forum alone that can decide upon those disputes. The forum may decide upon those disputes by adjudicating upon those disputes; it may decide those disputes if the parties consent to take a decision on an agreement. Whether in one case or the other, the decision of the domestic forum, whether by consent or *in invitum,* is an award and has all the characteristics of an award." The mere fact that all these heirs did not join in the reference to arbitration of a dispute about inheritance, does not make the award void. The award is valid so far as the parties who joined in the reference are concerned and they cannot turn and attack its validity. *Mam Raj* v. *Mt. Kishni,* 6 D.L.R. (Simla) 15=A.I.R. 1951 Simla 13.

In *Winter* v. *White,* 3 Moore 674=1 Brod. & Bing. 350=21 R.R. 636, *Richardson, J.* observed: "What is the nature of an award? An award is a decree made by a judge or judges, deriving authority from the choice of the parties. The power of such judge or judges to decide and the duties incumbent on the party to obey the decisions arise only from the contract of submission." See also, *Sornavalli Ammal* v. *Muthayya Sastrigal,* 23 Mad. 593=10 M.L.J. 208; *Bhajahary Saha* v. *Behari Lal Basak,* 33 Cal. 881=4 C.L.J. 162.

In *Yermnava* v. *Revanshiddappa,* A.I.R. 1927 Bom. 656=29 Bom. L.R. 297=101 Ind.Cas. 351, *Martin, C.J.* observed: "It is quite true that this award goes on to state that it is agreed to by the parties affected, and that they and others have added their signatures in token of that consent. But we do not think that this necessarily vitiates the award and turns it into a mere agreement." In *Kanshi Ram* v. *Harnam Das,* A.I.R. 1940 Lah. 73=I.L.R. 1940 Lah, 599=188 Ind.Cas. 493; *Din Mohammad, J.* observed: "As observed in *Wazir Ali* v. *Mahbub Ali,* A.I.R. 1914 Lah. 238=22 Ind.Cas 412=10 P.R. 1917=134 P.L.R. 1914, and *Gita Ram* v. *Kesho Ram,* 135 Ind.Cas. 62=32 P.L.R. 254, parties signing the award should not be allowed to pick holes in it.....The mere fact that the parties signed it will not convert the original nature of the document. It was written on behalf of the arbitrator and it was he alone who could have presented it for registration. The parties were not the executants of the documents and could, therefore, not be the proper persons to present it in any circumstances." An award even in the absence of the signatures of the parties, is binding on all who had agreed to make reference to arbitration. *Harbhaj Mal* v. *Diwan Chand,* 32 Ind.Cas. 88=102 P.R. 1915=A.I.R. 1916 Lah. 163. "An award of arbitrators derives its binding force as against the parties entirely from their previous submission, and their subsequent signature in token of consent in no way affects the character of the award. It is neither more

binding upon the parties when signed by them or less binding when they do not sign it. It is binding in the formed case because it is judgment of a tribunal to which the parties had unconditionally submitted before adjudication, and not because they have subsequently acknowledged the justice of the decision." *Jagannath* v. *Rambux,* 6 C.P.L.R. 95 ; *Kishan Chandra* v. *Ram Lal,* 53 Ind.Cas. 992=2 N.L.J. 364=A.I.R. 1919 Nag. 131. An award by arbitrators is as binding in its nature as a judgment of court. *Amir Bibi* v. *Arokyam,* 45 Ind.Cas. 813=34 M.L.J. 184. See also, *Bhajahary* v. *Behari Lal,* 33 Cal. 881=4 C.L.J. 182. A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made the submission and the award furnishes the only basis by which the rights of the parties can be determined. *Damodar* v. *Basheshwar.* A.I.R. 1936 Lah. 865 ; see also, *Lutufullah* v. *Mahomed,* 223 Ind.Cas. 307=A.I.R. 1946 Sind 117=223 Ind. Cas. 117 ; *Pannalal* v. *Chamanlal,* 225 Ind.Cas. 8=A.I.R. 1946 Lah. (Rul.) 405 ; but see *Guurai* v. *Sogmal,* 64 L.W. 203=(1951) 1 M.L.J. 85. An award for or against a joint Hindu family business in its trading name is valid, and can be enforced by a suit or by proceedings under the Arbitration Act. *Munshilal* v. *Modi,* 51 C.W.N. 563.

758. Award filed in court.—The award of arbitrators while is filed under s. 14 into court is a part of the court's record. *Katam* v. *Irnik,* (1957) 2 Andhra W.R. 280.

759. Award pronounced—Arbitrators, if become functus officio with regard to ministerial acts.—It is true that when once the award has been pronounced the arbitrators, having done what they were called upon to do under the submission, becomes *functus officio* thereafter, in regard to reference. But there remain certain ministerial acts such as the engrossing of the award on stamp paper and getting the award so engrossed registered which acts cannot be put on the same footing as proceedings in connection with the pronouncement of the award. The arbitrators cannot be deemed to have become *functus officio* with regard to the carrying out of such ministerial acts. *Dasaratha* v. *Ramaswamy,* (1955) 2 M.L.J. 693=1955 Mad. W.N. 832.

760. Nature and effect of an award.—Before the coming into force of the Arbitration Act, 1940, "a valid award was an operative award by itself. There were two ways in which it could be imposed: (1) it might be made rule of court by an application under the C. P. Code or under the Arbitration Act, 1899, as the case might be, or the party might be or (2) the party may treat it as an independent source of title and enforce it by suit. In either case it was open to the opposite party to challenge the validity of the award. The remedy by suit was taken away by S. 32 of this Act, which provides "Notwithstanding any law for the time being in force no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award nor shall any arbitration agreement or award be set aside, amended, modified or in any way appointed otherwise than as provided by this Act."

"The effect of this section was considered in *Ram Chander* v. *Munshi,* 28 Pat. 594=A.I.R. 1950 Pat. 48 in which *Ramaswami, J.* relied on *Moolchand Jothaju* v. *Rashid Jamshed Sons & Co.,* A.I.R. 1946 Mad. 346=I.L.R. 1946 Mad. 840 ; *Deokinandan* v. *Basanti Lal,* 45 C.W.N. 881=A.I.R. 1941 Cal. 527 and *Ralanj Vital & Co.* v. *Dhirajlal Manilal,* I.L.R. (1942) Bom. 452=A.I.R. 1942 Bom. 101 for the proposition that a suit will not lie to enforce an award. Mr Lalnarayan Sinha's contention is that a distinction must be drawn between a right and the remedies

to enforce it. Section 32 has taken away one of the two remedies available in respect of an award of arbitrators, but the legal effect of the award as a decree finally determining the rights of the parties remains and therefore *Krishna Panda* v. *Balaram Panda,* 19 Mad. 280 and *Bhajahari Saha* v. *Behary Lal,* 33 Cal. 881 are still good law. This consideration is supported by the process of reasoning in *Dewaram* v. *Harinarain,* 26 Pat. 437=A.I.R. 1948 Pat. 320 and *Jagadish* v. *Sunder,* 27 Pat. 86=A.I.R. 1949 Pat. 393 in which on the principle that a private award is operative even if it is not made a rule of the court, it was held that it is not exempted from the provisions of S. 17, sub-section (1), cl. (b), Registration Act. *Monohar Lall, J.* in the former case rejected *Mr. Lalnarayan Sinha's* argument that by the amendment of the law of 1940 an award is operative only when it is made a rule of the court. In reply *Monohar Lall, J.* pointed out that under S. 33 of the Act an award can be questioned in court without being filed under S. 14 of the Act a view which is contrary to that taken in *Deokinandan* v. *Basantalal,* 45 C.W.N. 881; *Ratanji Vispal & Co.* v. *Dhirajlal Manilal,* I.L.R. Bom. (1942) 452 and *Lachmi Prosad* v. *Gobardhan Das,* A.I.R. 1948 Pat. 171. *Monohar Lal, J.* also relied on the necessity for registration to pass title in the event of the parties accepting the award, and acting on it without making it a rule of the court. With respect, this reasoning appears to me to have no bearing on whether the award has an operative force without being made a rule of the court. In *Jagadish* v. *Sunder,* 27 Pat. 86 in which the leading judgment was delivered by me, the learned counsel relied on the amendment as between the 1940 Act and Sch. 2, C. P. Code, 1908 in the procedure by which the award is made a rule of the court. I rejected the contention as I considered that there was no substantial difference in the two sets of provisions. But my attention was not drawn in this connection to the effect of S. 32 of the 1940 Act. In *Mool Chand Jothaju* v. *Rashid Jamshed Sons & Co.,* A.I.R. 1946 Mad. 346, *Leach C.J.* observed: "The scheme of the Act (the Arbitration Act, 1940) is to prevent the parties to an arbitration agitating question relating to the arbitration in any manner other than that provided by the Act,' and as a reason for holding that a suit will not lie to enforce an award he said that such suit raises question with regard to the existence and validity of the award, which is contrary to S. 32 of the 1940 Act. The question of the existence and the validity of an award arises also if the award is pleaded by way of a defence. This explains the observance of *Chagla, C. J.* in *Moolchand Jothaju* v. *Rashid Jameshed Sons & Co., I.L.R.* (1946) Bom. 452=A.I.R. 1942 Bom. 101, which was cited with approval by *Ramaswami, J.* in *Ramchandra* v. *Munshi,* 28 Pat. 569.

"'Further under the present Act no proceeding can be taken on the award till after it has been filed, and I fail to see how a party can possibly be prejudiced by the existence of an award which has not been filed in court. Under the old Act it was competent to a party who obtained an award without filing it to a file a suit thereon. Further the award become enforceable as a decree as soon as it was filed. But under the present Act all proceedings with regard to the arbitration agreement or the award have to be taken as provided by the Act. Section 32 specifically provides that no suit shall lie on any ground whatsover for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in the said Act, and under S. 17 of the Act the court has to pronounce judgment according to the award

and a decree follows. It is only this decree that can be executed.'.....

"The present Act by insisting that within the time limited by Act. 178 of the first schedule to the Indian Limitation Act, 1908, an application must be made in court for the filing of the award, makes for certainty and minimises the danger of an injustice occurring. As a test of the correctness of the view which I am inclined to take the question was suggested whether a suit on the original title filed by a party to an award within the period limited by Act 178 is maintainable. I do not see why such a suit may not be entertained. This will defeat the Act of 1940 because it would be open to the defendant to make an application to get the award filed in court, and pending the disposal of that application, he could ask for a stay of her suit. Then as soon as the award is made a rule of the court, it is available to the defendant as a bar to the suit." *Per Reuben, C.J.* in *Sia Kishore* v. *Bhairu,* A.I.R. 1953 Pat. 42.

761. Award without intervention of court—Procedure to be followed.—In the case of award without intervention of court the procedure laid down by the Act is Ss. 14, 15, 16, 30 and 17 has to be followed in chronological order, beginning with giving notice by the court of the filing of the award to the parties. Where, therefore, without having the awards filed before it and without having notice of filing of such awards as required by S. 14 (2), the court cannot entertain an application under S. 30 for setting aside an award. *Janardhan Prosad* v. *Chandra Sekhar,* I.L.R. (1950) Nag. 983=A.I.R. 1951 Nag. 198=1951 N.L.J. 241. In arbitration without intervention of the court, the arbitrator can sign the award on behalf of the other. *Yeshwantrao* v. *Dattatrayarao,* I.L.R. (1947) Nag. 631=A.I.R. 1948 Nag. 162. In such a reference it is open to the parties at any stage to modify the reference which they had originally made. *Ibid.*

762. Form of an award as given in Civil Procedure Code.—In Appendix to the Second Schedule of the Civil Procedure Code, the following form was given :—

"AWARD.

(*Title of suit.*)

In the matter of an arbitration between *A. B. of* and *C. D. of* :—

WHEREAS in pursuance of an order of reference made by the Court of and dated the day of 19 the following matter in difference between *A. B.* and *C. D.* namely.....has been referred to us for determination :

Now we, having duly considered the matter referred to us, do hereby make our award af follows :—

We award—

(1) that.....

(2) that.....

Dated the day of 19

X.

Y.

Where the award is in the form of a document the document is the award. *Ma That* v. *Ma Saw,* (1902-1903) U.B.R. Vol. II, Arbitration p. 1. But now Schedule II of the Civil Procedure Code has been repealed in its entirety by this Act.

763. Form of award.—Unless the arbitration agreement indicates

in what form an award is to be made [*Everard* v. *Paterson,* (1816) 6 Taunt. 625; *Henderson* v. *Williamson,* (1719) 1 Str. 116; *Anon* (1826) 5 L.J. (O.S.) K.B. 16; *Gatiliff* v. *Dunn,* (1738) Barnes 55; *Eardley* v. *Steer,* (1835) 4 Dowl. (423)], it may be made in such form as the arbitrator or umpire thinks fit.—*Halsbury's Laws of England,* Vol. I, p. 468. It is usual to insert recitals in an award, but it is not necessary to do so.—*Halsbury's Laws of England,* Vol. I, p. 468. See also, *Spence* v. *Eastern Counties Rail Co.,* (1839) 7 Dowl. 697; *Davies* v. *Prat,* (1855) 17 C.B. 183; *Baker* v. *Hunter,* (1847) 16 M. & W. 672. No particular form of words is necessary to constitute an award. All that is required is that the language of the arbitrator should be clear. *Lock* v. *Vullimy,* 5 B. & Ad. 600; *Matson* v. *Trower,* (1824) Ry. & M. 17; *Smith* v. *Hartley,* 10 C.B. 800; *Samon's case,* (1594) 3 Co.Rep. 156; *Marten* v. *Burge,* (1836) 4 A.& E. 973; *Bailey* v. *Curling,* 20 L.J.Q.B. 235. An award which purports to be the considered award of the arbitrators cannot be said to be no award simply because the arbitrators accepted the compromise arrived at by the parties and cast the terms of the compromise in the form of an award. Such an award cannot be invalidated. *Dulan Bibi* v. *Sunderrao,* I.L.R. 1937 Nag. 449.

An award implies an adjudication or decision by the arbitrator upon the matter submitted to him. *Thakurdas* v. *Jaswant Rai,* 1 P. R. 1904. The award must be in such a way as to comply in point of form with the directions contained in the submission. Unless these directions are complied with the award will not be valid, unless the directions are of an immaterial character.—*Russell* on *Arbitration,* 13th Edn., p. 396, citing *Henderson* v. *Williams,* (1714) 1 Strange 116; *Everard* v. *Paterson,* 6 Taunt, 625; *Gatliff* v. *Dun,* (1738) Barnes. 55. With regard to the substance of the award, any form of words amounting to a decision of the question referred will be good as an award. No technical expressions are necessary. *Eardley* v. *Steer,* (1835 4 Dowl. 423=4 L.J. (N.S.) Ex. 293. An award may be in the shape of an opinion. *Maston* v. *Trower,* (1824) R. & M. 17. The words "I have surveyed and estimated the several works necessary to be done in repairing the dilapidation to the house, and find the same amount of £55-5s.," were held to be a conclusive award. *Whitehead* v *Tottersell,* (1834) 1 A. & E. 491.—*Russell* on *Arbitration,* 13th Edn., p. 405.

In *Kaluram* v. *Ram Dayal,* 5 N.L.R. 107=3 Ind.Cas. 55, during the pendency of a suit for possession, the parties requested one G to decide their case by arbitration. G proposed that a lottery might be put and one who obtains the 'winning ticket' should win the subject-matter of the suit. The parties agreed to this. Accordingly a lottery was put and the defendant won the property. In remanding the case to the lower appellate court, the court of Judicial Commissioner of Nagpur observed: "In the first place, it is not in every case where two parties intended to be concluded by the decision of a third, that the third person is an arbitrator. An opinion, or even a decision, may be sought by two persons from a third merely to preclude differences from arising, and not to settle them after they have arisen; and such an opinion or decision would appear generally not to be an award. [Cf. *Leeds* v. *Burrows,* 12 East 1; *Collins* v. *Collins,* (1859) 28 L.J.Ch. 184; *Turner* v. *Goulden,* (1874) 43 L.J.C.P. 60; *Lee* v. *Hemingway,* (1834) 3 L.J. (N.S.) K.B. 124; *Camswilson, In re,* (1887) 56 L.J.Q. 530; *Jenkins* v. *Betham,* (1855) 24 L.J.C.P. 94; and *Bros.* v. *Helsham,* L.R. 2 Ex. 72.] Where it appears from the terms of an agreement for the settlement of disputes, that the intention of the

parties was that there should be an inquiry in the nature of judicial inquiry, and that their respective cases should be heard and a decision arrived at upon the evidence, there is reference to arbitration. [*Hoffer, In re,* (1867) 36 L.J.Q.B. 97 ; *Chambers* v. *Gold Thrope,* (1901) 1 K.B. 624=70 L.J.K.B. 482=84 L.T. 444 ; *Hammond and Waterton, In re,* 52 L.T. 808.] It has been expressly held that stewards of a horse race, appointed to settle any disputes respecting it, are not arbitrators in strict sense. *Ellis* v. *Hooper,* (1859) 28 L.Ex. 1.....Three elements are inseparable from every arbitration, namely, (1) a dispute between two persons requiring settlement, (2) its submission for settlement to a third person and (3) a decision by that third person according to his own judgment. A submission is an agreement to take the decision, and not the advice only, of the person or persons to whom the matter is to be referred. It is also manifest that the acceptance of the office by an arbitrator is indispensable to perfect his appointment [*Ringland* v. *Lowndes,* (1864) 33 L.J.C.P. 25], though of course such acceptance may be expressed or implied from his conduct in proceeding to an award.....

"An actor or manager in a lottery is certainly not an arbitrator in any sense : nor can the result of any lottery be called an arbitration award. Except where there is fraud, such result is not controlled by any opinion of the person conducting the lottery: it is not an offspring of his judgment : there is no 'decision' by him in any intelligible and accepted significance of that term. The result is due to what we call chance..... The essence of the transaction is that, if the event turns out one way, one party will win, but if it turns out the other way the same party will lose : and at the time of the agreement the course of event must be uncertain. [Cf. *Carlill* v. *Carbolic Smoke Ball Company,* (1892) 2 Q.B. 484 (490) ; *Thaker* v. *Hardy,* 4 Q.B.D. 685.] There need be nothing unlawful in the affair to which the agreement relates ; if the agreement is a wager on an uncertain event it is void. *Diggle* v. *Higgs,* 2 Ex.D. 422 ; *Tremble* v. *Hills,* 5 App.Cas. 342 ; *Hampden* v. *Walsh,* 1 Q.B.D. 189 ; *Shoolfred* v. *Roberts,* (1900) 2 Q.B. 497=68 L.J.Q.B. 998=(1899) 2 Q.B. 560". But see *Puran Chand* v. *Ram Nath,* 84 Ind.Cas. 490=A.I.R. 1925 Oudh 227, where the court observed : "It appears that the dispute was referred to four arbitrators two being appointed by each side and a *sirpanch* who was appointed by both parties. The two arbitrators appointed by the plaintiff took one view and those appointed by the defendant another. The umpire being unable to decide between them drew lots and gave a decision accordingly. It has been argued that such a decision does not amount to a legal finding as to the facts in issue, but I question whether there is anything in the Civil Procedure Code which makes such an award illegal .....The applicant pleads that the umpire was guilty of misconduct but there is nothing to show that the umpire must write a judgment or come to a separate decision whereas in the present case, he had only to choose between two conflicting decisions of the arbitrators. The reference to lot could hardly be tolerated in an ordinary court but parties who refer their disputes to arbitrators do not expect the careful observance of legal forms which they would meet within the ordinary courts of law."

A report from the arbitrators to the effect that the parties had by their advice settled the dispute amicably between and executed a document embodying the terms of settlement is not an award. *Rehman* v. *Gulam Kadir,* 79 P.R. 1877. But a request in the shape of an order can be construed as an award. *Smith* v. *Hartley,* (1851) 10 C.B. 800=20 L.J.C.P. 169, *Stibs* v. *Triste,* 1 Sid. 54. But there should not be any uncertainty

in the decision of an arbitrator. *Wakefield* v. *Llanelly,* (1865) 3 De G.I. & Sm. 11.

In *Sreelal Mangtulal* v. *J.F. Madan,* 52 Cal. 100=88 Ind.Cas. 49= A.I.R. 1925 Cal. 599, *Sanderson C.J.* observed: "Before leaving this case I think necessary to add one or two words about the form of the award. The form of award, in my experience, is unusual. It is more like a judgment of a Judge, which is subject to appeal, than the award of an arbitrator. The learned arbitrator has gone so far as to include in his award part of the evidence ; he has referred to cases which were cited, and he has commented on at least one of them. As pointed out in *Hodgkinson* v. *Fernie,* (1857) 3 C.B. (N.S.) 198=27 L.J.C.P. 66=3 Jur. (N.S.) 818=111 R.R. 614, when a suit or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions of law and fact. The award of the arbitrator is intended to be final both in fact and law, and the courts will not interfere except on certain well recognised principles and in certain well-defined circumstances. An award made in the form of the award now under consideration is calculated to have an effect which is the exact opposite of finality and one might almost say it is an invitation to the parties to embark upon further litigation, as, indeed, the parties have done in this case." In *Purusholama Das* v. *Jetabhai,* 17 Ind.Cas. 33=(1912) M.W.N. 1076, *Sadasiva Aiyar J.* said: "They were not bound to state why they came to such conclusion. It has been held in *Nanijappa* v. *Nanjarao,* 23 M.L.J. 290=12 M.L.T. 133=16 Ind.Cas. 478=(1912) 1 M.W.N. 1091, that an award need not be a reasoned judicial decision, and the arbitrators need not even give their reasons for their conclusions and they are not even bound to record anything of the proceedings (see *Ramdhari Sahu* v. *Ramcharitar Sahu,* 38 Cal. 143= 7 Ind.Cas. 333)." See also, *Baranashi Das* v. *Ram Kishan,* 167 P.R. 1889. An award need not state particulars of the findings. *Angus* v. *Redford,* 11 M. & W. 69=12 L.J.Ex. 180.

764. Rules of arbitration by Bengal Chamber of Commerce.—No occasion for resorting, to Rule 21 arises, unless the arbitrators themselves consider the evidence to be material and unless they find that the party in possession of the evidence is not willing to give it to the court. *Kalihar* v. *Luchminaran,* A.I.R. 1958 Cal. 501. Where the words of the agreement are wide enough to cover all disputes concurring the relevant transactor or contract there can obviously be successive reference under the authority regarding different disputes and even in a case where fresh disputes arises as to the import or effect of the contract made on a reference of the original dispute, a second reference regarding that dispute can be made. *Baranagore Jute* v. *Hulashand,* 62 C.W.N. 734=A.I.R. 1958 Cal. 490. See the above case for applicability and construction of Rule 7 of the Rules of the Tribunal, where the meaning of another court has been given.

765. Madras Kirana Merchant's Association.—For interpretation Rules 17(6) and Rule 21 of said Association vide *Shah Lal Chand* v. *R. S. Jain,* (1958) 2 M.L.J. 561.

766. Collateral writings—whether part of an award.—Where the award was accompanied by a note from the umpire to the plaintiff on a separate piece of paper, but not annexed to the award, in which he expressed an opinion that the cost of action, and of the reference and award, should be paid by the defendant, and that he would have so ordered but he could not do so inasmuch as the order of reference was

silent as to costs, it was held that the parties were to be bound by the award, and that the accompanying note could not be looked at. *Leggo* v. *Young,* 16 C.B. 626=24 L.J.C.P. 200. See also, *Holgate* v. *Killick,* (1861) 7 H. & N. 418=31 L.J.Ex. 7=5 L.T. 358 ; *Kent* v. *Elstab,* 3 East 18. The report of arbitrators embodying a compromise arrived at between the parties subsequent to the reference is not an award. *Shanker* v. *Gobinda,* 54 Ind.Cas. 311 ; *Ghulam* v. *Begum,* 55 Ind.Cas. 218.

767. Contents of an award.—In *Raminder Singh* v. *Mohinder Singh,* A.I.R. 1940 Lah. 186=190 Ind.Cas. 399, *Young C.J.* observed: "It was next urged that the award of the arbitrator is very brief; he has not referred to the evidence recorded by the lower court, nor has he given findings on the various issues ; and for this reason is bad. This contention, too, is devoid of all force. The reference did not require him to record separate findings on the issues which had been framed by the court. On the other hand, the parties in their application had asked for a reference in general terms for settlement of 'all our disputes in the case' and they had agreed to accept his award 'without any objection.' It is hardly necessary to say that an arbitrator is not bound by the technical rules of procedure which the courts must follow, nor need he record separate findings on the various points on which the parties are at issue, or write a reasoned judicial decision. All that he is required to do is to give an intelligible decision which determines the rights of parties in relation to the subject-matter of the reference. *Narpat Rai* v. *Devi Das,* 13 P.W.R. 1911=14 Ind.Cas. 371 ; *Nanjappa* v. *Nanjarao,* 23 M.L.J. 290=16 Ind.Cas. 478 (481). Further the arbitrator in this case is a near collateral of the contesting parties equally related to them, and it appears that he had been selected by reason of his special knowledge of their affairs to decide the dispute, which had been pending in courts for a period of six years and of which the end was not in sight. Obviously, it was not the intention that he should record a formal judgment like an appellate court on the evidence which had been produced by the parties in the court below. He took a broad view of the case and gave an award, which he conceived to be just and equitable in the circumstances. This he was perfectly entitled to do. If any authority is required for this obvious proposition, reference may be made to the decision of their Lordship of the Privy Council in *Muhammad Newaz Khan* v. *Alam Khan,* 18 Cal. 414=70 P.R. 1891=18 I.A. 73, where an award given by an arbitrator selected by reason of his special knowledge of the affairs of the family, and not based upon strict rules of law, but on a 'broad view' of the dispute, was upheld, it being observed that the arbitrator 'was within his rights in so doing'. In such cases, as remarked by *Lord Cockburn C.J.* in the well-known case in *In re Hopper,* (1867) 2 Q.B. 367=37 L.J.Q.B. 97=8 B. & S. 100=15 L.T. 566. 'We must not be over ready to set aside awards when the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings."

An award setting out a considerable portion of the evidence adduced before the arbitrator, and finding expressly the matters referred, is good, although that evidence does not seem to support the finding. *Arthur* v. *Owden,* 9 D.P.C. 341=5 Jur. 340 ; see *Lancaster* v. *Hamington,* 4 A. & E. 345. All that is required is that there should not be any doubt on the face of the award as regards the meaning of the arbitrators. *Jagroop* v. *Bankateswar,* 34 Ind.Cas. 355 & 3 O.L.J. 137.

768. Assessment of compensation by arbitrators.—The arbitrators

must in general have a wide discretion in selecting their method of valuation for purpose of compensation but where they have considered two methods and two methods only and have chosen one of these methods and have rejected the other, it becomes a question of law whether, having regard to their terms of reference their decision can be justified. *International Railway Co.* v. *Niagara Parks Commission,* 169 Ind.Cas. 562=A.I.R. 1937 P.C. 214. The arbitrators whose duty is to ascertain the actual value of certain property at a certain time have no power to include interest in their assessment of value. *Ibid.*

769. Award must follow submission.—An award must follow submission. If the award differs from the submission, it is void both at law and in equity. *Hide* v. *Petil,* 1 Ch.Ca. 185. See also, *Robinson* v. *Birs,* 1 RolAbr. 377. If a submission to an award be made conditional, *ita quod* the award be made *de prae missis,* if the award be not made of the whole, it is void; but if the submission be not conditional, then the award, though made out of part of the premises submitted, is good *pro tanto. Hide* v. *Cooth,* 2 Vern 109. Where one of the matters in difference between A and B, parties to submission, was, whether at the time of the submission, on a day therein named, partnership existed between them, and if it ever did exist, whether it had been put an end to, and if so, at what time and on what day, and the arbitrator found that if any partnership ever existed between them the same was dissolved and put an end to by mutual consent and agreement on a certain day (subsequently to that mentioned in the submission), and that nothing was due from A to B in respect of profits, *held* that as the arbitrator did not find whether partnership did exist or not, the award was bad. *Bhear* v. *Harradine,* 7 Ex. 269=21 L.J.Ex. 127. Where particular question of value are submitted, the award should find those matters specifically, and not a sum in gross. *Richards* v. *Browne,* 9 Ir.C.L.R. 199. But an award is not bad for not deciding several items separately, unless either they were referred separately in form, or it clearly appears from the reference that the parties intended that they should be separately decided. *Whitworth* v. *Hulse,* 35 L.J.Ex. 149=L.R. 1 Ex. 251=12 Jur. (N.S.) 652. Where a submission is of several specific things, the arbitrators should make their award on each matter submitted to them; but where the submission is of all matters in difference, or of disputes without specifying them, they need only make their award of such things of which they had notice. *Fagan* v. *Fagan,* 12 Ir.Ch.R. 483. Where a cause and all matters in difference are referred, it is not necessary to specify in the award what part of the sum awarded is given for the differences and what part for the cause. *Waters* v. *Pedley,* 2 L.J. (OS.) K.B. 152. Where a cause is is referred, it is not necessary that the arbitrator should find for the plaintiff or the defendant in the very words of the issue. It is sufficient if he decides substantially the question in dispute. *Wykes* v. *Shipton,* 3 N. & M. 240=3 L.J.K.B. 90. See also, *Spooner* v. *Payne,* 4 C.B. 328=16 L.J.C.P. 225. An award of all the partnership stock and effects to one partner, when the submission contemplates a division between the two, is bad. *Wood* v. *Wilson,* 2 C.M. & R. 241=4 L.J.Ex. 193.

Under reference to settle matters in difference, an award for such alterations in defendant's works as to arbitrator should seem necessary, regard being had to their state at a particular period, an award directing no alteration other than that parts of the machinery which were made of wood should be made of different material, was held a due execution of the authority. *Walker* v. *Forbes,* 6 Ves. 70. Where an agreement

provides that various things shall be done by respective parties, and that it any dispute shall arise with respect to them, such disputes shall be settled by particular persons as arbitrators, the award of the arbitrators need not embrace any more of the matters provided for by the agreement than are brought before them by the parties. *Hawkesworth* v. *Bramwell,* 5 Myl. & Cr. 281. A submission being of all matters in difference between the parties, an award of so much to be paid by the defendant to the plaintiffs on their banking account, and for which sum the plaintiffs were to give the defendant a release, is binding between them ; for no other matter in difference between them shall be intended unless it is shown. *Ingram* v. *Milney,* 8 East 445. Where each of several contracts contains the same submission clause, a single award in respect of several contracts is valid. *Grahams* v. *Chandulal,* A.I.R .1935 Sind 228. So long as the arbitrator fulfils the conditions of the agreement of reference, it is immaterial if the award is right or wrong. But if the conditions provided by the agreement are not fulfilled, the award has no legal value. A.I.R. 1948 A 222=1948 A.L.J. 109.

770. Power of arbitrator to award interest and costs.—An arbitrator has wide powers in deciding the disputes referred to him. He has power to award interests, where he considers it fair and fit. *Tulsiram* v. *Jhanaklal,* I.L.R. 1936 Nag. 44=165 Ind.Cas. 556=19 N.L.J. 151= A.I.R. 1936 Nag. 197. Where arbitrators are empowered to decide question of costs, their direction that the parties should bear their own costs is a valid direction. *Harnam* v. *Kishan,* Ind.Cas. 7=A.I.R. 1936 Pesh. 37. Where the arbitrator is directed by the court to keep the directions of the appellate court as to costs in view while awarding costs, but at the same time the order of reference gives him a discretion in the matter, he is not bound to follow the directions of the appellate court, and his failure to do so does not vitiate the award and no substantial injustice is involved. *Ma Ngwe* v. *U. Min Sin,* 163 Ind.Cas. 590=A.I.R. 1936 Rang. 240. The court has jurisdiction, where it appears from materials before it that an arbitrator has exercised his discretion in a non-judicial manner as to costs, to set aside his award so far as it relates to costs, *Heaven* v. *Sven,* (1958) 1 W.L.R. 248 (Eng.).

771. Award prepared by legal adviser.—A lay arbitrator may avail himself and charge for professional assistance in preparing his award. *Gallaway* v. *Keyworth,* 15 C.B. 228=2 C.L.R. 860=23 L.J.C.P. 218 ; *Dobson* v. *Groves,* 14 L.J.Q.B. 17. See also, *Underwood and Bedford and Cambridge Ry., In re,* 11 C.B. (N.S.) 442=31 L.J.C.P. 10= 5 L.T. 581 (where an award was not set aside for taking advice from the legal adviser of one of the parties). But it is not proper to take such advice. *Underwood, etc.* (*supra*). See also *Behren* v *Bremer,* (1854) 3 C.L.R. 40. A recital in an award, that it had been drawn by a person who, under the terms of the submission, attended the arbitrator as an attorney, does not constitute any improper delegation of authority. *Baker* v. *Cotterill,* 7 D. & L. 20=18 L.J.Q.B. 345=14 Jur. 1120. The court refused to set aside an award made by two arbitrators upon a suggestion by the third that the award had been influenced by the opinion of counsel taken by the others upon a case inaccurately stated ; the two arbitrators swearing that the case was not inaccurately stated, and their minds had been made up as to the award made before the opinion was taken. *Hare, In re,* 8 Scott 367=6 Bing.N.C. 158. But see *Lawrence* v. *Hill,* 6 L.T. (O.S.) 394. Arbitrators can take professional assistance if so authorised by the arbitration agreement. *Sharp* v. *Nowell,*

(1848) 6 C.B. 253. Ministerial duty may be delegated by the arbitrators. *Higgins* v. *Long*, 2 Stra, 1025. The writing of the award by junior at the dictation of the arbitrator is an act of a ministerial character and could be delegated to a third party. *Nihal Chand* v. *Shanti Lal*, A.I.R. 1935 Oudh 349=(1935) O.W.N. 582=155 Ind.Cas. 522=(1935) O.L.R. 324. The cost of preparing award by solicitors or legal advisers are to be paid by arbitrators or umpire. *Nanjappa* v. *Nanparao*, 16 Ind.Cas. 478. See also, *Juggoban* v. *Chand Mohan*, 31 Ind.Cas. 33.

772. Recital in award.—An award must recite the bond of reference. *Dodsley* v. *Dodsley*, 1 L.J (O.S.) K.B. 7; *Paull* v. *Paull*, (1833) 2 C. & M. 235=3 L.J. (N.J.) Ex. 11; *Spence* v. *Eastern Counties*, (1839) 7 Dowl. 697. But it is not necessary to the validity of the award that there should be an introductory recital.—*Russell* on *Arbitration*, 13th Edn., p. 405. An award made within enlarged time is good, though it does not recite that the arbitrators did enlarge the time. *George* v. *Louseley*, 8 East 13 =R.R. 366; *Baker* v. *Hunter*, 16 M. & W. 672=16 L.J.Ex. 203 The recital in an award of the original agreement to refer will not invalidate the award where the parties have by agreement submitted matters to the arbitrator which were not included in the original agreement to refer. *Thomas Iron Works* v. *Reg.*, 10 B. & S. 33=20 L.T. 318. "But though recitals are not essential, it is advisable that they should be made in order to explain the award, and so that it may be seen on the face of the instrument that the arbitrators had authority to award as he had done, and that he has fully performed his duty. In general, an arbitrator recites verbatim so much of the submission as contains his authority to make the award, and specifies the subject-matter on which it is made. Any provisions of the submissions which are necessary to warrant particular directions, as for instance, respecting costs or saving what should be done, ought to be set forth. But it is recommended that he should not specify those clauses which confer on him powers which he does not exercise. [*King* v. *Bowen*, (1841) 8M.W. 625.]"—*Russell* on *Arbitration*, 13th Edn., p. 406.

A wrong recital in an award cannot give authority to arbitrator to decide matters not within his jurisdiction by arbitration agreement. *Price* v. *Popkin*, 10 A. & E. 139=3 Jur. 433=8 L.J.Q.B. 198. But a mis-recital in an award does not vitiate it. *Watkins* v. *Phillpotts*, 1 M'Clal. & Y. 393 =29 R.R. 809. A cause was referred to three arbitrators and in case they should differ to an umpire. The award contained no statement that the arbitrators had differed, but recited that they had "considered the decision of the umpire". *Held* that it was not void in consequence of the mistake, but that the words were surplusage. *Harlow* v. *Read*, 3 D. & L. 203=1 C.B. 733=14 L.J.C.P. 239. A mistake made in the recital in an award by an umpire as to the Christian name of one of the arbitrators who appointed him is immaterial. *Trew* v. *Burton*, 1 Cr. & M. 533=2 L.J.Ex. 236. Where an arbitrator appointed under the Land Clauses Act, and having power to assess the amount of damage, but no power to decide the question of liability, made an award containing an order for payment, but the recital showed the extent of the arbitrator's authority, *held* that this was an error of form only, and the award could not be set aside on account of it. *Harper and G. E. Ry., In re*, 44 L.J.Ch. 507=L.R. 20 Eq. 39=L.T. 214.

773. The award must be final.—In *Ganesh Narain* v. *Malida Koer*, 10 IndCas. 450=13 C.L.J. 399, the court observed: "It is well-settled that an arbitrator must be careful to see that his award is a final decision

on all matters requiring his determination. The obligation to decide depends upon the question whether the submission requires that all or only some of the matters in dispute are to be determined by him. *Wrinhtson* v. *Bywater,* (1938) 3 M. & W. 199=7 L.J.Ex. 83=1 H. & H. *Samuel* v. *Cooper,* (1835) 2 A. & 752=1 H. & W. 86; *In re Wright,* (1841) 1 Q.B. 98=4 P. & D. 730; *Whiteworth* v. *Hulse,* (1866) L.R. 1 Ex. 251 50; *Randall* v. *Randall,* (1805) 7 East 81=8 R.R. 601 3 Smith 90; =35 L.J.Ex. 149=12 Jur. (N.S.) 652; *Doe* v. *Horner,* (1938) 8 A. & E. 235 =3 N. & P. 344=7 L.J.Q.B. 164; *Stone* v. *Phillips,* (1937) 4 Bing (N.S.) 37=5 Scoutt 275=3 Hodges 302=7 L.J.C.P. 54; *Wakefield* v. *Llanelly Ry. Co.,* (1865) 3 De G. & S. 11=34 Beav. 245; *Mitchel* v. *Stanley,* (1812) 16 East 58=14 R.R. 287; *Wilkison* v. *Page,* (1842) 2 Hare 276=11 L.J.Ch. 193; *Fagan* v. *Fagan,* (1849) 12 Ir. Eq.R. 483; *Bowes* v. *Fernie,* (1838) 3 My.L. & C. 150. See also authorities collected in the *Laws of England,* Edited by *Lord Halsbury,* Vol. 1, page 478, note (*q*). The same rule has been adopted in the American Courts in a series of decisions amongst which may be mentioned, *Kleine* v. *Cotora,* (1814) 2 Gall. 61, and *Smith* v. *Potter,* (1855) 27 Vermont 304=65 Am.Dec. 198. The position, of course, is different where the arbitrator is empowered to make one or more awards at his discretion, as in *Dowse* v. *Cox,* 3 Bing. 20=28 R.R. 656; *Wrighton* v. *Bywater,* (1838) 3 M. & W. 199, and the decision of this court in the case *Shoshemukhi Dabia* v. *Nobin Chander,* 4 C.L.R. 92, must be taken to fall within this class of cases. In the case before us, however, it was clearly the duty of the arbitrator to give a complete adjudication of the matters in controversy."

An arbitrator is not bound to determine a matter not notified as matter of difference or which is merely collateral question, though it may be necessary to dispose of it with a view to deciding the main dispute. *Khanchand* v. *Kadumal,* 15 Ind.Cas. 819=5 S.L.R. 240. See also *Ress* v. *Walters,* 16 M. & W. 263; *Kune and Atkinson,* cited in *Russell* on *Arbitration,* 7th Edn., p. 263. In all cases of invalidity of an award for want of finality there is a clear omission either to decide a difference referred to arbitration at all or to decide it in a manner which finally determines it. *Khanchand* v. *Kadumal* (*supra*). Thus in the leading case of *Randall* v. *Randall,* 7 East 81, the omission was to ascertain the rent to be paid by the plaintiff, which was point expressly referred to the arbitrators. Similarly, in *Dandekar* v. *Dandekar,* 6 Bom. 663, there was an omission to determine one of the principal subjects of dispute, *viz.,* to make a decision of certain fields. Again in *Hewitt* v. *Hewitt,* 1 Q.B. 110=55 R.R. 219, and *Ross* v. *Boards,* 8 Ad. & El. 207=47 R.R. 590=2 Jur. 567, there was a failure to determine finally the point referred. But in all cases the submission is to be carefully looked at. *Vide Wrighton* v. *Bywater,* (1838) 3 M. & W. 199; *Dowse* v. *Cox,* (1825) 2 Binb. 20. In *Hunt* v. *Hunt,* (1836) 5 Dowl. 442, an award was set aside for not deciding in whose favour the cause was decided. In *Kilburn* v. *Kilburn,* (1845) 13 M. & W. 671=14 L.J.Ex. 160, the award was held bad inasmuch as it failed to decide every issue joined in the cause.

Where two substantial matters are referred, and the arbitrators find only upon one of them, the award is bad altogether, as not being conclusive. *Hayward* v. *Phillips,* 1 N. & P. 228=6 L.J.K.B. 110. In construing an award, it is the duty of the court to favour that construction which renders the award certain and final. *Wood* v. *Griffith,* 1 Swanst. 52=18 R.R. 18. See also, *Vishnidas* v. *Tijumal,* A.I.R. 1938 Sind 59=174 Ind.Cas. 334. A submission empowered an arbitrator to

settle and judge of alleged defects in a house, and to determine what was necessary to put it in perfect condition, and to settle certain claims for extra work by one of the parties, and the cost of the arbitration were to abide by the result of the award. The award ordered a sum to be paid by one party to and received by the other, in satisfaction of all the matters in difference referred. It was held that the award is uncertain, and not final, for not deciding upon the various matters referred. *Rider, In re,* 3 Bing. (N.C.) 874=5 Scott. 86. Four actions between distinct parties, and all matters in difference, were referred. Among the matters in difference was a fifth action, relating to part of the premises in dispute, of which fifth action the award took no notice, notwithstanding it had been mentioned to the arbitrator. In holding that the award is bad in toto, *Tindal, C.J.* observed: "Here, four acions were referred to the arbitrator, and all matters in difference. Part of the matters in difference was an ejectment on which there is no award: and I cannot say that the award is good, when the condition of the submission is that the arbitrator shall award on the premises referred to him. It seems to be like the case of *Auriol* v. *Smith*, Turn & Ross 121, where the Court of Chancery held, 'that an award is good in part, and bad in part, where the submission was clearly capable of being separated: but not where all the matters were within the submission, and the award was upon the face of it entire.'" *Coltman, J.* observed: "There are cases where an award may be good in part, and bad in part; but that is whether matter objected to is severable, and no part of the consideration of the submission: as in *Doe d. Williams* v. *Richardson*, 8 Taunt, 697=21 R.R. 318, where the defect was only as to the direction of mutual release; or *Aitcheson* v. *Cargey*, 26 R.R. 305=2 Bing. 199, where the arbitrator exceeded his authority by directing the mode in which the matters ordered by the award were to be done. But where matters within the submission and part of the premises were referred, have been unnoticed in the award, it cannot be sustained."

In *Ghulam Khan* v. *Muhammad Hasan*, 29 Cal. 167 (186)=29 I.A. 51, *Lord Macnaghten* observed: "They (arbitrators) were not indeed bound to give an award on each point. They had to give their award on the whole case. In point of fact however they did decide the question. They may have erred in law, but arbitrators may be judges of law as well as judges of fact and an error in law certainly does not vitiate an award." An award is not invalid where there is no illegality on the face of it and there is a decision on the whole matter in issue between the parties. *George* v. *Vastian Soury*, 22 Mad. 203. Where the whole case has been submitted to the arbitration of a person, his duty is to decide the whole dispute substantially; he is not bound to write a judgment and give his finding on each issue although he sets forth in the award all the issues seriatim. *Narpat Rai* v. *Devi Das*, 14 Ind.Cas. 371=13 P.W.R. 1911.

An award which leaves some of the questions undecided, or leaves it in doubt whether some of the questions have been decided, cannot be maintained. *Wakefield* v. *Llanelly Ry. and Dock Co.*, 11 Jur.N.S. 456=12 L.T. 509; *Winter* v. *White*, 2 Moore. 723. So also an award is bad which does not finally determine the questions referred. *Ross* v. *Boards*, 8 A. & E. 291=7 L.J.Q.B. 209. It is not necessary that an award should be in terms expressed to be "of and concerning the premises", if it appears on the face of the instrument to be an award on all matters referred, *Brown v. Croydon and Canal Co.*, 9 A. & E. 522=8 L.J.Q.B. 92. By

the terms of a submission, a chancery suit and all matters in difference between the parties were referred, and it was made an express matter of reference, whether an agreement between the parties should be rescinded or not. The arbitrator merely decided as to the chancery suit that each party should pay his own costs, and gave the directions upon the subject of rescinding the agreement, but awarded specially on every other subject-matter of the agreement. It was held that the award was not sufficient. *Upperton and Tribe, In re,* 3 A. & E. 295=1 H. & W. 280.

In *Ramji Ram* v. *Salig Ram,* 11 Ind.Cas. 481=14 C.L.J. 188, the court observed: "In support of the fifth objection taken by the defendants, it has been broadly contended that the award of the arbitrator which has been accepted by the umpire, is uncertain and incomplete and consequently void in its entirety. In support of this proposition reference has been made to the principle recognised in *Nickels* v. *Hancock,* (1855) 7 De G.M. & G. 300 (314): *Wakefield* v. *Llanley Railway Co.,* 3 De G.J. & S. 11 (16), that if the award is defective it cannot be treated as valid in part, because the parties had contracted to be bound by the decision of the arbitrator on the whole and not on part of the matters to him. Reference has also been made to cases of *Randell* v. *Randell,* (1805) 7 East 81=8 R.R. 601; *Manser* v. *Heaver,* (1832) 3 B. & Ad. 295=37 R.R. 426; *Hewit* v. *Hewit,* (1841) 1 Q.B. 110=4 P. & D. 598: *Bowes* v. *Fernie,* (1838) 4 Myl. & C. 150=48 R.R. 39; *Giscome* v. *Hart,* (1839) 5 M. & W. 50=7 D.P.C. 402=8 L.J.Ex. 197: *Fagan* v. *Fagan,* 12 Ir.Eq.R. 483; *In re, Tidswell,* (1863) 33 Beav. 213 (217)= 10 Jur.N.S. 143, and *Ganesh Narain* v. *Malidar Koer,* 10 Ind.Cas. 450= 13 C.L.J. 399 (403). In answer to this contention it has been argued that the principle formulated on behalf of the defendants is not of universal application that, in the case before us, it was open to the arbitrators to make successive awards, that the one they have made decides the principal questions in controversy, and that, although other subordinate questions may still remain to be decided, the award, so far as it goes, cannot rightly be treated as open to objection on the ground of uncertainty or incompleteness. In support of this proposition, reference has been made to the cases of *Aitcheson* v. *Cargey,* (1824) 2 Bing. 199= 26 R.R. 298: *Wholenbury* v. *Lageman,* (1815) 6 Taunt. 254=16 R.R. 616=1 Marsh. 579: *Higgins* v. *Willes,* (1828) 3 Man. & R. 382; *Phatt* v. *Hall,* (1837) 2 M. & W. 391=1 Jur. 358: *Lewis* v. *Rossiter,* (1875) 44 L.J.Ex. 136=1 H. & W. 86=4 N. & M. 505=41 R.R. 520: *Samuel* v. *Cooper,* (1835) 2 A. & E. 752=1 H. & W. 86=4 N. & M. 505=41 R.R. 520: *Wilkinson* v. *Paige,* 1 Hare 276=11 L.J.Ch. 193. *In re Tidswell (supra)*: *Dowse* v. *Cox,* 3 Bing. 20=28 R.R. 565: *Wrightson* v. *Bywater,* (1838) 3 M. & W. 199=1 H & H. 50=7 L.J.Ex. 83; *Sashi Mukhi* v. *Nobin Chandra,* 4 C.L.R. 92: and *Makunda Ram* v. *Salig Ram,* 21 Cal. 590=21 I.A. 47 In our opinion, the principle applicable to cases of this description is well-settled and does not admit of serious controversy. The real point for consideration is, whether, upon the submission in the case before us it can rightly be contended that the award is void in its entirety, because some of the matters in controversy have not been decided by the arbitrators and the umpire. No doubt, as laid down in *Whitworth* v. *Hulse,* (1866) L.R. 1 Ex.Ch. 251, *Randell* v. *Randell,* 7 East 81=8 R.R. 601, *Samuel* v. *Cooper,* 2 A. & E. 752, *Bradford* v. *Bravan,* Willes 268, and *Bowes* v. *Fernie,* 4 My. & Cr. 150, the arbitrator must be careful to see that his award is a final decision of all matters requiring his determination, and his failure to determine any of them may completely

vitiate his award; this would be specially the result where there is such a connection and interdependence between the various matters covered by the submission that the decision and disposition of some of them only to the exclusion of others, would operate to produce injustice between the parties. But it is equally well settled, as laid down in *Wrightson* v *Bywater*, 3 M. & W. 199, and *Dowse* v. *Cox*, 3 Bing 20=28 R.R. 565, that this principle has no application, if the submission can be construed to empower the arbitrator to make several awards. It is further well-settled that an award is nonetheless final, though it does not execute itself or preclude all future controversies: if it leaves nothing to be done but the performance of some ministerial act, it is not faulty for want of such clarity and certainty; the principle applicable would be, *Certum est quod certum reddi protest*, that is sufficiently certain which can be made certain. *Corgey* v. *Atchison*, 2 B. & C. 170= 26 R.R. 298." An award is not invalid where matters not in the award were not brought before the arbitrator. *Ress* v. *Waters*, 16 M. & W. 263 *Elsome* v. *Rolfe*, 2 Smith 459. Where matters have been referred, it is a matter of evidence whether a particular matter of complaint has been subjected to the arbitrator's consideration. *Marten* v. *Thornton*, 4 Eh. 180; *Raver* v. *Forner*, 4 T.R. 146: *Smith* v. *Johnson*, 15 East 213. Where a cause and matters in dispute are referred, it is sufficient for the arbitrator to state that he finds the plaintiff "has no cause of action", without making any reference to matters in dispute, independently of the action, it not being shown that any matters in dispute beyond the action are brought before him. *Wyatt* v. *Curnell*, I.D.N.S. 327; *Bennett* v. *Brighton Cor.*, 17 L.T. 509.

Where joint property belonging to certain persons has been partitioned by an award made without the intervention of the court, the mere fact that no specific direction were given by the arbitrators about the ventilators and drains existing in the properties partitioned does not render the award invalid on the ground of difficulty in execution of the award or indefiniteness in the award. *Mohammad* v. *Mohammad*, 188 Ind.Cas. 477=A.I.R. 1940 Lah. 24.

774. Specific question of law referred to arbitrator.—Where a certain question of law is specifically referred to and decided by the arbitrator the arbitrator's decision is final however potently he may have erred. *Kuruvilla* v. *Kuruvilla*, A.I.R. 1959 Kerala 405=1959 Ker L.T. 445 see also A.I.R. 1959 Kerala 174: A.I.R. 1955 S.C. 468.

775. Effect of an award.—"The award shall be final and binding on the parties and persons claiming under them respectively."—Para. 7 of the First Schedule. Where a reference to arbitration was made by certain persons of a community describing themselves as representatives of the community and an award was given by the arbitrators, the award is not binding upon the community unless authority of the signatories to bind the community is proved. *Hashmat* v. *Soddiq*, 98 Ind.Cas. 998= A.I.R. 1927 All. 128. A valid award ordinarily operates to merge and extinguish all claims raised in the submission and after the award has been made, the submission and the award are the only basis by which the rights of the parties are governed and constitute a bar to any action on the original cause of action. *Ramchand* v. *Gobindram*, 53 Ind.Cas. 337 =13 S.L.R. 75. See also, *Maung Po* v. *Ma Bu*, A.I.R. 1937 Rang. 459: *Bhajahary* v. *Behari*, 33 Cal. 881=4 C.L.J. 182. Where an award has replaced the original rights of the parties, it is in itself a good defence to an action on those rights; but where an award has merely ascertained

and defined those rights, not only the award but also its performance must be established to complete the defence. *Swamirao* v. *Channappa,* A.I.R. 1927 Bom. 237=29 Bom.L.R. 301=101 Ind.Cas. 398; *Allen* v. *Milner,* (1831) 2 Cr. & J. 47; *Subrati* v. *Hafizan* ,42 Ind.Cas. 116=4 O.L.J. 487. Where a promissory-note has been allotted to the share of a person by an award, it may operate as a transfer *inter alia* of the suit note and as such he is entitled to maintain a suit on it even though it has not been endorsed. *Thangatur* v. *Nichanametla,* A.I.R. 1935 Mad. 473=(1935) M.W.N. 282=41 M.L.W. 420=156 Ind.Cas. 335; but see *Dilipat Singh* v. *Kashinath,* 24 Ind.Cas. 542=17 O.C. 108.

776. Piecemeal awards—validity of.—An award should be entire and complete. *Ganga Dhar* v. *Indar Singh,* A.I.R. 1938 All. 195=I.L.R. 1938 All. 236=174 Ind.Cas. 671=(1938) A.L.J. 113. In the above case *Rachhpal Singh, J.* observed: "Sir Tej who appeared on behalf of the appellant has contemplated before us that the awards given by the arbitrator in the present case were no awards. He further contended that it was the duty of the arbitrator to give one complete award and as he failed to do so, the two awards which he gave piecemeal were not good and, therefore, could not be enforced. We think that the contention is well founded and is amply supported by the authorities which have been cited before us by him. The first authority to which a reference might be made is in *Comyn's Digest,* Vol. 1, p. 666. It is laid down there as follows: "So an award ought to be entire and therefore, if it be made, part at one day and part at another though all be made before the time limited for it, it shall be void."

"In *Russell's Law of Arbitration,* 11th Edn., p. 224, the statement of law on the point is stated to be as follows. 'It is implied in all cases, unless something to be contrary is expressed, or may be inferred from the submission, that the arbitrator can make but one award. *Gould* v. *Staffordshire,* (1850) 5 Ex. 214 (223)=1 L.M. & P. 264=19 L.J.Ex. 281=14 Jur. 528=155 E.R. 92, *per Parke* B. This must be one entire and complete instrument in itself; therefore, if it is made part at one day and part at another, though each and every part is made within the time limited for the award, it will be void (*Comyn's Digest,* Arb.E. 16). If without special power, the arbitrator makes two awards, each deciding part of the matters referred, and not one entire on all together, both may be set aside for there is no one final award on all the subjects. *Winter* v. *Munton,* (1818) 2 Moore 723=19 R.R. 560.'

"Sir Tej in his arguments addressed to us has also cited the view expressed in a book recently published on the law of arbitration in England and that is the *Law of Arbitration* by *Quintin Mcgarel Hogg.* At page 137, the learned author states that. 'The principle from Bacon's Abridgement set out at the beginning of this chapter requires an award to be final as well as complete. It is not enough that the arbitrator should determine the issues referred to him and all of them; he must further determine them finally, so that in relation to them no further controversy can arise.'

"The view enunciated in the above-mentioned books is amply supported by authority. In this connection we need only refer to the case of *Gould* v. *Staffordshire Potteries Waterworks Co. (supra),* where at page 96 of 155 E.R., *Baron Parke* made observations which clearly support the contention raised before us by the learned counsel for the appellant. *Baron Parke* observed as follows. '.....and this was contended for by analogy to the ordinary practice or submission to arbitration, where every-

thing to be inquired into must be included in the award. But the ground for the rule is to be found in the agreement of the parties to the submission, in which it is usually one of the terms that the arbitrator is to make but one award. That condition is implied in all cases, unless something to the contrary is either expressed in or may be inferred from the submission.....'

"This view has been taken in several English cases and it is clear that there should be one and complete award which should determine the dispute between the parties finally. The law in India is the same. We may also refer in connection with this matter to the case in *Ganesh Narain Singh* v. *Malida Koer,* (1911) 13 C.L.J. 399=10 Ind.Cas. 450. *Mookerjee, J.* at page 403 of 13 C.L.J. observed that 'It is well settled that an arbitrator must be careful to see that his award is a final decision on all matters requiring his determination. The obligation so to decide depends upon the question whether the submission requires that all or only some of the matters in dispute are to be determined by him..... The same rule has been adopted in the American courts in a series of decisions.....The position of course is different where the arbitrator is empowered to make one or more awards at his discretion, as in *Dowse* v. *Cox,* (1825) 3 Bing. 20=10 Moore 272=3 L.J.C.P. 127=28 R.R. 565; *Wrighton* v. *Bywater,* (1938) 3 M. & W. 199=1 H. & H. 50=7 L.J. (N.S.) Ex. 83=6 Dowl. P.C. 359=49 R.R. 570, and the decision of this court in *Shoshemukhi Dabia* v. *Nobin Chunder Roy,* 4 C.L.R. 92, must be taken to fall within this class of cases. In the case before us, however, it was clearly the duty of the arbitrator to give a complete adjudication of the matters in controversy.'"

A perusal of the case of *Shoshemukhi Dabia* v. *Nobin Chander Roy* (*supra*), shows that unless there is an agreement between the parties which authorises the arbitrator to make several awards, it is not competent to do so and that the whole award should be like a judgment complete, giving the decision of the arbitrator on all the points involved in the case. See also, *Ramji Ram* v. *Salig Ram,* 11 Ind.Cas. 481=14 C.L.J. 188, and the cases cited therein; *Joy Mongal Singh* v. *Mohun Ram,* 12 W.R. 397 (400), affirmed in 23 W.R. (P.C.); *Alagu* v. *Veluchamia* 74 Ind.Cas. 609= A.I.R. 1923 Mad. 576; *Ashutosh* v. *Sudhansu,* 151 Ind.Cas. 916; *Nemichand* v. *Kesarimull,* 114 Ind.Cas. 818; *Mukund Ram* v. *Saligram,* 21 Cal. 590 (P.C.); *Winter* v. *Munton,* 2 Moo. 723=19 R.R. 560; *Ramanuja* v. *Vathapathra,* A.I.R. 1943 Mad. 172=(1942) 2 M.L.J. 690.

Where the arbitrators have left undetermind part of the matter referred to arbitration the award cannot be filed. The award which does not deal with the whole subject-matter of the dispute (settling of accounts of partnership) cannot be separated from the portions which have not been dealt with so as to enable the arbitrators to deal with the latter portion subsequently. *Bijadhar Ram* v. *Raj Karan Singh,* A.I.R. 1938 Pat. 129=19 Pat.L.T. 16=174 Ind.Cas. 592. Where one of the parties prevents the completion of the award by his conduct, he cannot afterwards plead that the award is incomplete; the principle being that when a party to a contract wrongly prevents a thing being done by another party, that thing is deemed to be done. *Alagu* v. *Veluchami,* 74 Ind.Cas. 609=(1923) M.W.N. 331=32 M.L.T. 369=A.I.R. 1923 Mad. 576=45 M L.J. 76=18 L.W. 26; *Mackay* v. *Dick,* (1881) 6 App.Cas. 251=29 L.R. 541.

777. Award in partition suit, whether can be piecemeal.—In *Ramanuja Chariar* v. *Vathapathra,* A.I.R. 1943 Mad. 172=(1942) 2 M.L.J. 698, *Wordsworth, J.* observed : "It is no doubt the law that an arbitrator

must make a single award unless the terms of the reference permit him to make a series of awards. The case commonly referred to as authority, for this doctrine is *Winter* v. *Munton,* 2 Moore 723.....It seems clear on the authority of this case and other similar decisions that if in a partition dispute a reference is made of the whole matter to the arbitrator with directions to make an award, the arbitrator would not be compowered to make a series of separate awards each dealing with one branch of the dispute, and this is reasonable, for on the making of an award, the arbitrator would be *functus officio* and would have no power to do anything further. Moreover, the first award which he made would be defective in that it did not cover the whole of the matters referred. We do not, however, consider that it is the law that an arbitrator dealing with a complicated partition dispute is debarred from taking up the enquiry piecemeal, classifying the evidence according to the subject-matter more or less under issues just as a court would do and arriving at tentative conclusions on each section of the case, always provided that he does not make anything in the nature of an award in writing until the whole matter is decided. In a partition enquiry the arbitrator must decide firstly what are the properties available for division, before he proceeds to decide how those properties should be divided. The apportionment of the debts will not infrequently depend upon the apportionment of the lands and it is to our minds almost inevitable that an arbitration of this kind should proceed piecemeal. It follows that there is nothing wrong in the procedure of the arbitrator in this case unless he can be deemed to have made a final and formal award at any of the stages before he passed his award, Ex.D., which is sought to be enforced." Where parties accepted a partial award and they were placed in possession of their respective allotments in terms thereof, a subsequent suit should only proceed only for partition of the properties not covered by the award. *Ganga Prasad* v. *Upendra,* 49 C.W.N. 316.

778. Award must be certain.—An award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties.—*Russell* on *Arbitration,* 13th Edn., p. 207. But a *prima facie* uncertainty or want of conclusiveness in an award does not vitiate, if capable of being rendered certain or conclusive; and the award may be good or bad according to the event. *Cargey* v. *Aitcheson,* 9 Moore 381=2 Barn. & Cr. 170=2 Bing. 199=3 Dowl. & Ry. 433=1 L.J.K.B. 252=26 R.R. 298. In *Ramji Ram* v. *Salig Ram,* 11 Ind.Cas. 481=14 C.L.J. 292, the court observed: "It is further well settled that an award in nonetheless final though it does not execute itself or preclude all future controversies if it leaves nothing to be done but the performance of some ministerial act, it is not faulty for want of such finality and certainty the principle applicable would be, *certum est quod certum reddi potest,* that is sufficiently certain which can be made certain: *Cargey* v. *Aitcheson* (*supra*)." So also where an arbitrator states rules for calculating the amount of money to the paid, without giving the result of such calculation, the award is sufficiently certain, on the principles that that is sufficiently certain which can be made certain. *Manindra* v. *Mohananda,* 13 Ind.Cas. 161=15 C.L.J. 360; *Beach* v. *Beach,* (1635) Cro.Cas. 383; *Strong* v. *Strong,* (1872) 9 Cushing 560; *Dharm Das* v. *Ajudhiya Prosad,* 77 P.R. 1882. An award for fixing the rule for calculating the amount of money to be paid, without stating the result of such calculation, is sufficiently certain. *Higgins* v. *Willes,* 3 Man. & Ry. 382. So also an

award that two persons shall pay a debt in proportion to the shares which they held in certain ship, the ratio of their shares not being a subject of dispute, is sufficiently certain. *Wholenbury* v. *Lageman,* 6 Taunt, 254 = 1 Marsh. 579 = 16 R.R. 616. But an ambigous or uncertain award is bad and cannot be enforced. *Lawrence* v. *Hodgson,* (1826) 1 Y. & J. 16; *Rainforth* v. *Hamer,* (1855) 25 L.T. (O.S.) 247 *Re Tidswell,* (1863) 33 Beav. 213; *Hopcraft* v. *Hickman,* (1824) 2 Sm. & St. 130; *Watson* v. *Watson,* (1648) Styles 28 (56); *Massey* v. *Aubery,* (1652) Shyles 365; *Kendal* v. *Symonds,* 3 C.L.R. 323 (Eng.). An award stated that the plaintiff was entitled to demand of the defendant £90 in respect of the causes of action mentioned in the declaration in respect of certain matters mentioned in a set off. *Held* that the award was sufficiently certain. *Platt* v. *Hale,* 2 M. & W. 391 = 1 Jur. 358. Where an award directs certain produce to be sold at market-price, the amount to be realised is sufficiently certain and cannot make the award uncertain. *Vishindas* v. *Tejumal,* 174 Ind. Cas. 334 = A.I.R. 1938 Sind 59.

"It is well settled", says *Rupchand Bilaram , Ag.J.C.* in *Vishindas* v. *Tejumal,* A.I.R. 1938 Sind 59 = 174 Ind.Cas. 334, "that the courts will make every reasonable intendment in favour of the oldest cases on this point is *Wood* v. *Griffiths,* (1818) 36 E.R. 291 = 1 Swanst. 43 = 18 R.R. 18. In that case *Lord Eldon* has said: 'It is extremely clear that every award must be certain and final; but it has, particularly in more modern times, been considered the duty of the court, in construing an award, to find that it is certain and final; and instead of leaning to a construction, which in effect would destroy nine-tenths of the awards made, if possible, to put one consistent sense on all the terms.'

"It is equally well settled that unless and until the contrary is shown, the court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him, and that the burden of proving that the arbitrator has awarded on matters not within the submission or has failed or omitted to award on matters which were within the submission lies upon the party who seeks to impeach the award. *Halsbury,* Vol. I, para. 1118. And it goes without saying that an award cannot be set aside on the ground of uncertainty upon a point upon which there is no controversy between the parties: *Cargey* v. *Aitcheson,* (1823) 2 B. & C. 170, and *Plummer* v. *Lee,* (1837) 2 M. & W. 495 = 5 Dowl. P.C. 755."

In *James Finlay* v. *Asudamal,* 5 S.L.R. 89 = 12 Ind.Cas 657, the court observed: "An award must be complete and certain. If it awards that any sum of money be paid, that amount must be definitely stated. If costs are granted, the award must specify their amount. Where the arbitrator or umpire awards costs without specifying the amount, the award is bad for uncertainty." But see *Baker* v. *Cotterill,* 18 L.J.Q.B. 345.

779. Conditional award.—The award must be final, and therefore a conditional award is bad unless it provides an alternative in case the condition be not fulfilled [*Sherrey* v. *Richardson,* (1695) Poph. 15; *Fruser* v. *Prowd,* (1618) Cro. (Jac.) 423; *Kinge* v. *Fines,* (1662) Sid. 59; *Crofts* v. *Harris,* (1692) Corter 187; *Batlie* v. *Edinburgh Oil Gas Light Co.,* (1835) 3 Cl. & F. 639 (655)], nor can power be reserved to deal with any difference which may arise on the award.—*Halsbury's Laws of England,* Vol. I, p. 470. Where a submission was with reference to a breach of contract by the non-delivery of certain goods, an award directing the delivery of the goods, or, in default thereof, the payment of a sum of money, was held to be a good award. *Gabriel* v. *Langton,* 4 W.R. 249. It is competent to

an arbitrator, who is empowered to decide whether a sale should be set aside, to pass an award setting aside the sale on the vendor repaying the purchase money. *Venusami* v. *Chilukuri,* 15 Ind.Cas. 573=(1912) 1 M.W.N. 901.

780. Award not acted upon.—Where it is found there was a submission to arbitration and valid award, the fact that the terms of the award have not been fully carried out will not prevent it from operating as an adjudication between the parties as to their respective rights. An award even though never carried into effect is equivalent to a final judgment and binding on the parties in the absence of positive evidence that both parties agreed that the former state of things should be restored. *Govindlal* v. *Maneckchowk,* 151 Ind.Cas. 156=36 Bom.L.R. 174=A.I.R. 1934 Bom. 140; *Latufulla* v. *Muhammad,* A.I.R. 1946 Sind 117=223 Ind.Cas. 307. A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand. *Latufulla* v. *Muhammad Sidik,* A.I.R. 1946 Sind 117=223 Ind.Cas. 307; *Krishna Panda* v. *Balaram,* 19 Mad. 290; *Bhajahari* v. *Behary Lal,* 33 Cal. 881.

781. Partial vlidity of award.—An award may be good in part, and bad in part, where the subject is clearly capable of being separated. *Addison* v. *Gray,* 2 Wils. 293; *Armitage* v. *Walker,* 2 K. & J. 211; *Winter* v. *Lethbridge,* 1 M'Cleil 253=13 Price 535. Where good part of the award is separable from the bad, the latter does not vitiate the rest. *Lewis* v. *Rossiter,* 44 L.J.Ex. 136=33 L.T. 260. In *Ladha Mal* v. *Sardari Lal,* A.I.R. 1935 Lah. 30, *Din Mohammad, J.* observed: "The plaintiff relies on *Amir Begam* v. *Badruddin Hussain,* A.I.R. 1914 P.C. 105=23 Ind.Cas. 625=36 All. 636=17 O.C. 120 (P.C.), and contends that where part of an award was found to be invalid as being in excess of the arbitrator's powers, their Lordships of the Privy Council maintained the remainder of the award as good on the ground that it was separable from the rest." See also, *Bhimsain* v. *Tarachand,* A.I.R. 1932 All. 154=(1931) A.L.J. 1087=135 Ind.Cas. 230; *Mayappa Chettiar* v. *Venkatachellam,* A.I.R. 1935 Rang. 34=155 Ind.Cas. 97; *Dogdusa* v. *Bhuken,* 9 Bom. 82; *Kashinath* v. *Ganguraj,* 117 Ind.Cas. 523=A.I.R. 1929 Bom. 193; *Gangadhar* v. *Dattatriya,* A.I.R. 1937 Bom. 211; *Nathu* v. *Samson,* A.I.R. 1931 Rang. 252=9 Rang; 480 (F.B.); *Ratan Kar* v. *Sobbaram,* A.I.R. 1936 Lah. 794; *Bachchanlal* v. *Narottam Dutt,* A.I.R. 1933 All. 59=143 Ind. Cas. 423=(1932) A.L.J. 120; *Mohammad Khalil* v. *Abdul Rahim,* 93 Ind.Cas. 261=A.I.R. 1925 Pat. 810=4 Pat. 670; *Katumal* v. *Joyram Das,* 108 Ind.Cas. 791=A.I.R. 1928 Sind 144; *Dayaram* v. *Narain,* A.I.R. 1929 Sind. 200; *Muhammad Sayed* v. *Abdul Ghaffur,* 115 Ind.Cas. 680=10 P.L.T. 53; *Fazal* v. *Enayet,* 68 Ind.Cas. 209=A.I.R. 1922 Oudh 189; *Badri* v. *Raj Narain,* 1944 A.L.W. 66. In *Sabitri Devi* v. *Promoda,* 19 Ind.Cas. 941=21 C.L.J. 248, the court observed: "In the present case, the award is open to objections in material particulars and the entire award must be null and void. *Duke of Bucclench* v. *Metropolitan Board of Works,* 5 Ex. 221 (229)=39 L.J.Ex. 130 (136); *Ganesh Narain* v. *Malida Koer,* 10 Ind.Cas. 450=13 C.L.J. 399; *Ramji Ram* v. *Salig Ram,* 11 Ind.Cas. 481=14 C.L.J. 188. This is not a case in which the invalid portion may be separated and enforced apart from the objectionable part. *Mohammad Mumtaz Khan* v. *Farhut Ali,* 23 All. 394=28 I.A. 190=5 C.W.N. 881; *Buta* v. *Municipal Committee of Lahore,* 29

Cal. 854=29 I.A. 168=87 P.R. 1902=7 C.W.N. 82=4 Bom.L.R. 673." The above rule is also not applicable where it is not possible to split up the award into two parts. *Bachchanlal* v. *Narottam Datt,* A.I.R. 1933 All. 59=143 Ind.Cas. 423; *Ladha Mal* v. *Sardari Lal,* A.I.R. 1935 Lah. 30 (but see *Mata Badal* v. *Sheo Mangal,* A.I.R. 1936 Oudh 72); *Ratan Koer* v. *Sobhan Ram,* A.I.R. 1936 Lah. 794.

782. Stamp duty on award.—An award is to be stamped according to Article 12 of the Indian Stamp Act as amended by local amending Acts. Article 12 runs as follows: "Award, that is to say, any decision in writing by an arbitrator or umpire, not being an award directing a partition, on a reference made otherwise than by an order of the Court in the course of a suit—is liable to the same *ad valorem* duty as a bond, where the amount or value of the property to which the award relates as set forth in such award does not exceed Rs. 1,000 and in any other case it is liable to a stamp duty of Rs. 5." An award under the Bombay District Municipality Act, 1873, section 81, or the Bombay Hereditary Offices Act, 1874, section 18, is exempted from payment of any stamp duty.

An award directing partition of property if signed by the parties interested by way of assent to the award, becomes thereby an instrument of partition and should be stamped accordingly. *Amarsi* v. *Dayal,* 9 Bom. 50. See also, *In re Vasanji Haribhai,* 15 Bom. 677; *Rattan Chand* v. *Gharitamal,* (1900) P.L.R. 459. An award began by saying "We decide as below. The parties should act accordingly." It went on the defendant "should take into his possession as below after passing a legal release". It added other directions with regard to the action of the defendant and provided "in connection with whatever is settled to be given to the defendant and to be taken him, we direct that the defendant should take into possession the properties and receive and pay money stated above after passing a release on sufficient stamp and getting it registered." *Held,* that the award came within the meaning of the words "an award by an arbitrator directing a partition" within the meaning of section 2, clause 15, of the Indian Stamp Act (11 of 1899). *Kalidas Lalbhai* v. *Tribhandas,* 31 Bom. 68=8 Bom.L.R. 869. In the above case *Beaman, J.* said: "I should like to add that, in my opinion, the words 'an award by an arbitrator directing a partition' precisely fit the case. In ordinary cases, arbitrators have no power to do more than direct a partition. The terms of section 2, clause 15, provide for all the cases, for parties having decided or agreed to divide, for arbitrators, to whom reference has been made, directing a partition, and last, for the courts effecting a partition. It lies with the parties themselves to agree to make or actually to make a partition. But it is not competent to arbitrators to do more than direct a partition." But to make an order chargeable under S. 2(15) of the Stamp Act, it must effect an actual division. *Tiruvengadathan* v. *Mangayya,* 12 Ind.Cas. 775=(1911) 2 M.W.N. 516. In the above case the court observed: "In my opinion the decree effects an actual partition of the property among the parties, and is, therefore, the final order in the suit effecting a partition, and is accordingly chargeable with duty as an instrument of partition. [See *Balaram Budharam Marvadi* v. *Ramkrishna,* 29 Bom. 366.].....I have been referred to a judgment of *Wallis, J.* in *Seshachalam Pillai* v. *Alwar Chetty,* (1911) 2 M.W.N. 515=12 Ind. Cas. 769, in which he expresses the opinion that 'final order' in section 2(15) applies to some order of the Civil Court made in execution; but the above case which is the decision of a Full Bench, does not appear to have been brought to the notice of the learned Judge."

The mere fact that the parties signed the award would not constitute it a deed of partition. Every case must be decided upon its own facts, and the real question is, whether the document in question is a true award of arbitrators or a mere deed of partition by the parties themselves disguised in the form of an award in order to escape payment of stamp duty. *Sukh Dial* v. *Mani Ram,* 29 P.R. 1915=27 Ind.Cas. 489=29 P.L.R. 1916.

In *Ramkumar* v. *Khushal Chand,* A.I.R. 1928 Nag. 166=107 Ind. Cas. 668, the court observed: "In this connection I may draw the lower courts' attention to the fact that the award in question is unstamped. Unless and until it is engrossed on a stamped paper it has no validity and cannot operate as an award. As it stands at present it has no valid existence, so to say, and the court could not be justified in looking at it, or in acting upon it, far less, could it pass a decree in terms thereof. The executant of the award being the arbitrator, under section 29(g) of the Stamp Act, it was his duty primarily to direct any of the parties to provide him with the necessary stamp, and to see that he did not deliver or publish his award on a plain paper; and thus save himself from the blame attaching to him for having evaded the stamp law." But see *Anant Ram* v. *Murlidhar,* 78 Ind.Cas. 194. The writing of an award on a stamp paper before it can be filed in court is merely a ministerial act. *Parshottamdas* v. *Kekhushru,* 149 Ind.Cas. 324=35 Bom.L.R. 1101=A.I.R. 1934 Bom. 6.

An award requires to be duly stamped. Where an unstamped award is filed on the question whether the court should permit the petitioner to pay the penalty and have the document duly admitted in evidence, the proviso to S. 35 Stamp Act enacts that it is not the duty of the court in all cases to admit the document on payment of penalty, it provides that it is subject to all just exceptions. *Indurthi Srinivasa* v. *Indurthi Venketa,* (1963) 1 Andh. W.R. 45=A.I.R. 1963 A.P. 193. As soon as the award is signed by the arbitrators, they become *functus officio.* They are not entitled to rewrite the award on a stamped paper. *Ibid.*

783. Registration of award.—Under clause (*vi*) of sub-section (2) of section 17 of the Indian Registration Act, before its amendment by Act XXI of 1929, an award was not required to be registered. Sub-section (2) of section 17 ran as follows: "Nothing in clause (*b*) and (*c*) of sub-section (1) applies to.....(*vi*) any decree or order of a Court and any award." in interpreting the scope of the corresponding clause of 1877 Act, it was observed in *Telaklal Singh* v. *Sripat Chowdhury,* 20 Ind.Cas. 860=18 C.W.N. 475: "The courts below have acted upon this award and founded their decision thereon though it had not been previously enforced in court. *Bhajahary Saha* v. *Beharilal,* 33 Cal. 881=4 C.L.J. 162. On the present appeal, it has been argued that the unregistered award was not admissible in evidence, because it was in essence a deed of partition and as such was compulsorily registrable under section 17(2) (*vi*) of the Indian Registration Act, 1877.....In so far as the first of these points is concerned, reliance has been placed by the appellants upon the case of *Upendra Nath* v. *Umesh Chandra,* 6 Ind.Cas. 346=12 C.L.J. 25=15 C.W.N. 375, to show that a partition deed is compulsorily registrable, if it affects title to the property of more than the statutory value. This had not been disputed by the respondent. The determination of this question depends upon the construction of clause (*vi*) of section 17(2) of the Indian Registration Act, 1877, *which lays down that decrees and orders of court and awards are*

not compulsorily registrable. On behalf of the appellants, it has been argued that the collection of the words of this clause indicates that its application is restricted to awards filed in court. This contention is not supported by the language used by the Legislature and is opposed to the decision of this court in the case of *Tara Kanta* v. *Rai Kishori,* 6 Ind. Cas. 361=13 C.L.J. 158. If the term 'awards' was intended to be restricted in clause (*i*) to awards which have been filed in court, the provision for exclusion of awards would be needless, because if a proceeding has been taken in court to enforce an award, such proceeding would terminate in a decree or order in which the award itself would be merged. Consequently, a provision to the effect that decrees and orders of courts are not compulsorily registrable would completely cover the case in point. We are, consequently, not prepared to accept the interpretation put upon clause (*i*) of section 17(2) by the learned vakil for the appellant. We are fortified in this view by an examination of the language of clause (*vi*) of sub-section (2) of section 17 of the Indian Registration Act of 1908. That clause now provides that any decree or order of a court and any award is not compulsorily registrable. So that whatever doubt might have been possible as to the true meaning of the provisions contained in the statute of 1877, that doubt has now been removed by the Legislature. We hold accordingly that the award in this case was not compulsorily registrable. We may add, however, that a document, which purports to be an award, may amount to something more than award, if the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators, the award may thereupon become a deed of partition, and may as such become compulsorily registrable. The distinction between an award and a deed of partition to which we have just adverted, was explained by *Mr. Justice West* in the case of *Amarsi* v. *Dayal,* 9 Bom. 50, and it was recognised in the cases of *Rattan Chand* v. *Ghasita Mal,* 459 P.L.R. 1900, and *Azimat Singh* v. *Kalwant Singh,* 111 P.L.R. 1907=71 P.R. 1906. See also, *Bhagat Ram* v. *Paras Ram,* 84 P.R. 1907=184 P.L.R. 1908."

An award even when it creates an interest in immovable property is exempted from registration under section 17(2) (*vi*) of the Registration Act. *Hotchand* v. *Kishin Chand,* 83 Ind.Cas. 548=17 S.L.R. 164=A.I.R. 1924 Sind 29. Where an award given by the arbitrators is in accordance with a compromise made by the parties to a suit and not going beyond the scope of the suit, and the award is made a decree of court, registration of the award is not necessary under section 17(2) (*vi*) of the Registration Act. *Gandharp Singh* v. *Nirmal Singh,* 54 Ind.Cas. 325=6 O.L.J. 529= 22 O.C. 300. See also, *Pranal Anni* v. *Lakshmi Anni,* 22 Mad. 508 (P.C.)=1 Bom.L.R. 394=26 I.A. 101=3 C.W.N. 485; *Charu Chandra* v *Sambhu Nath,* 46 Ind.Cas. 358=3 P.L.J. 225=(1918) Pat. 193 (F.B.). A document signed by arbitrators as their award does not cease to be an award merely because the settlement was arrived at by the parties as also was signed by them. *Wazir Ali* v. *Mahbub Ali,* 22 Ind.Cas. 412= 134 P.L.R. 1914=101 P.W.R. 1914=10 P.R. 1917. Where the document settling the dispute was an award it did not require, registration. *Khazan Chand* v. *Hamir Chand,* 46 Ind.Cas. 685=139 P.W.R. 19. See also, *Ralia Ram* v. *Duni Chand,* 66 Ind.Cas. 118. So it is clear that an award is not compulsorily registrable. *Khet Singh* v. *Manmodsingh,* 78 Ind.Cas. 134. See also, *Jagannath* v. *Rambax,* 6 C.P.L.R. 95; *Ghulam Fatima* v. *Ghulam Muhammad,* 39 Ind.Cas. 912=125 P.L.R. 1917;

Subrati v. *Hafizan,* 42 Ind.Cas. 116; *Gandharp Singh* v. *Nirmal Singh,* 54 Ind.Cas. 325=22 O.C. 300; *Yemnava* v. *Revanshidappa,* A.I.R. 1927 Bom. 656=29 Bom.L.R. 297=101 Ind.Cas. 351. [The word "award" in section 17 (2) (*vi*) of the Registration Act is not limited in its application to awards made otherwise than by or with the consent of parties].

That was the state of things when section 17(2) (*vi*) was amended by the Transfer of Property (Amendment) Supplementary Act of 1929 (XXI of 1929). Now the amended clause (*vi*) runs as follows: "any decree or order of a Court, except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceedings'." The effect of the amendment is that now an award is required to be registered if it falls under clause (*b*) and (*c*) of sub-section (1) of section 17 of the Registration Act. *Vide Ladha Mal* v. *Sardari Lal,* A.I.R. 1935 Lah. 30. See also, *Mata Badal Singh* v. *Sheo Mangal,* A.I.R. 1936 Oudh 72=(1935) O.W.N. 1141=(1935) O.L.R. 622=158 Ind.Cas. 812; *Mohammad* v. *Mohammad,* I.L.R. 1939 Nag. 607=183 Ind.Cas. 845=(1939) N.L.J. 375 =A.I.R. 1939 Nag. 233 (F.B.); *Nanibala* v. *Ram Gopal,* A.I.R. 1945 Cal. 19=18 C.W.N. 721. But see A.I.R. 1958 Pat. 252 (F.B.) reported *infra* under the heading "effect of non-registration of an award."

Where the declaration as to the rights of the parties is made in an award such declaration of rights cannot be held to amount to a mere recital of facts but becomes the basis of the title of the parties in the sense that whatever the previous rights of the parties may have been, if the award is valid and can be enforced in a court of law, the rights of the parties as declared by the award can also be enforced. This being so that award should be compulsory registrable. *Badri* v. *Chaman,* A.I.R. 1937 Pat. 183. See also, *Abdulla* v. *Bahram,* A.I.R. 1935 Pesh. 69=155 Ind.Cas. 1022. An award made by arbitrators under order of the court has no force until a decree is passed on it. A private award, if it is valid, is operative even though the party has sought to enforce it by a regular suit. A private award therefore falls within the class of documents specified in section 17 (1) (*b*), Registration Act, whereas an award or any other class does not. But in view of the amendment of section 17, Registration Act, (*b*) section 10 of T.P. Supplementary Act, 1929, the exception contained in section 17 (2) (*vi*) having been removed, a private award if it satisfies the requirement as to value, is compulsorily registrable. *Jitendra* v. *Nagendra,* A.I.R. 1934 Cal. 815=60 C.L.J. 259=39 C.W.N. 54=153 Ind.Cas. 778.

The above question was considered by a Full Bench of the Sind Judicial Commissioner's Court in the case of *Hassanand Naraindas* v. *Jodhomal Chengomal,* A.I.R. 1936 Sind 79=30 S.L.R. 115=163 Ind. Cas. 455 (F.B.. There the question referred to were as follows:—

"(1) Is an award made in pursuance of a reference filed in court under para. 17, Civil Procedure Code, compulsorily registrable? (2) If yes, is it compulsorily registrable before the court has accepted it and had passed a decree in terms thereof? (3) If not, is the award or the decree passed in terms thereof to be registered after the decree has been passed?"

In answering the questions *Davis, J.C. said*: "We are of opinion that the answer to the first question is in the negative, that in consequence the second question does not arise, and that the answer to the third question is in the negative. Mr. Dipchand for the opponents bases his argument that an award filed in court under para. 17, Schedule II, Civil

Procedure Code, requires registration if the award purports to create a mortgage or lien over immovable property of the value of one hundred rupees or upwards, on the Amending Act of 1929, whereby the words 'any award' have been deleted from section 17 (2) (*vi*), Registration Act XVI of (1908). It is his argument that an award filed in court under para. 17, Schedule II, is no longer among the exceptions, and he is, by the very generality of the words 'and award', constrained to argue that an award, even in a suit, if it purports to create a mortgage or lien no immovable property, must be registered. This is contrary to general experience and is answered, we think, by the argument that an award in a suit being part of a judicial proceeding does not require registration on the principle laid down by the Privy *Council* in *Bindesri Naik* v. *Ganga Saran,* 20 All. 171=25 I.A. 9=7 Sar. 273 (P.C.) Before amendment section 17 (2) (*vi*), Registration Act, read as follows : 'any decree or order of a Court or any award' and after amendment it reads : 'any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding.'

"Generally speaking, therefore, a decree or order of a court is expected from the provisions of section 17(1) which makes registration compulsory, but a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding, requires registration.,There is no reference in clause (*vi*) now to 'any award.' The object of the amendment was to supersede the Privy Council decision in *Hemanta Kumari* v. *Midnapur Zemindari Co.,* A.I.R. 1919 P.C. 79=53 Ind.Cas. 534=46 I.A. 240=47 Cal. 485 (P.C.), so far as it ruled that consent decree did not require registration even if they comprised immovable property other than that which was the subject-matter of the suit.

"Now, it appears to us that a distinction must be drawn between awards made with and awards made without the intervention of the court, that where an award is made with the intervention of the court, the award is part of a judicial proceeding and comes within the general principle laid down by the Privy Council in *Bindesri Naik* v. *Ganga Saran,* 20 All. 171=25 I.A. 9, and does not require registration ; and that an award made without the interevention of the court does require registration."

Where an award declares that in the event of the non-payment of the amount awarded, the other party will have a right to realise the same in execution proceedings by the sale of the mortgaged properties and mortgage was created by a prior registered document, the award was outside the letter of section 17 (1) (*b*). *Chotiram* v. *Laloomal,* A.I.R. 1935 Sind 136=157 Ind.Cas. 28. In the above case the court observed : "The award no doubt purports to empower respondent No. 1 to bring to sale the mortgaged property by applying for the sale in execution proceedings taken on the strength of the award without recourse to a law suit, but such power or right to bring this property to sale does not create, declare, assign, limit or extinguish any right, title or interest to immovable property, nor can such power or right be valued or be said to be of a value of Rs. 100 or upwards. An award of the nature in dispute is not only outside the letter of section 17, clause (1) (*b*), but it is also outside its spirit." See also, *Het Lal* v. *Upendra Nath,* 16 Pat. 34=166 Ind.Cas. 22=17 Pat.L.T. 835=A.I.R. 1937 Pat. 214 ; *Chhoti Lal* v. *Ram,* A.I.R. 1941 Pat. 215=195 Ind.Cas. 87.

An award made through intervention of the court does not require registration. *Keshomal* v. *Gianchand,* 31 S.L.R. 8=169 Ind.Cas. 479= A.I.R. 1937 Sind 156.

An award made by arbitrators appointed by the court with a view to having its terms incorporated in a decree of the court is not an award which is compulsorily registrable. *Kya Hla* v. *Ma Pan,* A.I.R. 1935 Rang. 16=154 Ind.Cas. 557 ; *Sher Bahadur* v. *Ram Narain,* A.I.R. 1945 Oudh 1=1944 O.W.N. 416. An award which merely directs one of the parties to pay a certain sum of money of the other periodically, does not require registration and therefore must be treated as a valid award. *Ratan Kaur* v. *Sobha Ram,* A.I.R. 1936 Lah. 794. Where an award is made without the interevention of the court and filed under para. 20 of Schedule II, Civil Procedure Code, it is the application to the court which is to be registered and numbered as a suit, and the application must contain and show what the award is, and it is on the award that the court has to pronounce judgment and pass a decree which must be in accordance with the award. When a charge is created by the award on the immovable properties of one of the parties to the arbitration and award, and mentioned in the award, it cannot be said that the compromise relates to properties outside the suit and not the subject-matter of the suit, within the meaning of section 17 (2) (*vi*) of the Registration Act. Such an award and the decree passed thereon do not require registration. *Hanmanta Gouda* v. *Shivappa,* 42 Bom.L.R. 1123. The amendment made in 1929 with reference to section 17 (2) (*vi*), Registration Act, has no retrospective operation. *Pashpat* v. *Udai Bhan,* 183 Ind.Cas. 808=(1939) O.L.R. 558=(1939) O.W.N. 809=A.I.R. 1939 Oudh 269 ; *Karmsing* v. *Gambibai,* A.I.R. 1937 Sind 7=166 Ind.Cas. 947=30 S.L.R. 337.

If once an award is held inadmissible for want of registration, it would be difficult to lay down any such broad proposition of law which would enable the courts to enforce that portion of the award which does not sin against the law of registration and to ignore that which does. Translated into practice such a proposition would inevitably lead to anomalous results. *Ladha Mal* v. *Sardari Lal,* A.I.R. 1935 Lah. 30 ; but see *Mata Badal Singh* v. *Sheo Mangal Singh,* A.I.R. 1936 Oudh 72= (1935) O.W.N. 1141=(1935) O.L.R. 622=158 Ind.Cas. 812, where the court observed: "The learned Munsif then proceeded to deal with the fifth issue, which was : 'Is the award unenforceable for want of registration ? On this issue the finding was that the award ought to have been registered, and that, as it was unregistered, the application for the filing of it must fail. The plaintiff appealed to the learned Subordinate Judge, who held that as regards the movable property the award was not invalid for want of registration, and he accordingly remanded the case to the Munsif for the trial of the remaining issues as far as the movable property was concerned. The defendant has made this present application for revision challenging the order of the learned court below.....Substantially, the only point taken on behalf of the applicant was that the arbitration award had to be either accepted or rejected *'in toto'*, and that it was not open to the learned Subordinate Judge to reject it as regards the immovable property, and to hold it admissible, subject to the decision on the remaining issue, as regards the movable property.....

"The result is that the only authority for the proposition contended for by the learned counsel for the applicant is the case reported in *Narsingh Narayan* v. *Ajodhy a Prosad,* 16 C.W.N. 256=13 Ind.Cas. 118.

That, however, was a case under the old Code, and on the other side we have been referred to a number of cases, to only one of which we think it necessary to make reference. That is a decision of their Lordships of the Privy Council reported in *Amir Begam* v. *Badruddin,* A.I.R. 1941 P.C. 105=23 Ind.Cas. 625=36 All. 336. In the course of that ruling their Lordships said : 'It is well-recognised law that when a separable portion of an award is bad, the remainder of the award, if good can be maintained' .....It is to be noted, however, that the dictum of their Lordships, which we have quoted above, was couched in quite general terms, and did not limit the applicability of the proposition enunciated by them to any particular set of facts and circumstances. It was generally laid down that when a separable portion of an award is bad, the remainder of the award if good can be maintained.

'We therefore, think that according to that principle the learned Subordinate Judge was quite right in regarding the award in the present cases as admissible as far as the movable property was concerned, subject, of course, to the decision to be arrived at by the learned Munsif on the remaining issues". See also, *Ratan Kuar* v. *Sobha Ram,* A.I.R. 1939 Lah. 794 ; *Bachchanlal* v. *Narottam Dutta,* A.I.R. 1933 All. 59=143 Ind.Cas. 423=(1932) A.L.J. 1090. Want of registration of the award is a defect *dehors* the award or the decision of the arbitrators, and so is not covered by s. 16 (1) (*c*) of the Act. *Nanibala* v. *Ram Gopal,* 48 C.W.N. 721= A.I.R. 1945 Cal. 19. But an award is not exempt from the provision of section 17, sub-section (1) clause (*b*) of Registration Act. *Sia Kishori* v. *Bhaisaw,* A.I.R. 1953 Pat. 42 (54) ; A.I.R. (1949) Cal. 549.

784. Effect of non-registration of award.—Failure to register an award which requires registration under S. 17 (1) (*b*) of the Registration Act is not a ground upon which it can be set aside. As execution cannot be ordered upon the unregistered award, the court has power to order its removal from its file. *Anandilal* v. *Keshavdeo,* A.I.R. 1949 Cal. 549=I.L.R. (1945) 2 Cal. 526. The Court observed : "If, as I am satisfied in this case, an award has been filed which cannot be the subject of execution proceedings, there is no need to wait until such an application is made, but steps can be taken at the outset to prevent an attempt to enforce the award". Under the present Act no judgment in terms of such an award can be passed by the Court. Once a reference has been made to arbitration even without intervention of the court, the court under the Act, has got exclusive jurisdiction in regard to the validity, effect or existence of the reference and the award and the jurisdiction of all other courts is ousted. Further s. 17 of the Act shows in unmistakable terms that an award, though given without intervention of the court, has to be made a rule of the court and the court will pronounce judgment on the award, and a decree shall follow, that is to say, the award by itself is of no effect. An award as such, does not purport or operate to create, any right, title or interest in the property dealt with by it within the meaning of s. 17 (1) (*b*) of the Registration Act and therefore an award even if it be in respect of immovable property with hundred rupees and upwards, does not require registration. *Soonarani* v. *Prabhu,* 1958 B.L.J.R. 181=A.I.R. 1958 Pat. 252=1958 Pat. L.R. 39=I.L.R. 37 Pat. 252 (F.B.) overruling I.L.R. 26 Pat. 437 ; A.I.R. 1948 Pat. 320 and I.L.R. 27 Pat 86 ; A.I.R. 1949 Pat. 393.

785. Award signed by all—assignee of one at the time of registration.—The registration of an award which is signed by all the arbitrators who made it is not invalid by reason of the fact that one of

the arbitrators did not appear at the time of registration to admit signature. Such an award cannot be held to be invalid. *Sukdeo* v. *Radhika*, 4 D.L.R. (Pat). 185 ; see also 23 Pat. 719.

786. Decree based on award not properly stamped or registered. —Although an award is not admissible in evidence for want of proper stamp and registration a decree based on such an award is admissible in evidence. If the decree does not reproduce the terms of the award but only makes a reference to the award, a copy of the award is admissible in evidence to understand the terms of the decree. *Hans Raj* v. *Amar Chand*, 42 P.L.R. 77=A.I.R. 1940 Lah. 107.

787. Construction of award.—Awards are constructed liberally and in accordance with the dictates of commonsense, and as far as possible in accordance with the real intention of the arbitrator.—*Russell* on *Arbitration*, 13th Edn., p. 423. The true principle of construction of an award is to give to the ordinary English word their ordinary and plain meaning. The court will rather lean towards up-holding the award than towards initiating it. *Durga Prosad* v. *Anordeyi*, A.I.R. 1947 Cal. 75=50 C.W.N. 880 ; see also, *Meenakshi Sundarm* v. *Velambal*, A.I.R. 1944 423=(1944) 1 M.L.J. 301=57 M.L.W. 317. The award of the arbitrator should, according to the ordinary rule of law, be read as a whole and portions out of it cannot be picked up to show that the finding of the arbitrator was inconsistent with those portions. In order to find out what the award means, one has only to refer to the operative portion of the award ; and the legality or illegality of the award must depend upon that portion and not upon anything else, *Ganesh Singh* v. *Bhikham Singh*, A.I.R. 1928 Oudh 1=4 O.W.N. 1085=107 Ind.Cas. 545=3 Luck 1. The court in construing an award, shall make every reasonable intendment a presumption in favour of the award being a final, certain and sufficient termination of the matter in dispute. *Kotumal* v. *Jayramdas*, A.I.R. 1298 Sind 144=108 Ind.Cas. 791. See also, *Wood* v. *Griffith*, 1 Swan, 43 ; *Hawkins* v. *Colclough*, 1 Burr. 274 ; *Harrison* v. *Greswick*, 13 C.B. 399 ; *Cargey* v. *Aitcheson*, 2 B. & C. 170 ;*Bland* v. *Russian Bank*, (1906) 11 Com.Cas. 71. Evidence is not admissible to explain or aid, much less to contradict, what is to be found on the face of an award. *Dutton* v. *Jamnadas*, 76 Ind.Cas. 84 ; *Amir Begam* v. *Badruddin*, 23 Ind.Cas. 625=36 All 336=18 C.W.N. 755=1 O.L.J. 249=12 Aff.L.J. 537=17 O.C. 120=16 Bom.L.R. 413=(1914) M.W.N. 472=19 C.L.J. 194 (P.C.)=27 M.L.J. 181 ; *Bucclench* v. *Metropolitan Board*, 5 H.L. 418 (462)=41 L.J.Ex. 137. It is not permissible to the court to send for the umpire and examine him as to the meaning of his award. The umpire is *functus officio* after he has published his umpirage or award, and the document must speak for itself. Where the ambiguity is patent on the face of the document it would not be competent to the court to launch into an inquiry to ascertain which of the two possible interpretations of the document the court should accept as the correct one. *Vallabh Das* v. *Keshab Lal*, A.I.R. 1927 Bom. 428=29 Bom.L.R. 660=104 Ind.Cas. 94. An award like a decree speaks from its date. *Lal Das* v. *Bai Lal*, 1 Ind.Cas. 105=11 Bom.L.R. 20 ; *Karmsing* v. *Gambibai*, A.I.R. 1937 Sind 7.

788. Objection to the jurisdiction of award.—In considering the jurisdiction of arbitrators the same strictness ought not to be applied which would be applicable if it were a question of submission to the jurisdiction of a Court. It is clear that if a party to a submission appears before the arbitrators and merely takes part in a preliminary discussion, he does not thereby waives his right to object to the jurisdiction of the

arbitrators before the latter actually enter upon the consideration of the matters upon which they make their award. If however after objecting to the jurisdiction and such objections being over-ruled, he proceeds with the case, under protest, to defend himself, he does not lose his right thereafter to say that the arbitrator acted without authority. But when no objection to jurisdiction is taken and a party takes part in the proceedings on the assumption that the proceedings are before the competent tribunal, it is not permissible to that party to object to jurisdiction thereafter and contend that the whole of the proceedings are *Coramnon judice* .....*All India Government Syndicate Ltd., In re,* 47 Bom.L.R. 420 = A.I.R. 1945 Bom. 497.

789. Notice to parties of the making and signing of an award or publication of the award.—Under section 11 of the Indian Arbitration Act of 1889, the arbitrators or umpire were bound to give notice to the parties of the making and signing of the award as well as a notice of filing of the award in the court. Under this section the arbitrators are only bound to give notice of the making and signing of the award to the parties. After the fling of the award by the arbitrators or umpire the court is to give notice to the parties of such filing. As in England, so in India, it is necessary for the validity of an award that it should not only be signed and executed by the person making it as a final decision upon the matters referred to him, *but also be published.* By the term publication is meant, generally speaking, a delivery to some of the parties to the award; and probably a holding of it by the arbitrator after notice to the parties or the purpose of delivery might be held to effectuate the award. *Fatima Kurban* v. *Shau Wilayat,* 19 A.W.N. 30 It is only where the submission provides for the making and publishing of the award that the award is not valid unless it is published. *Anant Ram* v. *Murlidhar,* 78 Ind.Cas. 194 = A.I.R. 1924 Nag. 204. As soon as the arbitrators have made a complete award, the award is regarded as made and published. The law casts upon the arbitrator no obligation to stamp an award and an award is complete though it is unstamped and therefore inadmissible in evidence. In the absence of an express stipulation as to the mode of delivery of the award, the duty of the arbitrator is to have the award ready for delivery to the parties at their request and to acquaint them with the fact within a reasonable time. *Ibid.* It is the duty of the arbitrators to give notice to the parties that an award has made. *Venkataramayya* v. *Palayya,* 56 L.W. 419 = 1943 M.W.N. 548 = A.I.R. 1943 Mad. 718: but see *Udoy Chand* v. *Bhagirath Lal,* 61 C.L.J. 515. See also *Grahams* v. *Chandu Lal,* A.I.R. 1935 Sind. 228 *Roberts* v. *Ebirpardt,* 28 L.J.C.P. 74; *Fumley v. Bramson,* 20 L.J.Q.B. 178. Failure by arbitrator or by Court to give notice to the parties as required by this section vitiates the decree. *Venkataramayya* v. *Palayya,* A.I.R. 1943 Mad. 718 = (1943) 2 M.L.J. 152. S. 14 (2) of the Arbitration Act is mandatory and a notice has to be given of the filing of the award. But if a party to whom notice has to be issued has knowledge that the award has been filed that would be sufficient compliance with s. 14 (2). *Bollaram Goerge* v. *Kadpak,* (1961) 1 Andh. W.R. 276 = A.I.R. 1961 A.P. 457 = 1961 Andh. L.T. 622; see also *Mathulla* v. *Thomas* 1962 Ker. L.T. 873 = 1962 Ker L.J. 374 = I.L.R. (1962) 1 Ker. 486 = A.I.R. 1962 Ker. 320 (notice to arbitrator and opposite party).

790. Notice within reasonable time.—No time is fixed either by the Arbitration Act or by the Limitation Act within which the arbitrator should give notice of the making and filing of the award. It need not

be given immediately the award is signed. The arbitrators are left with a free hand on that point. It is their duty after they make and sign their award to give notice to the parties within a reasonable time, which must be final according to the circumstances of each case. *Bai Laxmi Bai* v. *Shridhar,* A.I.R. 1943 Bom. 221=45 Bom.L.R. 416. The object of a notice of the making and signing of the award is to apprise the parties to the arbitration agreement, of the fact of the making of the award so as to enable them to prefer objections before the Court in proper time. A mere omission on the part of some of the arbitrators to sign the notice required by this section is mere irregularity and does not vitiate the proceedings. *Ramtaran* v. *Adhar,* A.I.R. 1953 Cal. 646= 91 C.L.J. 267. In the above case *Das J.* observed: "Our attention was drawn to a decision of this court in the case of *Mairamjan Bibi* v. *Asaraddi,* 43 C.W.N. 8429.....In that case, however, no notice whatsoever was given of the signing of the award. It was held by a Bench of this Court that this rendered the proceedings invalid for the reason, that unless notice is given to the parties of the filling of the award the parties would have no opportunity of filing objections, within the time prescribed by Act. Our attention was also drawn to the case of *Luxmi Bai* v. *Sridhan Manik,* A.I.R. 1943 Bom. 221=210 Ind.Cas. 144. That case, however, was one where the notice of the award was given by an Attorney acting on behalf of all the parties. The present case is not covered by the two decisions referred to above." Where notice of the filing of the award was issued to all the parties except the party who had himself filed the petition in court for a direction to the arbitrators to file their award and two other parties who had already appeared in court and filed their objections, the award was filed according to law. 91 C.L.J. 267=A.I.R. 1953 Cal. 649.

Where notice is given by the arbitrators before the award is signed it is obviously not a valid notice. The arbitrators must sign their award and then give notice in writing to the parties of the making and signing thereof. *Ram Swaroop* v. *Phoolchand,* 1946 A.M.L.J. 41. But failure by the arbitrator to give notice under this section is not an omission which would invalidate the award. This omission is not covered by words "otherwise invalid" in section 30, clause (*b*). It is not the intention of the law that notice should be given by all the arbitrators. If a notice is given by one arbitrator only; it shall be deemed to have been given by all, unless the contrary is proved, and it will thus be perfectly good notice. *Labab Gul* v. *Badsha,* P.L.D. 1952 Pesh. 23. The giving of notice of an award is not exercising any judicial functions of an arbitrator. *Lakshmibai* v. *Shridhar,* A.I.R. 1943 Bom. 221=45 Bom.L.R. 416=210 Ind.Cas. 144.

791. Section 42—Applicability to notice under s. 14.—Section 42 may apply to notice referred to in clause 1 of s. 14, but it can have no application to the notice which is to be given by the court under clause (2) of section 14. *Ram Bhorosey* v. *Peary Lal,* A.I.R. 1957 All. 265=1957 All. W.R. (H.C.) 177(2); A.I.R. 1927 Cal. 619; A.I.R. 1927 Pat. 135; A.I.R. 1926 Bom. 312.

792. Notice may be given through attorney.—The giving of the notice of the award is not exercising any judicial function of an arbitrator. The notice is only to the effect that an award has been made. It is not any decision on any of the dispute referred to the arbitrators. It is only a ministerial act which the arbitrators are fully entitled to delegate to their attorneys. *Bai Lakmibai* v. *Shridhar,* A.I.R. 1943

Bom. 221=45 Bom.L.R. 416.

793. Notice of amount of fees and charges.—Where the parties have chosen their own arbitrators they must be taken to have intended to pay him at the rate ordinarily charged by persons of his experience, and they must pay his fees, unless it is proved that the charges are extortionate. *Bulchand* v. *Thakurdas*, A.I.R. 1933 Sind 300. See also *Gridhari Lal* v. *Surendra Nath*, 152 Ind.Cas. 373=A.I.R. 1934 Nag. 199; *Llandrimdod* v. *Hawksley*, 68 J.P. 242=20 T.L.R. 241; *Cromption* v. *Ridler*, (1887) 20 Q.B.D. 48; *Brown* v. *Landover*, 25 T.L.R. 625; *Re Stephens Smith & Co.*, 36 Sol.J. 646. Para, 8 of the First Schedule of the Indian Arbitration Act enacts: "The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and a what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practioner and client." See also, *In re Prebble, and Robinson*. (1892) 2 Q.B. 602. Where a lawful and reasonable fee has been agreed to by the parties to be paid to the arbitrator, he is not guilty of misconduct in getting payment of such fee before the commencement of the inquiry. *Narasimhadu* v. *Subramania*, 75 Ind.Cas. 850=17 L.W. 648. Where the arbitrators take money from one of the parties singly whether for charges or for anything else before making their award, that is sufficient misconduct to set aside the award. But where the arbitrators took money as fees from one of the parties and it was done by way of mutual arrangement between the contending parties, the award is not vitiated by reason of any misconduct on the part of the arbitrators. *Akhoy Kumar* v. *S. C. Dass*, A.I.R. 1935 Cal. 359=38 C.W.N. 784=156 Ind.Cas. 165. The sub-section requires the arbitrators to state in the award the amount of fees payable to them. *Narasimhadu* v. *Shbramania (supra)*. See also *Bassent Chander* v. *Damigee*, Bourke.O.C. 7 Cor. 150: *Mohunlal* v. *Nathuram*, 1 B.L.R.O.C.J. 144: *Mudoosoodun* v. *Koylas*, 2 Ind.Jur. N.S. 12: *Dharu* v. *Dildar*, 46 Ind.Cas. 182; *Ramcharan* v. *Jasoda*, 5 Luck. 678=126 Ind.Cas. 508=7 O.W.N. 97=A.I.R. 1930 Oudh. 89: *Cyril Kirkpatrik, In re*, 22 P.R. 1897; *Gurdinomal* v. *Wadhumal*, 19 Ind.Cas. 611=6 S.L.R. 226; *Wilson* v. *Jagmannis*, 52 Ind.Cas. 653=17 A.L.J. 1053; *Takhitram* v. *Kishnichand*, I.L.R. 1940 Kar. 34=190 Ind. Cas. 880=A.I.R. 1940 Sind 190. An award cannot be enforced as a decree so far as the arbitration fees go. The arbitrator has undoubtedly a right to file a suit for recovery of his fees. *Rahim* v. *Shahban*, A.I.R. 1935 Sind 200=159 Ind.Cas. 125. See also, *Crampton* v. *Ridley*, (1887) 20 Q.B.D. 48. Where the arbitrators or umpire award costs without specifying the amount, the award is bad for uncertainty. *James Finlay* v. *Arudamal*, 5 S.L.R. 89=12 Ind.Cas. 637. See also, *Mohanlal* v. *Nathuram*, 1 B.L.R.O.C.J. 144. In the first-named case the court observed: "The authority of the arbitrator as to costs is limited except in cases of special agreement to 'costs of the reference and award' (para 9 of First Schedule, Arbitration Act). The costs and charges of filing an award are separate matters, and are distinguished in section 11 of the Act. Under the rules of this court, the award is filed by presenting a petition, and the Act gives power to the court to pass orders on this petition, 'on such terms as to costs as it may think fit'. It is clear that under the Act, all costs incurred in the process of obtaining an order from the court, are within the discretion of the court, and are outside the province of the arbitrator. Practically, it is impossible for the

arbitrator to grant costs of filing the award, for he cannot know at the date of his award what those costs amount to". See also *J. M. Lang* v. *Holland,* 76 Ind.Cas. 660=A.I.R. 1924 Sind 91. The court is not to vary the order of the arbitrator as regards the cost of arbitration. *Mir* v. *Khairun,* 19 P.R. 1880; *Chuni* v. *Dhan,* 97 P.L.R. 1909. See also, *Hargopal* v. *Kartar Singh,* 91 P.R. 1888; *Dharu* v. *Dildar,* 46 Ind.Cas. 182; *Bassent Chander* v. *Damigee,* Boorke.Rep.O.C. 7; *Dadgdeesa* v. *Bhukan,* 9 Bom. 82. Where an arbitration award provides for the payment by the plaintiff of the costs including the arbitrator's fee, but the court omits to fix the fee before the decree is prepared, it is open to the court to fix the fee after the preparation of the decree. *Wilson* v. *Jagmandir,* 52 Ind.Cas. 653=17 A.L.J. 1053. In a proper case the court is competent to reduce it on application by a party. *Thadomal* v. *Menghraj,* A.I.R. 1930 Sind 190=123 Ind.Cas. 694; see also *Lloyd* v. *Board of Trade,* 35 L.C. & Rep. 217. Where the court holds that there is no valid reference to arbitration, it has no jurisdiction to pass an order as to costs of the award. *Arunachala* v. *Louis Dreyfus,* A.I.R. 1928 Mad. 370=54 M.L.J. 580=(1928) M.W.N. 228=27 M.L.W. 803=109 Ind.Cas. 175. In *Becker Shillan & Co., In re,* 90 L.J.K.B. 316=(1921) 1 K.B. 391, matters in dispute between the parties to a contract of sale having been referred to arbitration, the arbitrators disagreed and an umpire was appointed. By his award the umpire dealt with the arbitrators' and umpire's fees, the costs of shorthand notes, and the hire of the arbitration room, but omitted to deal with the costs of the reference. It has been held that, as it appeared that the umpire had not exercised his discretion with respect to the costs of the reference, the award must be remitted to him on the ground that he had not dealt with all the matters referred to him.

794. Application by party to enforce an award—Articles 120 and 178 of the Limitation Act.—Art. 178, Limitation Act, governs cases falling within s 14(1), Arbitration Act, the parties in signing the award do not bring the case within where notice in writing of making of the award is to be given. Art 178 has no application for the enforcement of the award made by the parties to the arbitration agreement and there being no period of limitation prescribed for such an application, the application made by a party to the award within six years of the making of the award must be regarded to be within time. *Ganga* v. *Radha,* A.I.R. 1955 Punj. 145=57 Punj. L.R. 253.

SUB-SECTION (2).

795. Sub-section (2).—This sub-section can apply only to a case where the help of the court is sought for getting the award into court by calling upon the arbitrators to do it; where the only relief asked for is the passing of a decree in terms of the award filed in court the case falls under s. 17, *Puptalla* v. *Nagidi,* A.I.R. 1957 Andhra Pra. 11=69 Mad. L.W. (Andhra) 163. This sub-section is based on sub-section (2) of section 11 of the Indian Arbitration Act of 1899, and paragraph 10 of the Second Schedule of the Civil Procedure Code. Under section 11(2) it is necessary to file "any depositions or documents which may have been taken and proved before" the arbitrators or umpire. This portion is taken from para 10 of the Second Schedule of the Civil Procedure Code. Under this sub-section the notice of filing is not to be given by the arbitrators or umpire but by the court. The arbitrators are bound at the request of any party or if so directed by court to file an award or

a copy thereof in court on payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award. In case of disputes as to arbitrators' remuneration or costs the procedure laid down in section 38 is to be followed. *Vide* section 38 and notes thereon. Sub-section (2) clearly implies that where the award or a signed copy thereof is in fact filed into Court by a party he should have the authority of the umpire for doing so. Where the awards are handed over by the umpire to the party, it cannot be assumed that the mere handing over of the awards necessarily implies the authority of the umpire to file the same in the Court on his behalf. That authority has to be specifically alleged and proved. In the absence of such authority, the filing of the awards by the party cannot be the filing by the umpire. *Kumbha Mawji* v. *Dominion of India*, A.I.R. 1953 S.C. 313. In the above case *Jagannatha Das J.* said: "This section clearly implies that where the award or a signed copy thereof is in fact filed into Court by a party he should have the authority of the umpire for doing so.....Where as in this case, the originals are said to have been handed over to both the parties, it cannot be assumed that the mere handing over of the awards to the parties necessarily implies the authority of the umpire to file the same into Court on his behalf. That authority has to be specially alleged and proved. In the present case the statement in the affidavit relied on by learned counsel before us is no more than an assertion that the umpire handed over the original awards to the appellant for filing, but there is no allegation that they were so handed over to him for filing on behalf of the umpire..... Here again, the learned judge has overlooked that under S. 14 sub-section (2) the actual filing by the umpire is not essential, but it is sufficient if the umpire causes the awards to be filed. It is not suggested that sending by post in compliance with the notice is not such causing." It is not necessary that an application to file the award be made by all the arbitrators. Any one of them on behalf of the others can file the award. *R. K. Misra* v. *Kundanlal*, I.L.R. (1949) Nag. 272=A.I.R. 1949 Nag. 349=1949 N.L.J. 408; *Narayan* v. *Dewaji*, I.L.R. 1945 Nag. 323 (326)= A.I.R. 1945 Nag. 117; *Shamdas* v. *Khimanmal*, A.I.R. 1914 Sind 90=8 S.L.R. 302.

796. Filing of award—Procedure.—Sub-section (2) contemplates the filing of the award in court by the arbitrator; it is essential that he should himself take it to the court; it is enough if he causes it to be filed. No formality in the act of filing the award is required; the arbitrator need not make an application for permission or leave to file the award. He can just file the award in the court without any application but the act of filing must be his or on his behalf. An arbitrator cannot be said to have caused the award to be filed unless he delivers it to another person with a direction to file or directs the person, who has custody of it, to file it. A.I.R. 1953 S.C. 313=1953 S.C.J. 436= (1953) 1 M.L.J. 841; A.I.R. 1948 Pat. 171; *Amod Kumar Verma* v. *Hari Prosad*, A.I.R. 1958 All. 720. An award is useless unless it is followed up by a decree. If the award can be filed in the court by the arbitrator and not by any of the parties, the making of the award would in some cases be rendered futile. Court would not be justified in interpreting s. 14 to mean that the award can be filed by a party also. Courts' jurisdiction consists in interpreting the law and not enacting a law. If the award is stolen from the possession of the arbitrator, he may be able to file a signed copy of it in court. An award affecting

immovable property with more than Rs. 100 is required to be registered; if the arbitrator loses the award or if he has delivered it to a party who refuses to hand it over back to him or if he has produced it before some tribunal for some other purposes he can always obtain a copy from the registration department and file it in court. *Amod Kumar* v. *Hari Prosad,* A.I.R. 1958 All. 720 [but as regards registration vide I.L.R. 32 Pat. 252 (F.B.)]. An authority to file award must be alleged and proved. Where such allegation is made in the application any subsequent prayer would be of no avail. Mere handing over of the award to the party does not necessarily imply the authority of the arbitrator or the umpires to file the same in court on his behalf. *Khumblad Manji* v. *Dominion,* A.I.R. 1953 S.C. 313=1953 S.C.J. 436=(1953) 1 M.L.J. 481; *Banarasi Dass* v. *Om Parkash,* 59 Pun. L.R. 395=A.I.R. 1957 Punj. 301. Arbitration Rules framed by the Punjab High Court under s. 44 do not expressly authorise a party to submit an application for filing an award into court. Under Rule 10(a), a party to an arbitration agreement may only cause the award or a signed copy thereof to be filed in court. This is what exactly is provided by s. 14(2) of the Act. *Ibid.*

797. Arbitrators can file award.—There is nothing in this section which precludes the arbitrators from filing the award. It is not correct to say that parties to the arbitration should make an application in court for filing an award or causing an award to be filed. *Narayan* v. *Dewaji,* A.I.R. 1945 Nag. 117=I.L.R. 1945 Nag. 323.

798. Filing of award is compulsory when ?—The arbitrators are bound when all the preliminaries are fulfilled at the request of any party to file the award or a copy thereof in court, and such an award unless it is set aside or remitted for reconsideration, becomes enforceable as if it were a decree of court.. The award stands on the footing of a decree. *Gotha* v. *Thatha,* 5 Ind.Cas. 374=7 M.L.T. 355. In the above case the court observed : "Section 11 of the Act IX of 1899, requires that the awards should be signed and filed. The arbitrators are bound at the request of any party to file the award or a copy thereof in court and such an award unless it is set aside or remitted for reconsideration becomes enforceable as if it were a decree of court. The writing and signing of an award is not, thereof, a formality that may be dispensed with by the parties. It stands in this respect on the same footing as a decree". It is not necessary that the arbitrator should file it in court personally. He may deliver it to one of the parties. But he ought not to hand over with it the proceedings, depositions and exhibits in the suit. *Jagat Sundari* v. *Sanaton,* 5 B.L.R. 357.

In *Nursing Chunder Dawn* v. *Nuffer Chunder Dutt,* 17 Cal. 832 (839) *Wilson J.* observed : "The defendants have applied for an order directing that the arbitrators appointed to decide the matters in difference in this suit should give certain documents which came to their hands as arbitrators.....The arbitrator cannot be compelled by the court to undertake the reference or to proceed with it or to make an award. But if, and so far as, he acts as arbitrator, he takes upon himself, not only a duty towards the parties, but also, as was pointed out in the case of *Maharajah Sir Joy Mungul Singh* v. *Mohun Ram Marwaree,* (12 W.R. 397), a duty to the court, and this is distinctly the case with respect to documents. Section 516 expressly requires arbitrators, who have made an award, to file it, together with any depositions and documents which have been taken and proved before them. With regard to documents trans-

mitted by the court to the arbitrator as part of the record, it was said, in the case already referred to:—'The documents were entrusted to him by the court, and it was his plain and simple duty to return them to the court'. As to documents entrusted directly by the court to an arbitrator, such as the records of the suit, I think it clear that he is bound to return them when his right to keep them as arbitrator comes to an end, whether by the making of his award or by the making of an award becoming impossible; and I see no solid distinction between and exhibits with which he is entrusted by reason of the order appointing him arbitrator and directing exhibits to be filed. This being the duty of the arbitrator, and a duty towards the court, it follows, in my opinion, that that duty can be enforced by order made upon the arbitrator."

An application that an award be remitted to the arbitrators, in order that the proceedings, depositions, and exhibits in the suit, which had not been submitted with it to the court, should be submitted, ought to be made within 30 days after the date of service of the notice of filing of the award; otherwise if the award be good on the face of it, the court will give judgment upon it. *Vide Beney Madhab* v. *Hurry Mohun,* 2 In.Jur. N.S. 16. Where in a due course a documents purporting to be the arbitrator's award was received by the court through the post it was held that the so-called award was never delivered by the arbitrator and was, in fact and in law, no award at all. *Shamlal* v. *Misri Kunwar,* (1907) A.W.N. 115=29 All. 426. Where the award was sent to court by post and none of the arbitrators took responsibility for saying as to who caused the award to be sent to court, the award was not properly placed before the court, and, as such could not be acted upon by the court. *Ram Narain* v. *Lalj Rai,* A.I.R. 1929 Pat. 178=118 Ind.Cas. 606. The act of an arbitrator, in handing an award to the proper officer to be filed, is not an "application" within the meaning of the Limitation Act. *Roberts* v. *Harrison,* 7 Cal. 333=9 C.L.R. 209. An award should be filed in the court and then only the court can proceed further and pass a decree. *Himtoollah* v. *Hurun,* 13 W.R. 62. Where there has been no proper compliance with the requirements of this section an award is ineffective and void. *Benode Lal* v. *Pran Chandra,* 14 C.L.J. 143=11 Ind.Cas. 898. See also *Khatiza* v. *Abowatu,* 5 Rang. 171=102 Ind.Cas. 800=A.I.R. 1927 Rang. 197. Where an award has been passed in England under the English Arbitration Act an Indian court has no power to file it, as the provisions of the Indian Arbitration Act are in many respects inapplicable to awards made under any other Act. The proper remedy is to file a suit in the Indian court upon the award. *John Batt* v. *Kanoolal,* 53 Cal. 65=95 Ind.Cas. 21= A.I.R. 1926 Cal. 938. See also, *Oppenheim* v. *Mahomed,* 74 Ind.Cas. 616=A.I.R. 1922 P.C. 120=45 Mad. 496 (P.C.). But now see the Arbitration (Protocol and Conventions) Act, 1937, by which the law has been changed to a certain extent.

The filing of an award under the Arbitration Act is an act to be done not on the application of the parties. *Baijnath* v. *Ahmed,* 18 Ind. Cas. 978=17 C.W.N. 395=40 Cal. 219. An award made on an agreement to refer future disputes to arbitration can be legally filed in court. *Ram Dhan* v. *Shankar,* 164 Ind.Cas. 296=A.I.R. 1936 Lah. 492. The filing of an award is a purely ministerial act and can be legally performed by any one of the arbitrators appointed. *Shamdas* v. *Khimanmal,* 29 Ind.Cas. 602=8 S.L.R. 302; *Khatiza* v. *Abowatu,* A.I.R. 1927 Rang. 197= 5 Rang. 171. The mere receipt of the award by the court is the filing

of the award. The Act does not contemplate special order being passed for filing of the award. The award stands filed and is enforceable as decree of the court unless it is remitted for reconsideration of the arbitrator or set aside. *Volkart* v. *Achrajram,* A.I.R. 1931 Sind 160=134 Ind.Cas. 1182=25 S.L.R. 528. See also, *Udholdas* v. *Ukamal,* 14 S.L.R. 217=60 Ind.Cas. 942; *Khatun* v. *Abdul,* 14 Bur.L.J. 129=4 L.B.R. 249; *Baijinath* v. *Ahmed,* 18 Ind.Cas. 978=17 C.W.N. 395=40 Cal. 219; *Tribhubandas* v. *Lallubhai,* 35 Bom. 193=12 Bom.L.R. 860=8 Ind.Cas. 179; but see *Jamadevi* v. *Allah Rakha,* A.I.R. 1942 Lah. 190=44 P.L.R. 249=201 I.C. 462. When the attention of the court is drawn to such irregularities, the effect of which is to make the filing of the award improper and illegal, the court in the exercise of its inherent jurisdiction, is bound to take steps to rectify matters and the proper procedure is to begin from the beginning again. *Khatiza* v. *Abowalu,* A.I.R. 1927 Rang. 197=5 Rang. 171=102 Ind.Cas. 800. In case of transfer of a case to another court after order of reference but before award, the award is to be filed before the court to which the case has been transferred. *Harbhan Dutt* v. *Ladli Saran,* A.I.R. 1933 Oudh 547=10 O.W.N. 1196=146 Ind.Cas. 582.

799. Sub-section (2) of section 14, whether exhaustive.—Sub-section (2) of s. 14 is not exhaustive. Where umpire dies before filing the award or authorising any one to file award on his behalf order for filing award may be made under s. 151 C.P. Code. *Panchanon* v. *Union,* A.I.R. 1959 Cal. 84. Section 14(2) does not say that a party has to make a request to the arbitrator first to cause the award to be filed in court before he makes a request to the court to direct the arbitrator to file the award. Mere production of the award does not amount to filing of the award. *State of Kerala* v. *Kanan Davan* 1960 Ker. L.T. 1347.

800. After filing parties are take up liligation.—Where arbitrators make an application for filing an award at the request of one of the parties to the arbitration the proper procedure is to allow the parties to the arbitration to take up the litigation in their hands and relieve the arbitrators. *Narayan* v. *Devaji,* A.I.R. 1945 Nag. 117=I.L.R. 1945 Nag. 323.

801. When the award is beyond the pecuniary jurisdiction of Court.—Where a court finds that it has no pecuniary jurisdiction to entertain an application for filing an award, the proper order is one of return of the application for presentation to the proper court and not one of dismissal of the application. Under Rule 338B (5) of the Rule framed under s. 44 of the Arbitration Act, every application under s. 14(2) for filing an award is to be registered as a suit. On the analogy of O. 47, R. 10 read with S. 141 C. P. Code, a court is competent to pass an order returning an application for presentation to the proper Court. *Venayak* v. *Anant,* I.L.R. (1945) Nag. 781=1945 N.L.J. 253=A.I.R. 1945 Nag. 214 The valuation for the purpose of the jurisdiction for filing an award relating to partition, is the valuation of the share to be partitioned and not the valuation of the entire property. *Ibid.*

802. Any depositions and documents, etc.—In *Yusuf Khan* v. *Ruyasat Ali,* A.I.R. 1926 Oudh 307=3 O.W.N. 279=13 O.L.J. 224=93 Ind.Cas. 446=1 Luck. 139, the court observed: "It appears to us clear from the evidence of the arbitrator himself who was examined in that case that at first when he went to make an inquiry in the village he took down pencil-notes of the depositions made by the witnesses who were

examined before him and that subsequently at Unao he faired them out and the papers which he had filed along with the award were those faired out copies of the depositions. The fair copies do not bear the signatures of the parties or of the witnesses whose depositions they purported to be and there was nothing to show that those were really accurate fair copies of the depositions, the notes of which he had taken in pencil during the course of the inquiry. It is also clear that the documentary evidence which was filed before him was not filed by him in court.....In any case it is clear that the arbitrator did not comply with the provisions of para 10 of Schedule II. We do not wish to lay down that the mere fact that an arbitrator has omitted to file along with his award the depositions of the witnesses examined by him or the documentary evidence filed before him would justify a court in holding that the award is on that ground invalid, but there may be a case like the present which have before us in which the procedure adopted by the arbitrator in not filing that evidence before the court may lead one to the conclusion that the arbitrator did not act in accordance with law, and that he was, thereof, guilty of misconduct as stated in para 15. It was held in *Ganga Sahai* v. *Lekhraj Singh*, 9 All. 253, that the word 'misconduct' should be interpreted in the sense in which it is used in English law with reference to arbitration proceedings. It does not necessarily imply moral turpitude, but it includes neglect of duties and responsibilities of arbitrators, and of what Courts of Justice expect from them before allowing finally to their awards. It appears to us to be clear in this case that the arbitrator who was appointed by the court below neglected his duties and ignored the responsibilities laid on him by law. It was not proper for him to convert his pencil notes into ink-written depositions without having taken some steps to ensure that they were accurately transcribed. He should have no such transcription taken signatures of the parties and taken other steps to ensure their accuracy. He also did not file those pencil notes along with his award which could have enabled the court to see that the record of evidence which was filed by him was an accurate transcript. We also find that his action as alleged by him that the documentary evidence filed before him was returned to the parties in court was not proper.....The arbitrator had no business to return those receipts to the parties. That action on his part shows an utter want of realisation of the responsibilities laid upon him by law. It, therefore, appears to us that the arbitrator was in this case guilty of what may be termed as 'judicial misconduct'."

This section undoubtedly contemplates possibility of the depositions of witnesses being reduced to writing by the arbitrators but does not oblige them to keep such a record. *Sampas* v. *Kisan*, A.I.R. 1929 Nag. 264=119 Ind.Cas. 694=26 N.L.R. 168. In the course of the judgment the court observed: "It was also contended that because the arbitrators did not make any notes of the statements of the parties or take down the depositions of the witnesses examined by them their proceedings were void but no authority has been shown to me in support of this contention. Para 10, Schedule II, of the Civil Procedure Code, only says that the award is to be filed in court 'together with any depositions and documents which have been taken and proved' before the arbitrators, and it was suggested that this paragraph postulates that depositions of witnesses must be reduced to writing. I do not think this suggestion is sound. The paragraph in question undoubtedly contemplates the *possibility* of the positions of witnesses being reduced to writing by the

arbitrators but does not oblige them to keep such a record." See also *Amirbegam* v. *Budruddin,* 23 Ind.Cas. 625=36 All. 336 (P.C.). The omission to file depositions and documents along with the award was only a minor irregularity and not one which would make the filing of the award by the arbitrator as of no consequence. *Shyam Sunder* v. *Sita Ram* I.L.R. (1959) 9 Raj. 666=1959 Raj L.W. 427. An arbitrator should not allow removal of documents which were entrusted to him and form parts of the record. *Joymangal* v. *Mohunram,* 8 B.L.R. 319= 12 W.R. 397. See also, *Nursing* v. *Nuffer Chunder,* 17 Cal. 832. There is no law, which requires an arbitrator to keep record of his proceedings. All that is necessary is that there should be an award in writing by the arbitrator. He is, of course, bound to make enquiry, but he is not bound to keep a record of such an enquiry. *Ramdhan* v. *Shankar,* 164 Ind.Cas. 296=A.I.R. 1936 Lah. 492.

803. Non-filing of certain documents.—The mere non-filing of *Khatas* (account books) which were not received in evidence is not sufficient to vitiate the proceedings and render the filing of the award otherwise than in accordance with law. *Ramtaran* v. *Adhar,* A.I.R. 1953 Cal. 646=91 C.L.J. 267. Pencil or pen notes of evidence when there is a formal minute of the evidence and proceedings before the arbitrator, do not require to be filed having regard to the language used in sub-section (2). *Haji Ebrahim* v. *Northern Indian Oil,* 85 C.L.J. 176.

804. Publication of award, effect of.—By the term "publication" is meant, generally speaking, a delivery to some of the parties to the award; and probably a holding of it by the arbitrator after notice to the parties for the purpose of delivery might be held to effectuate the award. *Fatima* v. *Shanwilayat,* 19 A.W.N. 30. After the arbitrators have delivered their award, their functions are at an end, and they have no power to correct or alter the award. But until they have finally published the award, they may make alterations therein. What constitutes a completion of the award, may depend upon the terms of the submission and upon the facts and circumstances of the individual case. *Ramjiram* v. *Saligram,* 11 Ind.Cas. 481=18 C.L.J. 188. Once an award is made published and signed by all the arbitrators, it is not open to the arbitrators to substitute another award for it. *Parshottamdas* v. *Kekhushru,* A.I.R. 1934 Bom. 6=35 Bom.L.R. 1101=149 Ind.Cas. 324. In the above case *Baker, A.C.J.* said: "It is, therefore, quite clear on the authorities that once the award is made and published, as it has been in the present case, and signed by all the arbitrators, it is not open to the arbitrators to substitute another award for it, and where, as in the present case, the authority of the arbitrators ceased from the time they made the award, the consent of the parties could not render valid that which is absolutely void. In *Banerjee's Law of Arbitration,* 1st Edn., p. 273, it is said: 'As consent cannot confer jurisdiction, the omission to observe such statutory requirements as create jurisdiction cannot be cured by ratification. But an award which is not absolutely void, but merely voidable because of some defect or irregularity which does not affect the jurisdiction of the arbitrators or of the court may be validated by such acts of the parties as indicate an intention to abide by it, and if ratified it will have the same effect as a valid award'."

805. When authority of arbitrators comes to an end.—In *Ramji-*

ram v. *Saligram*, 11 Ind.Cas. 481=14 C.L.J. 188, the court observed: "In support of the second objection taken by the defendants, it has been argued that as soon as the arbitrators signed the joint memorandum on the 24th September, 1904, their authority came to an end, and they could not resile from the conclusion they had deliberately and unanimously adopted. In support of this proposition, reference has been made to the case of *Henfree* v. *Bromley*, 6 East 309=8 R.R. 491, *Trew* v. *Burton*, 1 C. & M. 533=2 L.J.Ex. 236 and *Brook* v. *Mitchell*, 6 M. & W. 477. Now, it may be conceded, that when the arbitrator has made or, it is said in some cases, made or published his award as completed instrument his power is wholly at an end. He has exhausted his authority he is thoroughly *functus officio*, he can do nothing more in reference to the arbitration or the subject-matter. He cannot reopen the case or make a new supplemental award nor alter or amend the award already made or file additional explanatory alternative or amending documents." What he has done must stand or fall without further aid or assistance from him, he can neither support nor impeach it: *Bayne* v *Morris*, 1 Wallace 67=17 Law.Ed. 495; *Chatteu Lal* v. *Charitar*, A.I.R. 1941 Pat. 215=195 Ind.Cas. 87. In other words, as has sometimes been said, if after executing the award the arbitrator exercises a fresh judgment on the case and alters the award in any particular, the alteration is merely nugatory and his act is like a spoliation by a mere stranger: *Irvine* v. *Elron*, 8 East 54; *Ward* v. *Dean*, 3 B. & Ad. 234; *In re Hall & linds*, 7 M. & G. 847; *Mordue* v. *Palmer*, L.R. 6 Ch. App. 22=40 L.J.Ch. 8=23 L.T. 712; *Davies* v. *Pratt*, 16 C.B. 586; *In re Stringer and Riley*, (1901) 70 L.J.Q.B. 19=1 Q.B. 105; and *Mountain* v. *Parr*, (1899) 1 Q.B. 805=68 L.J.Q.B. 447. But the general principle that, after arbitrators have made and delivered their award and their functions are at an end, they have no power to correct or alter the award, applies only to cases in which the arbitrators had made and delivered the award in its final form, it is well-settled that, until the arbitrators have finally published their award as their final determination, they may make alteration therein. A good illustration of this doctrine is afforded by the case of *Bodge* v. *Hull*, (1871) 59 Maine 225, where it was ruled that the delivery to the parties by the arbitrators of a paper, not as their award but as detailed statement of their conclusion, does not terminate the powers of the arbitrators and a formal award subsequently made and published is binding. See also, *Byars* v. *Thompson*, 12 Leigh 550=37 Am.Dec. 680. Now what constitutes a completion of the award, may obviously, depend upon the terms of the submission and upon the facts and circumstances of the individual case. In the case before us (14 C.L.J. 188), when the memorandum of the 25th September, was drawn and signed, the arbitrators recorded that the parties should value the properties and supply the necessary stamped paper upon which the award was to be engrossed. The order was carried out, but after the result of the deliberation of the previous day had been engrossed on the stamped paper, one of the arbitrators declined to sign it on the ground that he had misunderstood the meaning of the language used in the memorandum; in fact, the arbitrators were not agreed as to the import of the term 'assets' as used therein. Under these circumstances, we are of opinion that, when the memorandum was drawn up and signed, there was no such completed and final award as would exhaust the authority of the arbitrators to deal further with the matter. Vide 14 C.L.J. 188.

806. Award made subject to the decision of a committee.—

Where by an association's contract the arbitrators' award was made subject to the decision of the committee in appeal and in the particular case the committee reversed the arbitrators' award and their decision was sought to be filed in court, *held* that the award of the committee is not within the terms of the Arbitration Act, and cannot be filed under it. *Heeralal Agarwalla* v. *Joakim*, 31 C.W.N. 446=102 Ind.Cas. 395=A.I.R. 1927 Cal. 391. But this decision was reversed on appeal in *Heeralal Agarwalla* v. *Joakim*, 31 C.W.N. 730=103 Ind.Cas. 648=A.I.R. 1927 Cal. 647=55 Cal. 648 where *C. C. Ghose J.* said: "There is, as indeed is recognised by the respondents, nothing to prevent the parties from agreeing to a submission such as is contained in the contract before us. In other words, there is nothing to prevent the parties from agreeing to a submission containing in it a further submission to arbitration. No doubt in section 11 of the Indian Arbitration Act, there is not to be found any reference to arbitration by a committee; but in my view it does not matter in the slightest whether the committee is described as a fresh set of arbitrators.....The contract contains, as it were two submissions or a submission with in a submission." See also, *Surajmull* v. *Chandunmull*, A.I.R. 1927 Cal. 601=31 C.W.N. 686=103 Ind.Cas. 634; *Fazalally* v. *Khimji*, 36 Bom. L.R. 1005=A.I.R. 1934 Bom. 476.

807. Court.—"Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the arbitration proceedings under section 21, include a Small Cause Court. *Vide* section 2(*c*). If an application to file an award is made in a court which has no jurisdiction to entertain it, the proper order on it would be, not an order of dismissal, but an order for return of the application for presentation to the proper court. *Jhirighat* v. *B. Gupta*, I.L.R. (1940) 1 Cal. 358=188 Ind.Cas. 143=71 C.L.J. 62=44 C.W.N. 285=A.I.R. 1940 Cal. 220. A dispute between a bank and S was referred to arbitration under the provisions of the Arbitration Act. The arbitrator made an award in favour of the bank and filed it in the Court of the District Judges. The District Judge transferred the application and the award to the court of the Honorary Sub-Judge who on the acceptance of the award by the parties passed a decree in terms of the award. Subsequently, the designations of the various courts in the Province was altered and the Divisional Judge (old style) became the District Judge. The arbitrator and the bank presented a fresh application in the Court of the District Judge that the award be filed in his court. The court directed it to be filed. *Held* that the procedure adopted by the District Judge in sending the file to the court of the Honorary Sub-Judge was a nullity. All the proceedings were complete when the award was filed by the arbitrator subject to any action wnich might be taken by the court under section 13 and 14; the mere presentation of the award amounted to filing of it within the meaning of section 11, and as it was already filed, a second application for filing it did not lie and the order of the District Judge on that application was a nullity. *Sainditta Mal* v. *Lyallpur Bank*, 160 Ind.Cas. 693=A.I.R. 1936 Pesh 2.

808. Court cannot raise objection suo motu.—Where the parties to the proceedings for filing an award on an application under this section do not raise a plea that the agreement to refer, as well as the award and proceedings before the Court are collusive, the Court is not justified in raising such a plea, which is one of the fact, *suo motu* and

rejecting the application to file the award on that ground. *Sobha* v. *Faquir,* A.I.R. 1947 Lah. 24=225 Ind.Cas. 166.

809. Arbitration agreement—Essentials—Writing necessity.—In order to constitute an agreement in writing within the meaning of s. 2(a) it is not necessary that the agreement should be signed by both parties. All that is necessary is that the parties accept the terms of the agreement. The acceptance may be in writing or by conduct or by oral agreement. A.I.R. 1955 S.C. 812=1956 S.C.J. 64; *Ram Chandra* v. *Howrah Oil,* 62 C.W.N. 773=A.I.R. 1958 Cal. 620. The first ingredient of an arbitration agreement is that it should be the writing. *Sugar Dealers* v. *Sitaram,* 1958 A.L.J. 521; *Rungta* v. *Jugometal,* 63 C.W.N. 527= A.I.R. 1959 Cal. 423. In the above named case it has been held that for purposes other than the purposes of the Arbitration Act, an arbitration agreement which is not in writing is still recognised. In this view a subsequent oral agreement to rescind or abrogate a prior arbitration agreement in writing for purposes other than those of the Arbitration Act, is not bad. 63 C.W.N. 527=A.I.R. 1959 Cal. 423.

810. Jurisdiction of courts to entertain an award.—A reference to Section 92, Government of India Act, 1935, shows that the Arbitration Act, 1946, is not applicable to North Cachar Hills. Hence, in the absence of a notification by the Government of Assam under section 92 applying the Act to Northern Cachar Hills, the Courts in these Hills have no jurisdiction to entertain awards passed under this Act. *Chanda Singh* v. *Executive Engineer,* A.I.R. 1953 Assam 93.

811. Procedure of filing of award against minor.—The presentation of the application by the arbitrator to the court for the filing of an award comes within the category of civil proceedings within the meaning of section 141, Civil Procedure Code. Hence, where an award is against a minor it is incumbent to make a prayer in such application for a person being appointed the guardian of the minor. Where no such prayer is made the application and the orders thereon are nullity as against the minor and the minor can seek his remedy by an application under Order 32, rule 5, and not necessarily by a separate suit. *Amravir Singh* v. *Punjjab Zamindars Bank, Ltd.,* A.I.R. 1940 Lah. 164=189 Ind. Cas. 254=42 P.L.R. 114 See also, *Abdul* v. *Thakur,* A.I.R. 1928 Cal. 844 =113 Ind.Cas. 843=55 Cal. 1241=32 C.W.N. 665; *Moti Chand* v. *Balaram Das,* A.I.R. 1933 All. 116=143 Ind.Cas. 326=55 All. 136=(1932) A.L.J. 1128; but see *Eda Punnya* v. *Jangla Kama,* A.I.R. 1920 Mad. 713=53 Ind.Cas. 184=37 M.L.J. 399.

812. Whether court can compel arbitrators to file award where fees due to arbitrators not paid.—There was no provision in the Arbitration Act of 1899, by which the court could compel the arbitrators to file an award in court when the fees and charges due to them in respect of the arbitration had not been paid. *Dayasing* v. *Cherundas,* A.I.R. 1940 Sind 144=189 Ind.Cas. 806. But this defect has now been removed by enactment of section 38 which deals with dispute as to the arbitrator's fees and costs, and follows generally section 13 of the 1934 Act of Parliament and paragraph 13 of the Second Schedule to the Code. The court may require the arbitrator to deliver up the award on the deposit into court of the amount he claims, and may then investigate the claim and grant to the arbitrators such sums as fees as it thinks reasonable. See also *Narayan* v. *Dewaji,* A.I.R. 1945 Nag. 117=I.L.R. 1945 Nag. 323. The law does not contemplate that an arbitrator must proceed with arbitration proceedings without payment of his fees in case he wanted

them to be paid before acting in the arbitration proceedings. Demand of fees from only one party to the arbitration and refusing to act further on failure to pay it, does not amount to misconduct on the part of the arbitrator. *Teja Singh* v. *Union,* A.I.R. 1955 All. 666. In *Shib Krishna* v. *Sunil Kumar,* A.I.R. 1949 Cal. 189 it was also *held* similarly whether s. 14 (2) applies or s. 38 does, in either case, the applicant cannot have the award filed unless he pays off the balance of the fees due to the arbitrators. The Act does not provide that if any of the parties does not pay his share of the arbitrator's fees, the court has power to compel him to do so by means of an interim order at the interest of another party who has paid his share and wants to have the award filed. The Act does not contain any provision either in s. 19 or in s. 41 for passing *interim* orders before the stage at which the award is filed. The Act provides for two remedies only. One is that the party who wishes the award to be filed can have his will fulfilled by paying the costs himself. The recovery of the costs from the remaining parties must form the subject-matter of a separate proceeding or may perhaps be adjusted at the time of passing the final decree. The other remedy is that if it is found that the arbitration is being brought to nothing by the recalcitrance of one of the parties who is refusing to pay his share of the arbitrator's fees, the person aggrieved may also make that a ground for an application for superseding the reference. *Shib Krishna* v. *Sunil Kumar,* A.I.R. 1949 Cal. 189.

813. Ss. 14 and 30—Award as to costs setting aside by court (C. P. Code s. 35).—The basis and utility of arbitration as a method of determining disputes is that parties select their own tribunal and agree to be bound by its decision not only on fact but also in so far as they do not take advantage of the special remedies by way of case stated, on law. In general, an award of an arbitrator cannot be set aside for error, whether of fact or of law, except by the machinery which is supplied through case stated, save that if he chooses to make a speaking award, it may be set aside for error on its face. But an award can always be set aside for misconduct. An umpire who has not been asked to state an award in the from of a special case need not give any reason for any part of his award, whether the substantive part or the costs part. The umpire in an arbitration has power to deprive a successful claimant of his costs and, indeed, to order a successful claimant to pay the costs of the other side in appropriate circumstances. The court has jurisdiction, where it appears on the materials before it that an arbitrator has exercised his discretion in a non-judicial manner as to costs, to set aside his award so far as it relates to costs. It matters not whether the material on which the court comes to the conclusion that there has been a non-judicial exercise of discretion appears on the face of the award or appears by affidavit evidence which comes before the court. The court must judge his exercise of discretion as to costs by putting itself in the position in which he was where he made his award with all the errors of law or fact he made. *Heaven* v. *Seven,* (1958) 1 W.L.R. 248 = 1958 Yearly Degist pp. 30-31.

814. Ss. 14(2) and 30—Award not filed—Application for setting aside award—Maintainability.—Under S. 14(2) either the original award or its copy signed by the arbitrators has to be filed in court. If an award or its copy is in fact filed in court by a party, it is not a valid filing under s. 14(2) unless the party has the authority of the arbitrators or umpire. This authority of the arbitrators or umpire has to be specifically alleged and proved. A.I.R. 1953 S.C. 313 = 1953 S.C.J. 436 = (1953) 1 M.L.J. 841.

An application for setting aside an award on the grounds of s. 30 of the Act cannot be made unless the award is filed under s. 14(2). *Shriram* v. *Resident,* I.L.R. (1954) Nag. 126=1954 Nag.L.J. 262=A.I.R. 1954 Nag. 236. After refusing to set aside the award, the trial court made a decree giving effect to the award. Consequently it attracts section 39(i)(vi) of the Arbitration Act and it is not an appeal under s. 17 of the Act read with S. 96 of the C. P. Code. *Ramakishtam* v. *Somelingan,* (1962) 2 An. W.R. 469.

815. Notice of filing of the award.—The provision of this section is mandatory, and if notice of the filing of the award is not given to the parties no decree could be passed by the court on the basis of the award. *Mairanjan* v. *Asaruddi,* 43 C.W.N. 824. See also *Muhammad Hussain* v. *Lallu,* 17 Ind.Cas. 430=15 Oudh Cas. 294. Where a defendant does not appear before the arbitrator to whom dispute has been referred to for arbitration and the arbitrator makes an award, the court cannot pass a decree on the basis of such award without issuing notice to the defendant under para 10, Schedule II, Civil Procedure Code (=this section), and the failure to issue such a notice is fatal to the decree. The court has no jurisdiction to deal with the matter as if there had been no arbitration for two reasons. In the first place the arbitration has not been superseded, and in the second place, the court has no evidence before it on which to pass even *ex parte* decree as it cannot treat the report of the arbitrator as evidence. *Thakur Singh* v. *Kandhai,* 158 Ind.Cas. 904=(1935) A.L.J. 986=A.I.R. 1935 All. 852. Giving a notice of the filing of the award is obligatory on the court. *Rangaswami* v. *Muthuswami,* 11 Mad. 144; *Chatturbhuj* v. *Ganesh,* 20 All. 474; *Udit Singh* v. *Ram Lakhan,* A.I.R. 1933 All. 313=145 Ind.Cas. 403=(1933) A.L.J. 149; *Ram Kumar* v. *Khusal Chand,* A.I.R. 1928 Nag. 166=107 Ind.Cas. 668: *Mani Ram* v. *Ram Asray,* A.I.R. 1921 Oudh 148; *Sohan Lal* v. *Munna Lal,* 62 Ind.Cas. 849=A.I.R. 1921 Oudh 154; *Venkataramayya* v. *Pattayya,* A.I.R. 1943 Mad. 718=(1943) 2 M.L.J. 152. The provisions of this section are mandatory and the parties are entitled to notice of the date of the filing of the award even if they have knowledge of the date on which the award is filed. The omission to give such notice is material irregularity and if a decree is passed upon the award without giving such notice, the decree is liable to be set aside in revision. *Gurditta Mall* v. *Basanta Mall,* 89 Ind.Cas. 240=A.I.R. 1925 Lah. 619. See also, *Chaturbhuj* v. *Ganesh,* 20 All. 474=(1898) A.W.N. 132; *Punoo Ram* v. *Nebhraj,* A.I.R. 1930 Lah. 228=119 Ind.Cas. 331; *Ranjit* v. *Bissay Ram,* A.I.R. 1926 Cal. 1018=94 Ind.Cas. 115; *Gopinath* v. *Naresh* 63 Ind.Cas. 243; *Ma Shwe* v. *Maung* Tok, (1877-1910) 2 U.B.R. 24. *Baijnath* v. *Narain,* A.I.R. 1927 All. 614=102 Ind.Cas. 608=25 A.L.J. 787; bue see *Valchand* v. *Gulba,* A.I.R. 1926 Bom. 312=28 Bom.L.R. 511=95 Ind.Cas. 547; *Saroj Bala Bose* v. *Jatindra Nath Bose,* A.I.R. 1927 Cal. 619=45 C.L.J. 458=103 Ind.Cas. 625. *Bholanath* v. *Batta Krishna,* A.I.R. 1927 Pat. 135=95 Ind. Cas. 321=1926 Pat. H.C.C. 161=7 Pat. L.T. 739; *Srikrishna* v. *Relumal,* 34 Ind.Cas. 845. Where notice of the filing of the award issued to all the parties except the party who had himself filed the petition in court for a direction on the arbitrators to file their award and two other parties who had already appeared in Court and filed their objections the award was filed according to law. *Ramtaran* v. *Adharchandra,* A.I.R. 1953 Cal. 646. But the notice need not be in writing, formally delivered to the parties; it might be given orally if the parties are present in the court personally or by authorised agent at the time of the filing of the award. *Imam Din* v. *Allah Rakha,* A.I.R. 1942 Lah. 190=44 P.L.R. 249=20 Ind.

Cas. 462. So also a decree passed before the time allowed for objection is liable to be set aside. *Vellu* v. *Appaswami,* 9 Ind.Cas. 127=21 M.L.J. 444; but see *Pandurang* v. *Amritrao,* A.I.R. 1931 Nag. 112=27 N.L.R. 240=134 Ind.Cas. 282.

816. Time for giving notice.—Sub-section (1) of this section does not require that the making of the award, signing the award and giving notice to the parties should all be done at the same time; this section cannot be read as compelling the arbitrators to give notice on the same day on which the award is made and signed. It should be given within a reasonable time. *Bai Laxmi Bai* v. *Shridhar,* 45 Bom.L.R. 415=A.I.R. 1943 Bom. 221.

817. Notice must be given personally.—Under this section it is the statutory right of a party to be personally served with notice of the filing of the award and service except personal service is not a proper service, knowledge of the filing of the award acquired otherwise than in the way prescribed by this section cannot be considered to be proper service of the notice of the award. Service of notice on the advocate cannot be regarded as valid service under this section. *Holaram* v. *Governor-General,* A.I.R. 1947 Sind 145=I.L.R. (1946) Kar. 459. The notice, of course, need not necessarily be in writing but may be given orally if the parties are present in Court at the time of filing of the award. But such verbal notice must be given explicitly and cannot be implied from the order recording the filing of the award in the presence of the parties. *Harichand* v. *Lachman,* 50 P.L.R. 57=A.I.R. 1948 E.P. 11=2 D.L.R. 956. As regards the manner of service of notice there is no express provision. The Arbitration Rules framed by the Calcutta High Court makes it clear that the notice of the filing of the award must be in writing and in a presented form. *Ganeshmal* v. *Keshoram,* 55 C.W.N. 349. Where a court passes an order to the effect that the objection to the award should be filed on a particular date in the presence of the counsel for a party (who is absent) such order amounts to sufficient notice within the meaning of s. 14(2). *Chhotelal* v. *Jamnadas,* 1962 Jab. L.J. 421=A.I.R. 1963 M.P. 20.

818. Ss. 14 and 25—Arbitration in pending suits—Non-service of notice—Effect.—It is clear, in view of the provisions of s. 25, that the provision of sub-section (1) of s. 14 are applicable, so far as it is possible to apply, to cases of arbitration in suits pending before court. Where therefore, a court has fixed a time for making and filing the award the objection of giving notice of the making and signing of awarw which is so necessary in private arbitration loses its significance because of the provisions in sub-section (2) of S. 14 and no question of limitation would arise if the award is filed within the time which the court has to fix under s. 23 or within such time as the court under s. 28 may have extended. Apart from that if the object of giving notice in a private award is to enable the parties to apply to the arbitrators or the court for having the award filed in court and the same is achieved in the case of arbitration in suits pending before the courts, then the only mandatory provisions of s. 14 would be that relating to the notice being given by the court of the award having been filed. *Ram Krishnamma* v. *Lakshinarain,* 1958 Andh. L.T. 338=1 I.L.R. (1958) Andhra 166=(1958) 2 Andh. W.R. 90=A.I.R. 1958 Andh. Pra. 497.

819. S. 14 and s. 30 and Sch. 1, Para, 2,—If it can be prevented, no clause, sentence or word in a document should be ignored as superfluous, void or insignificant. A construction which bears without effect any

part of the language of the agreement cannot be accepted. The words "the umpire shall sit with the arbitrators and preside at their meetings ....." clearly contemplated a stage when the arbitrators were in seisin of the reference and the umpire merely sits with them and presides over their meetings without taking any active part in the reference. By sitting with the arbitrators and presiding at their meetings the umpire does not enter upon the reference because his duties do not arise until the arbitrators disagree. When the umpire took up the burden of umpirage following disagreement, the arbitrators would have nothing further to do with reference and it would be the umpire who functioned alone in lieu of the arbitrator. Consequently the arbitrators in the case could not proceed until the arbitrators had appointed an umpire before they entered upon the reference. Where that was not done, the whole proceeding before the arbitrators was illegal and void, even though the award was unanimous. *New Great Insurance* v. *Bihari Lal*, 1958. B.L.J.R. 488.

820. Plea of non-service of notice whom to be raised.—A point as to non-service of notice of the filing of an award under this section, cannot be raised for the first time in revision. *Mafizuddin* v. *Alimuddin*, A.I.R. 1950 Assam 191. Under sub-section (2), the arbitrator has a right to file an award. He has also a further power to see that his acts are not ignored and he can pursue the matter to a superior Court. The Court is bound to give to the parties notice of the filing of the award, and if this is not done, without reason, then the arbitrator can move the High Court in revision. *Gundalal* v. *Motilal*, A.I.R. 1951 Nag. 32=1951 N.L.J. 243.

821. Order declining to file an award.—There is no provision in the Arbitration Act for appeal against an order refusing to file an award. But an appeal filed through mistake can be heard as a revision. *Peoples Bank of Northern India* v. *Lekhu Ram*, 173 Ind.Cas. 11=40 P.L.R. 79=A.I.R. 1938 Pesh. 3.

822. Whether such award can be challenged by the other party by suit.—Sections 32 and 33 provide that an arbitration agreement or award shall be contested only by application and not by suit. So "no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affect otherwise than as provided in this Act." *Vide* section 32 (*infra*). His remedy lies in section 33 of this Act. *Vide Rashid* v. *Moolchand*, A.I.R. 1946 Mad. 371=(1949) 2 M.L.J. 98.

823. Enforcement of award by successful party.—If a person who is unsuccessful wishes to question the existence, validity or effect of the award passed under the Act, he is bound to do so only by resort to Sections 32 and 33 of the Act. If a successful party were to bring a suit to obtain the relief that is granted to him by the award, it cannot be gainsaid that the plaintiff must prove the fact of the award *i.e.*, its existence, before he gets relief. When the otherside questions the existence or validity or effect of the award, question regarding the existence, validity or effect of the award would be directly raised. If an award is alleged by the plaintiff, obviously the defendant must be allowed to raise the question of the existence of the award. But under Section 31 (2) even the existence of the award shall not be determined by any court except the Court in which the award may be filed. This provision indicates that even a successful party to whom a relief is given under the award must seek to enforce it in the court in which the award may be filed, that is by proceeding under S. 14 of this Act. No separate suit lies for that purpose.

Rashid v. *Mool Chand,* A.I.R. 1946 Mad. 371=(1945) 2 M.L.J. 98, see also *Deoki Nandan* v. *Basantlal,* A.I.R. 1941 Cal. 527=I.L.R. (1941) 2 Cal. 123=196 Ind.Cas. 851 ; but see *Nanhelal* v. *Singhai,* A.I.R. 1944 Nag. 24 =I.L.R. (1944) Nag. 340=210 Ind.Cas. 473.

824. Award made but not filed in time—extension time by court. —Where the arbitrators have made the award but not filed it within time, the court has jurisdiction to extend the time for filing it. *Dhan Sukh Lal* v. *Navnit Lal,* A.I.R. 1934 Bom. 398=152 Ind.Cas. 1068=36 Bom. L.R. 831.

Now under Article 119 of the Schedule of the Indian Limitation Act, 1963 an award may be filed in court within thirty days from the date of service of the notice of the making of the award. So the party who wishes to have the award filed in court must make the request within the period.

825. Sub-section (2)—Notice under—Omission to issue notice—effect.—The omission by the court to intimate the parties of the filing of award is against the mandatory provision because it is designed to give an opportunity to the parties to file their objections against the award, the non-compliance of which will certainly vitiate the award, *Ram Krishamma* v. *Lakshmibayamma,* A.I.R. 1958 Andhra Pra. 497=(1958) 2 W.R. 90= I.L.R. (1958) Andh. Pra. 116.

826. Letter to the court by arbitrator filing award—Limitation.— Art. 178 of the Limitation Act of 1908 *does not apply to the filing of the award by the arbitrator. The arbitrator does not make an application to the Court when he files his award and intimates to the Court by the letter that he made the award and that award should be taken on file. It is only when such an application is made by a party to the reference the application of Art. 178 is attracted. *Jayanti Lal* v. *Chhaganlal,* 47 Bom.L.R. 317 =A.I.R. 1945 Bom. 417. There is nothing in the section which precludes the arbitrators from the award. It is not correct to say that only the parties to the arbitration should make an application in Court for filling an award or causing an award to be filed. *Narayan* v. *Dewaji,* A.I.R. 1945 Nag. 117=I.L.R. 1945 Nag. 323=1945 N.L.J. 169. Where arbitrators make an application for filing an award at the request of the parties to the arbitration the proper procedure is to allow the parties to the arbitration to take up the litigation in their hands and relieve the arbitrators. If the application is dismissed as untenable the mere fact that the person who originally filed the application in the trial Court, *viz.*, the arbitrators, have not filed the revision application, should not disentitle the persons aggrieved from continuing the revision application before the High Court. *Ibid.*

827. Filing of award by parties.—Where parties accept an award and apply to court for filing it, the court should not refuse to file it basing its view on some correspondence between the Registrar of the High Court and the District Judge, which it is not entitled to look at. *Kanshi* v. *Sampuran,* 38 P.L.R. 318.

828. Ss. 14 and 17—Application for filing award in court—Limitation.—An application Ss. 14, 16 and 31—Applicability to foreign Arbitration—Section 31 (4) confines jurisdiction to the particular court out of the many which may have jurisdiction in the matter under sub-section (1), in which the award has actually been filed. The filing, however, is done under s. 14 and, once the award is filed in court under that section, the sections following the said section 14, including the section 16 at least,

*See now Art. 119 of the Limitation Act of 1963.

which deals with the remission of the award, cannot effectively apply to foreign arbitration and foreign award. The court, will have obviously no control over the arbitrator or arbitrators and it may will be impossible to take any effective action under the said section. *Serajuddin* v. *Michael*, 63 C.W.N. 717.

It is only when the award is filed for the arbitrator or umpire in court that the court can deal with it as provided under S. 17.

The party has no interest to file an application for the purpose. *Basappa* v. *Chanabasappe*, A.I.R. 1960 Mys. 190.

829. Ss. 14, 16 and 31—Applicability to foreign arbitration.—Section 31(4) confers jurisdiction under s. 17, and would not attract Art. 178 of the Limitation Act. That article applies only to an application for filing an award in court which can only be made under s. 14. The *terminus a quo* is the service of notice of the making and signing of the award, etc. The fact of knowledge of the parties would not dispense with the necessity of service of notice in order to invoke the penalty of dismissal under Art. 178, Limitation Act. *Puffalla* v. *Nagidi*, 69 Mad. L.W. (Andhra) 163 = A.I.R. 1952 Andhra Pra. 11.

830. Scrutiny of award.—There is no rule of law that the arbitrator must decide all issues framed in the suit expressly as long as the whole suit is decided by him. He is not bound by any rules of procedure or those of evidence, and it is not open to the parties to pick holes in the decision by a tribunal if their own choice on these grounds. The Court which is called upon to register his decision is not a Court of appeal and cannot scrutinise it in the same way as Appelate Court. *Madanlal* v. *Nabibaksh*, 226 Ind.Cas. 241 = 48 P.L.R. 377.

831. Art. 158 of the First Schedule of the Limitation Act.—By Fourth Schedule of the Arbitration Act the following amendment has been made to Art. 158 of the First Schedule, of the Limitation Act 1908* namely:—

Description.	*Period of limitation*	*Time from which period begins to run.*
158. Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for reconsideration.	Thirty days.	The date of service of notice of filing of the award.
Under the Code of Civil Procedure, 1908, to set aside an award.	Ten days.	When the award is filed in Court and the notice of the filing has been given to the parties.

832. Scope.—Under Art 158 Limitation Act, three things are necessary for fixing the necessary point of limitation: (1) the award must have been filed; (2) in court, and a notice of the filing has been given to the parties. *Imamuddin* v. *Allah Baksh*, 201 Ind.Cas. 462 = 44 P.L. 243 = A.I.R. 1952 Lah. 190. Art. 158 of the Limitation Act is not applicable where the award is void on the face of it. *Lala* v. *Abdur*, 17 Ind.Cas. 320 (327). An application cannot be made to set aside an award till it is filed in court. *Bengal Jute Mills* v. *Jewraj*, I.L.R. (1943) 2 Cal 392 = A.I.R. 1944 Cal. 304. Under Art. 158, as it now stands, objections to the award

*See now Art. 119 of the Limitation Act of 1963, which prescribes "thirty days" as the period of limitation.

have to be put in within thirty days from the date when notice of the filing of the award is given to the parties concerned. *Harichand* v. *Lachman,* A.I.R. 1948 East Punj. 11=50 L.R. 57.

Under Art. 158, the starting point of limitation is the date of the service of notice of filing the award. The provision as to service of notice of filing the award in s. 14 is mandatory and the court has no power to pass a decree on the award unless notice is given to the parties to file objections. But where a party who is already cognisant of the filing of the award appears in the case and applies to the court for leave to examine the award and for time to file objections, service of notice of filing the award becomes unnecessary. In such a case even if the court has failed to give notice to him, the date when he enters appearance in the proceedings will be deemed to be the date of the service of notice of the filing of the award and an application filed more than 30 days from such date will be barrer under Art. 158—*Bholanath* v. *Mahadev,* A.I.R. 1952 Cal. 226.

If a party to an award wants to challenge the validity of the award on any ground and decides that the award should either be remitted or set aside he has to make an application in that behalf under s. 33 within the time prescribed by Art. 158. If the award directs a party to do an act which is prohibited by law or if it is otherwise partially illegal or void it would be open to the court to consider this patent defect in the award *suo motu,* and when the court acts *suo motu,* no question of limitation prescribed by Art. 158 can arise. The words used both in s. 17 and s. 30 are wide enough to include the jurisdiction of the court to deal with matters covered by those sections *suo motu. Hastimal* v. *Hiralal,* A.I.R. 1954 Bom. 243; see also *Ramaswami* v. *Muthuralaya,* A.I.R. 1954 Mad. 560. A party barred by limitation from making an application to set aside an award cannot either resist the filing of the award or show grounds upon which the award can be set aside. *Pant* v. *Joseph,* 61 L.W. 349=1948 M.W.N. 476=A.I.R. 1948 Mad. 512=(1948) 1 M.L.J. 376.

833. Art. 178 of the First Schedule of the Limitation Act.—By the Fourth Schedule of the Indian Arbitration Act, the following amendment was made to Art. 178 of the First Schedule of the Limitation Act of 1908*:—

Description of application.	*Period of limitation*	*Time from which period begins to run.*
178. Under the Arbitration Act, 1940, for the filing in Court of the award.	Ninety days.	The date of service of the notice of the making of the award.

834. Scope.—Under Art. 178 it must be an application made to court for the filing in court of an award which can come under the artcle. When the arbitrator files the award under S. 14(2) at the request of a party to the Arbitration agreement he does not, in view of the provisions of Ss. 373 and 375, Bombay High Court Rules, framed under the Arbitration Act, make an application to the court but does an act which the statute requires him to perform and intimates to the court by his letter of request that he has made an award and that it should be taken on file. There Art. 178 does not apply to the filing of the award by the arbitrator

*See now Art. 119 of the Limitation Act of 1963, which prescribes "thirty days" as the period of limitation.

at the request of one of the parties to the arbitration agreement. It is only when a party to the arbitration agreement applies to the court to direct the arbitrator to file the award and the arbitrator in pursuance of the order of the court files the award then Art. 178 applies and if the application to the court is beyond 90 days of the service of the notice on the party then the application is barred by limitation. *Joyantilal* v. *Chhaganlal,* A.I.R. 1945 Bom. 417=47 Bom.L.R. 317. In the above case *Chagla, J.* observed : "It cannot apply to anything done by one who is not a party to the proceedings and who is not interested in the result of the proceedings and, therefore, it could not have been intended that any act on the part of the arbitrator should be controlled by an Article of the Limitation Act. In my opinion, therefore, when an arbitrator files his award he is not making any application to the court and therefore, Art. 178 does not apply to the filing of the award by the arbitrator. I am strengthened in the conclusion I have reached by two decisions—one of the Calcutta High Court and the other of the Sind Chief Court. In *Keshrimull* v. *Megh Raj Basdeo,* A.I.R. 1942 Cal. 543= I.L.R. (1942) 2 Cal. 69, on almost identical facts *Gentle, J.*, came to the same conclusion and *held* that Art. 178 of Schedule 1, Limitation Act, did not apply to an award already filed in court. The Sind Court also, in *John* v. *Soomar,* A.I.R. 1943 Sind 33=I.L.R. (1942) Kar. 466=205 Ind.Cas. 304, came to the same conclusion." So the period of limitation provided by Art. 178 of the Limitation Act refers to an application made to the court's order under the Act by a party to an award to obtain an order directing the arbitrator to file the award. It does not apply to an award which had already been filed in court, although it was in fact filed more than ninety days after notice of it had been served. *Keshri* v. *Megh Raj, supra.* An application filed along with an award for making it a rule of the court is not governed by Art. 178. *Jaikishen* v. *Ramlall,* 48 P.L.R. 232=A.I.R. 1944 Lah. 398. The period of 90 days referred to in Art. 178 of the Limitation Act is to be completed from the date when one of the parties or both file an application in court under S. 14 and has no reference to the time when the arbitrators or umpire are requested to file the award. *Lachmi* v. *Gobardhan,* A.I.R. 1948 Pat. 171.

In *Gundalal* v. *Mathuradas,* A.I.R. 1951 Nag. 32=1951 N.L.J. 248, the court observed : "It has been held in series of cases that Art. 178, Limitation Act, 1940, does not apply to an arbitrator ; see *U. N. Mitra's Limitation Act* (7th Edn.) page 1107 ; also *John B. Paos* v. *Soomar,* I.L.R. (1942) Kar. 466=A.I.R. 1943 Sind 33, *Joyantilal Jamnadas* v. *Chagganlal,* A.I.R. 1945 Bom. 417=I.L.R. (1946) Bom. 113, *Dwarkadas* v. *Pearylal,* A.I.R. (1949) All. 234 (236)=1948 A.L.J. 524 ; *Lachmi* v. *Gobardhan,* A.I.R. 1948 Pat. 171 ; *Keshrimall* v. *Megh Raj,* I.L.R. (1942) 2 Cal. 69= A.I.R. 1942 Cal. 542 ; *Jai Kishen* v. *Ramlal,* A.I.R. 1944 Lah. 398=46 P.L.R. 232, I respectfully agree with the reasons given in these cases.' See also *Radha* v. *Madhu,* A.I.R. 1952 All. 856=1952 A.L.J. 405.

The question of interpretation of Art. 178 arose before a Division Bench of the Patna High Court in the case of *Jagadish* v. *Sundar Mahton,* 27 Pat. 86=A.I.R. 1949 Pat. 393, where however it has been held that notice referred to in the third column of Art. 178, is notice in writing as required by S. 14 (1) of the Arbitration Act to be given by the arbitrators. Time runs only from the date of the service of the notice under S. 14 (1).

In the course of his judgment, *Rauben, J.* said : "Under Art. 178 of

Sch. 1, Limitation Act, as amended by the Arbitration Act, 1940, the period of limitation for an application under S. 14(2) is 90 days from 'the date of service of the notice of the award.' It is pointed out that the award is said to have been made in July 1941 and that according to the applicants it was accepted and partly acted on by the parties. Hence, it is argued an application under S. 14(3) filed in November 1943 is hopelessly barred by time. The answer to this argument is that the notice referred to is the notice in writing required by S. 14(1) to be given to 'the arbitrators. In Art. 178 as it formely stood the starting point for the running of limitation was the date of the award. When this has been altered by the Arbitration Act, to the date of service of the notice of the award,' and we find that the provision for notice of the award is a new one (*vide* para. 10, Sch. 2, Civil P.C. 1908), it seems proper to connect the two and to take it that time runs from the date of service of the notice under S. 14(1). This interpretation is supported by the use of the word 'service', which in its ordinary connotation implies something more than a mere verbal communication of particular part. It is generally used in connection with written documents the contents of which are required to be communicated to some person.....If the power of a party to apply to the court to direct the filing of the award depends on the service of the notice under S. 14(1), the arbitrators would be able to hold up proceedings by delaying service of the notice. Hence, the interpretation which I have placed on sub-section (2) is consistent with the policy of the Act. Therefore, as soon as a party knows an award has been made it is open to him to file an application to the court to direct the award to be filed. Time will, however, not run against him till a written notice has been served upon him as required by sub-section (1). This provision is necessary as a safeguard"

In *Gangaram* v. *Radhakishan,* A.I.R. 1952 Punj. 350=54 P.L.R. 389, court observed : "Now an application under S. 14 is covered by Art. 178 of the Limitation Act and such application must be made within ninety days 'of the date of service of notice of the making of the award.' This means that an application under S. 14 must be made within ninety days of the day when the applicant comes to know of the existence of the award. The award in the present case was signed by both parties on 21st January, 1943 and *Radha Kishan,* therefore, knows that the award had been made. In other words he had notice of it. His application should therefore have been filed within ninety days of 21st January, 1943 and not having made until 2nd February, 1946, it is clearly barred by time."

In a recent Nagpore case a Division Bench consisting of *Bose, C.J.* and *Deo, J.* observed : "The provision for giving notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and the award is for the purpose of limitation under Art. 178, Iimitation Act, entitling either party to apply to the court for filing in court of the award. No time is fixed for the giving of such notice by the arbitrator and it has been held in several cases that it may be done within reasonable time by the arbitrator or his agent. A notice may be given to one party and may not be given to another party for a longer period. It cannot be said that an award becomes final so far as the first party is concerned and not as against the other entitles the arbitrators to scrap the award and make a fresh one.....An arbitrator is entitled to file an award in court under S. 14, sub-section (2). If he does so, the court is bound to give notice

to the parties of the filing of the award." A.I.R. 1951 Nag. 198 (201).

Where an award made on a reference out of court has not been filed into court at the instance of any of the parties thereto within the time permitted by Art. 178 of the Limitation Act, 1908, it will be open to the court to pass a decree in terms thereof, if it produced before the court by the Arbitrators themselves; it would then be competent to the court to investigate the validity of such an award. Art 178 of the Limitation Act does not apply for the filing of the award, if it were forwarded to the court by the Arbitrators for being filed. *O. Mohamed Yusuf* v. *S. Hafez Mohamed* 76 Mad.L. 482=(1963) 2 Mad.L.W. 287=(F.B.). A judgment and decree on the basis of an award is not permissible without the proper filing of the award under S. 14. In such a case there can be no comencement of the period of limitation for an application under Art. 158 of the Limitation Act to get the award set aside or remitted. *Seth Ramrichpal* v. *Ajmir Traders* 1962 Raj L.W. 546=I.L.R. (1962) 12 Raj. 820=A.I.R. 1962 Raj. 87.

835. Sections 14(2) and (3), 16 and 30—Scope of—Jurisdiction of Civil Court to interfere award.—While S. 14(2) of the Arbitration Act requires *inter alia* that particular document should be submitted along with the award, S. 16 refers to cases where remission of award is permissible and S. 30 enumerates the grounds on which award may be set aside. *Natha Subramanyam* v. *Murla,* (1958) 2 An.W.R. 646=I.L.R. (1958) A.P. 600=A.I.R. 1959 A.P. 199.

836. Ss. 14, 15, 16, 17 and 18—Sub-section (2) of Section 14 is not exhaustive.—Sub-section (2) of section 14 presupposes that the arbitrator or umpire is alive and avaliable or, at the most, if he is dead or not available after, he has before his death or departure from the place authorised a party or some one else to file the award in court on his behalf. Where the arbitrator dies before filing the award and without authorising any one to file it on his behalf, the section can have no application. Where the section could apply it may be entirely proper to insist on the strict observance of all the terms but there is nothing in the Act to indicate that the provisions of the section are exhaustive and that where sub-section (2) cannot apply the award cannot be filed at all.

Where S. 14(2) cannot apply the court may in proper case make an order for the filing of the award under S. 151 of the C. P. Code, where already before the death or departure of the arbitrator there is an application before the court for directing the arbitrator to file the award. It is true that the Code has been made applicable by S. 41 of the Act to proceedings before the court's subject to the provisions of the Act, but in the case contemplated there is a proceeding before the court and there can be no question of conflict in applying S. 151 of the Civil Pro. Code with S. 41 which does not apply at all.

It is not correct to say that an award filed otherwise than under S. 14(2) can be of no use because the provisions of Ss. 15 to 18 of the Act could be applied only where an award is filed under S. 14(2). None of those sections made the filing of the award under S. 14(2) a condition precedent to the recognition or entertainment of the award. The only basis on which they proceed is that there is an award before the court. Therefore if the court can make an order for filing of an award in a case under S. 151 of the C.P. Code, they can also implement that order by directing notice to be given of the filing under that section. *Panchanon* v. *Union,* A.I.R. 1959 Cal. 84.=63 C.W.N. 382. From a reading of Ss.

14, 15, 16, 17, 30, 31(1), 32 and 33 of the Arbitration Act, it is clear that the Legislature meant to fix a definite time-limit within which the existence or validity of an award could be challenged after it is filed in court and to provide an expeditious method of getting an award translated into a decree and made enforceable as such. *Kasiraju* v. *Vendukuri* (1960) 1 Andh. W.R. 125=1900 Andh L.T. 88=A.I.R. 1960 A.P. 576.

837. Suit to enforce an award—Parties.—Where a person was *co-nominee* and a party to the reference to arbitration proceedings, he could not have been impleaded as a party to the proceedings to enforce the award and so the court would have no jurisdiction to appoint a Receiver in respect of his properties. *S. K. Mahomed* v. *Noor Mahomed,* (1958) 1 M.L.J. 94=A.I.R. 1954 Mad. 149 (1950) 1 M.L.J. 237.

SUB-SECTION (3).

838. Sub-section (3).—The effect of s. 14(3) of the Act read with s. 13(b) is that the court's opinion can be sought by the Arbitrator on a question of law involved. Where the Arbitrators find difficulty to decide it for themselves and which decision when given in the opinion of the court will help and assist them in making the award and not defeat this very jurisdiction to make the award questions of law which go to the very root of the jurisdiction of the arbitrators themselves to act as arbitrators to conduct the arbitration proceedings and to make the award as arbitrators cannot be asked by the arbitrators by a procedure of a statement of case under S. 13(b) read with S. 14(3). The true interpretation therefore, of the word involved in S. 13(6) is that the questions of law must be immanent in the dispute in the sense that this decision will help the arbitrators in making true and just award and not transcendent. *Clive Mills* v. *Swalal,* A.I.R. 1957 Cal. 692 ; (1954) 1 W.L.R. 1494.

The sub-section reproduces section 11 (3) of the Indian Arbitration Act of 1889. See also, paragraph 11 of the Second Schedule of the Civil Procedure Code. This sub-section provides that where the arbitrators or umpire have stated a special case under clause (*b*) of S. 13 and the court after giving notice to the parties and hearing them, has pronounced its opinion thereon, such opinion is to form a part of the award. A special case stated for the opinion of the court must be confined to questions of law only and it is not open to the court to decide questions of facts raised by the arbitrators or the umpire. *Lakshman* v. *Ramchandra,* 84 Ind.Cas. 378=26 Bom.L.R. 386=48 Bom. 663=A.I.R. 1925 Bom. 22. See also notes under clause (*b*) of section 13 (*ante*). Before expressing opinion in a special case, the court is bound to give parties notice for hearing them. *Ibid.* The court's powers of interference regarding awards passed by arbitrators is limited in scope. The court is not competent to go into merits or otherwise of the decision but is entitled to correct only any obvious errors or patent mistake or other error which would appear on the face of the award. The court has no power in a petition, filed by the arbitrator under S 14 for filing an award, to add necessary parties under Order 1, Rule 10 of the C. P. Code, persons who were *co-nominee* not parties either to the agreement of reference or to the award. *Subramanian* v. *Vesudevan,* 63 L.W. 174=A.I.R. 1950 Mad. 48=(1950) 1 M.L.J. 237.

839. Bogus reference.—No decree can be passed on bogus arbitration agreement and award. *Motu Mal* v. *Haji Ibrahim,* I.L.R. Kar. 390.

840. Appeal.—Under section 39(1) (*ii*) an order on an award stated in the form of a special case is appealable. The parties to a suit agreed to refer the matter in dispute to arbitration. The agreement also provided that in that case of disagreement between the two arbitrators, the matter in difference was to be referred to an umpire. The arbitrators differed, and without referring their difference to an umpire, stated a special case for the opinion of the court on the points of difference between them. *Held* that the order of the court was not an order on an award stated in the form of a special case and was not therefore appealable. *Purshotam* v. *Ram Gopal,* 8 Ind.Cas. 171=35 Bom.L.R. 130=12 Bom. L.R. 852. Where application to file award was finally rejected, the order amounted to setting aside award and was appealable *Nawab* v. *Nawab,* A.I.R. 1959 All. 777.

841. Revision.—Where application for arbitration has been held untenable, a revision not by arbitrators but by person aggrieved is not incompetent. *Narayan* v. *Dewji,* A.I.R. 1945 Nag. 117=I.L.R. 1945 Nag. 323. An order refusing to file an award under S. 14(2), as distinct from an order refusing to file an arbitration agreement is not among the appellate orders mentioned in S. 39 of the Act. Accordingly no appeal lies. A revision however will be competent provided of course the matter falls under S. 115 C. P. Code. *Narayan* v. *Mohan,* I.L.R. (1950) Nag. 823= A.I.R. 1951 Nag. 297.

842. Decree passed on award before expiry of time.—If a decree is passed by a court on the award of an arbitrator before the expiry of the time for making an application to set aside the award, then such a decree should be deemed as passed without jurisdiction. In such a case the period of filing objection is 30 days. *Appa Rao* v. *Mohammad,* 61 L.W. 516=1948 M.W.N. 652=(1948) 2 M.L.J. 236=A.I.R. 1949; 256=4 D.L.R. (Mad). 45

843. Section 14 and 17—Scope of.—An application to Court by one of the parties to the agreement to file the award is an application under S. 14 and not under S. 17 of the Act. An application under S. 14 is covered by Art. 178 of the Limitation Act* and such application must be made within ninety days of "the date of service of the notice of the making of the award." This means that an application under S 14 must made within ninety days of the day when the applicant comes to know of the existence of the award. *Ganga* v. *Radhakishan,* A.I.R. 1952 Punj. 350=54 P.L.R. 389. Art. 178 of the Limitation Act applies only to applications under S. 14 of the Arbitration Act and not to those under S. 17. *Radhakishan* v. *Madhokrishna,* A.I.R. 1952 All. 856=1952 A.L.J. 405; A.I.R. Lah. 398.

844. Foreign properties.—It is not incompetent either to arbitrator or to the Court to record an admission of title to foreign properties by the parties and to incorporate it in the award decree. *Chidambaram* v. *Subramanian Chettiar,* (1952) 2 M.L.J. 521=A.I.R. 1953 Mad. 492.

845. Ss. 14(2) and 30(c).—The making of an award is a judicial act, while the filing of the award is a mere ministerial act. The filing of an award beyond the time allowed for filing it does not amount to misconduct for which the award is liable to be set aside, for, in such a case, the court has always power to extend the date for filing the award. *Padmabati* v. *Pannalal,* A.I.R. 1959 Cal. 156.

846. Ss. 14, 16, 30—Error apparent on the face of the award.—

*See now Art. 119 of Limitation Act of 1963, which prescribed 30 days.

The phrase "error" of law on the face of the award" has come up for judicial interpretation in *Champsey* v. *Jivraj,* A.I.R. 1923 P.C.=I.L.R. 47 Bom. 578 (P.C.). Their Lordships said: "An error in law on the face of the award mean, in their Lordships' view, that you can find in the award or *a document actually incorporated thereto,* as for instance a note appended by the arbitrator stating the reasons for the judgment, some legal proposition which is the basis of the award and which you can say is erroneous". See also *Kelanton* v. *Duff Development,* (1923) A.C. 395 (409); *Saleh Mahomed* v. *Nathumal, A.I.R.* 1927 P.C. 164= I.L.R. 55 Cal. 126; *Durga Prosad* v. *Sew Kishen,* A.I.R. 1949 P.C. 334. It is clear that a document cannot be said to be incorporated by mere reference to the award. *Natha* v. *Menta,* A.I.R. 1959 Andhra. Pra. 199. It is not obligatory to arbitrator having regard to the provisions of section 14(2) to send the inference that he followed down in the register. They were his private notes to be used in the analysis and understanding the case in certain aspects. They cannot be called a part of the award as it was not intended by the arbitrator as such they cannot be looked into for purposes of section 16 or section 30 of the Act. *Ibid.* Certainly the award must be taken at its face value. It is not open to the court to read in the award which are not there and then draw inference therefrom. Further, it is the duty of the court so far as it may be to look at the award in the way most favourable to its preservation. A document cannot be said to be incorporated by a mere reference in the award. It is necessary that having regard to the language of the arbitrator it was incorporated in the award. Otherwise it is not permissible to look into that document to find out the error of law. While S. 14(2) requires *inter alia* that a particular document should be submitted along with the award, S. 16 refers to cases where remission of award is permissible and S. 30 enumerates grounds on which award may be set aside. When a matter in difference is referred to an arbitrator, the jurisdiction of the ordinary court is ousted save for purpose of controlling the arbitrator, preventing misconduct and regulating procedure after the award. The arbitrator becomes the sole judge of law and fact in that matter and his award cannot therefore be reviewed or interfered with by the court except in the matter expressly provided for by the Arbitration Act.

The parties too having made themselves bound by the decision of the forum cannot complain if they get something which may not appear to them just unless they make out the stringent grounds on which the award in law may be remitted or set aside. A.I.R. 1959 Andh.Pra. 199. A contemporaneous document may be looked into if it contains reasons or is a document accompanying or forming part of the award. *Hodkinson* v. *Fernie,* (1857) 3 C.B. (N.S.) 189 (202); see also *Rex* v. *Northumberland,* (1951) 1 K.B. 711 (714).

847. Ss. 14, 33—Application under s. 14—Procedure to be followed—Admissibility of oral evidence.—An award made without the intervention of a court was taken to court under S. 14. Several objections were raised by one of the parties including allegations of judicial misconduct. The objecting party wished to produce oral evidence but the court disallowed the request. *Held,* that questions whether an award should be filed and a judgment should follow upon it or not, are to be dealt with in the ordinary way in which suits are dealt with under the provisions of the C. P. Code; were this not so, there would be no objection

in evading S. 41 which makes the provisions of the Code of Civil Procedure applicable to arbitration proceedings before the court. But this does not mean that whenever an application is made under S. 14 it will never fall under S. 33. It is conceivable that there may be such cases.

Held, also that as the applicant had raised a large number of objections, some of which involved points of fact which ought to have been scrutinised and determined with a little more circumspection, the court should have given an opportunity to the parties to produce their oral evidence before deciding the questions whether the award was a valid award and whether a judgment in its terms should follow. *Moti Mahal* v. *Babu Lal*, A.I.R. 1955 Punj. 109.

848. Sections 14(2) and 30—Award filed.—Application for setting aside.—Where after an award had been filed, an application is made to the court for setting it aside and it set it aside, dismissing the application for a judgment on the award by the same order, an appeal against the order which contains both the directions is competent. A separate appeal from the order repecting the application for a judgment on the award is not required. *Fateh Chand* v. *Juggilal*, A.I.R. 1955 Cal. 456=59 C.W.N. 223.

849. Section 14(2) and 20.—Objection to arbitration agreement on ground of minority of party should be raised when application under S. 20 is made. It cannot be raised after filing of award in court. *Kapur* v. *Rajkumar*, A.I.R. 1955 Punj. 235.

850. Filing award by arbitrator—Section 14—court fee.—Under s 14 of the Arbitration Act there is a well marked distinction between a case when an arbitrator himself applies to have the award filed and a case where the parties pray the court for giving direction to him to file an award. Art. 11(*n*) of Schedule II of the Madras Court Fees and Suits Valuation Act would apply only to cases where the parties seek a direction of the court for directing an Arbitrator to file an award. It cannot apply to cases where an Arbitrator, without any direction of the court, himself proceeds to file the award under S. 14(2) of the Arbitration Act. To such cases the residuary provision in Art. 11(1) of Sch. II of the Court-fees and Suits Valuation Act will apply. *Ramaswamy* v. *Salammal*, (1959) 2 M.L.J. 417.

851. Ss. 14, 16 and 31—applicability to foreign arbitration—Section 31 (4) confers jurisdiction to particular court out of the many which may have jurisdiction in matter under sub-section (1) in which the award has been actually filed. The filing, however, is done under S. 14 and once the award is filed court under that section, following the said section 14, including S. 16, will at once be attracted. However, section 16, at least, which deals with the remission of the award, cannot effectively apply to foreign arbitration and foreign awards. The court, obviously will have no control over the arbitrator or arbitrators and it will be impossible to take any effective action under the said section. *Sirajuddin* v. *Michael*, 63 C.W.N. 717.

852. Ss. 14, 17—Award filed in court by one of the parties.—It is open to the court before which an award is filed to act in the award under s. 17 in the sense of making a decree on the basis of it when the award is filed through the hand of one of the parties and it is not necessary that the award must have come before it as the result of specific proceedings as provided by s. 14 being taken. *Hazi Rahmatulla* v. *Chaudhari Vidya*, I.L.R. (1962) 2 All. 463=1963 All. L.T. 147=A.I.R. 1963 All. 602. As

the application by the plaintiff, although described as being one under s. 14(2) of the Arbitration Act was in substance and in respect of its prayer, not one under S. 14 and neither the Limitation Act nor the Arbitration Act prescribed any period of limitation for such application, no question of limitation could arise in respect of the application, unless it is held that Art. 181 of the Limitation Act of 1908 applies. *Ibid.*

Power of Court to modify award.

15. The Court may by order modify or correct an award—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or

(*c*) Where the award contains a clerical mistake or an error arising from an accidental slip or omission.

853. N.B.—This section dealing with court's power to correct an award, reproduces without change paragraph 12 of the Second Schedule of the Civil Procedure Code.—*Notes on Clauses.* There is no corresponding provision either in the Indian Arbitration Act of 1899, or in the English Arbitration Act of 1889.

854. Scope.—This section is taken verbatim from paragraph 12 of the Second Schedule of the Civil Procedure Code and there was no such provision in the Arbitration Act of 1899. So under the *old law* it thas been held that a court to which an application is made under section 525 of the Code of Civil Procedure to file an award in matter referred to arbitration without the intervention of a court has no power to amend the award or to remit it for reconsideration, but only possesses the power to file and enforce it or to reject the application. *Mustafa Khan* v.*Phulja Bibi,* 27 All. 526, following *Alarkhia* v. *Jehangir,* 10 Bom.H.C.Rep. 391 ; *Joala* v. *Narain,* 3 All. 541 ; *Manavikran* v. *Mallichery,* 3 Mad. 68 ; and *Dandekar* v. *Dandekar,* 6 Bom. 663. See also, *Ngatok* v. *Nga Kasim,* 14 Ind.Cas. 978=5 Bur.L.T. 55 ; *Narsing* v. *Ajudhia,* 13 Ind.Cas. 118=16 C.W.N. 256 ; *Fazal Ahmad* v. *Enayat,* A.I.R. 1922 Oudh 189=Oudh Cas. 213=9 O.L.J. 219=68 Ind.Cas. 209 ; *Thira Vugada* v. *Vaidinath,* 29 Mad. 303 ; *Allagappa* v. *Chidambaram,* A.I.R. 1931 Mad. 619=(1931) M. W. N. 451=34 M. L. W. 507=133 Ind.Cas. 522 ; *Yegna* v. *Gopala,* 47 Ind.Cas. 548=(1918) M.W.N. 595=8 M.L.W. 357 (F.F.) ; *Dhanpat* v. *Khau,* 23 Ind.Cas. 422 ; *MaChung* v. *Ma Aing,* (1897 1901) U.B.R. Vol. II, 297 ; *Maung Tui* v. *Maung Payu,* 72 Ind.Cas. 193=A.I.R. 1923 Rang. 130 ; *Bhagatram* v. *Parosram,* 84 P.R. 1907 ; *Subraman* v. *Vellani,* 24 Ind.Cas. 132=8 L.B.R. 58 in *Mohammad Afzal* v. *Abdul Hamid.* 88 Ind.Cas. 161=A.I.R. 1925 Lah. 570=7 L.L.J. 463, where the reference was to arbitration without the intervention of the court. the court observed. "The paragraph does not authorise a court to make any corrections in the award. The matter appears to be concluded by authority [see *inter alia Dhanpat Rai* v. *Khau Devi,* 23 Ind.Cas. 422 ; *Jaldhari Rai* v. *Muhammad Abdul Kabir,* 74 Ind.Cas. 649=A.I.R. 1923

Pat. 470=1 Pat.L.R. 244=4 P.L.T. 669; *Lang* v. *Hollani Moss, Ltd.*, 27 Ind.Cas. 526=8 S.L.R. 136; *Mustafa Khan* v. *Phulja Bibi*, 27 All. 526=2 A.L.J. 416=(1905) A.W.N. 86.] The Allahabad High Court in *Shyamlal* v. *Purshottam Das*, 58 Ind.Cas. 585=42 All. 277=18 A.L.J. 241, appear to have taken a contrary view, but they did not expressly dissent from or overrule *Mustafa Khan* v. *Phulja Bibi* (*supra*), which was cited before them." But *now* the law has been changed by this section. Under this section a court may modify or correct any award passed by an arbitrator under conditions prescribed in clauses (a), (b) and (c) of this section. See also *Mahammad* v. *Mahammad*, A.I.R. 1940 Lah. 24=I.L.R. 1940 P. 191=42 P.L.R. 720. *Vide* S. 25 *infra*. A decree passed on an award which has been so modified is a proper decree in accordance with the award under section 17. *Nanakchand* v. *Ramkishen*, A.I.R. 1933 Lah. 139=141 Ind.Cas. 72=34 P.L.R. 34.

Once the dispute is found to be within the scope of the arbitration clauses it is no part of the province of the Court to enter into the merits of the dispute. *Union of India* v. *Bakshi Ram*, 59 Punj. L.R. 572=I.L.R. (1957) Punj. 1210 relying on 1951 S.C.J. 1=A.I.R. 1951 S.C. 9. The powers of the court are limited to accepting the award, if there be no objection in passing a decree in accordance therewith, or superseding the reference or revoking or modifying the award or remitting it for further consideration, as laid down in the Act. But the Act does not disable the parties terminating their dispute in a different way. If the parties are dissatisfied with the award and want to substitute it by a compromise involving matter alien to the original dispute which are inseparable the court may supersede the submission and leave the parties to work out the agreement in accordance with the law outside the Arbitration Act. In such circumstance the new compromise itself may furnish a very good ground for superseding the reference and thus revoking the award. *Munshi Ram* v. *Banwarilal*, (1962) 2 S.C.J. 274=A.I.R. 1962 S.C. 303.

In *Parma Dutt* v. *Bipju*, 35 Ind.Cas. 887=78 P.R. 1916=124 P.W.R. 1916, the court observed: "I take this opportunity of pointing out that the lower court appears to me to have overlooked Article 12, Schedule II, Civil Procedure Code, which lays down the circumstances under which a court may modify or correct an award.....Now under the article the court may only modify or correct an award, first, by striking out of it something not referred to arbitration; secondly, by amending imperfections in form or correcting any obvious error which can be amended without affecting the decision of the case; and thirdly, where the award contains a clerical mistake or an error arising from an accidental slip or omission." A court has no power to rectify or correct the award on the ground that the arbitrator has taken a wrong view of the evidence which was palpable or apparent on the face of the evidence, unless the award is imperfect in form or the obvious error is of such a character that it can be set right without affecting the decision of the arbitrator. *Mahendra* v. *Suresh*, 80 Ind.Cas. 10=A.I.R. 1925 Cal. 332. See also, *Aftab Begam* v. *Abdul majid*, 81 Ind.Cas 525=22 A.L.J. 816; *John Mohd* v. *Hezi*, A.I.R. 1925 Sind 80=78 Ind.Cas. 60; *Venkataswami* v. *Suramma*, 45 Ind.Cas. 644=34 M.L.J. 323=8 L.W. 202 *Matubai* v. *Jeram*, A.I.R. 1933 Sind. 192=147 Ind.Cas. 256; *Sutramaniah* v. *Vasudevan*, A.I.R. 1950 Mad. 488.

After the publication of an award by the arbitrators or the umpire

they become *functus officio* and the award cannot be altered at their motion. *Parshottamadas* v. *Kekhushru,* A.I.R. 1934 Bom. 6 (8)=35 Bom. L.R. 1101=149 Ind.Cas. 324—*Halsbury,* Vol. 1, p. 665. But the court under this section in matters specified in clauses (*a*), (*b*) and (*c*), has jurisdiction to modoify the award.

In *J. Kaikabad* v. *Khambataa,* A.I.R. 1930 Lah. 26=124 Ind.Cas. 339=11 Lah. 342=31 P.L.R. 668, the court observed : "The inherent powers of the court under section 151 cannot be exercised to override the explicit provisions of Schedule II of the Code, which limit the jurisdiction of the court to 'correct' and 'modify' the award in certain specified cases only : *Bissa Mal* v. *Kesar Singh,* I Lah. 363=58 Ind.Cas. 789=2 L.L.J. 249, *Duni Chand* v. *Paritam Das,* A.I.R. 1925 Lah. 321 and *Rameshwar Mahton* v. *Dwarka Prasad,* A.I.R. 1925 Pat. 36=3 Pat. 378". See also, *Jethabhai* v. *Chapsey,* 34 Bom.L.R. 467=4 Ind.Cas. 108 =11 Bom.L.R. 1014 ; but see *Mumtaz Ali* v. *Syed Md. Sadat* Ali, A.I.R. 1932 Oudh 293 (296)=9 O.W.N. 803=140 Ind.Cas. 412.

Where an award sets aside deed of gift on condition of donor's paying to donee compensation to the extent of benefits received by donor, the award is not objectionable either under the provision of para 12 or para 14, and it cannot be set aside. *Ganesh Singh* v. *Bhikhan Singh,* A.I.R. 1928 Oudh 1=4 O.W.N. 1085=107 Ind.Cas. 545=3 Luck. 1. This section is applicable only if the "imperfection in the form" exists in the award at the time when it is filed in court by the arbitrator, and not if it comes into existence at a subsequent stage on the happening of an unanticipated event. *J. Kaikabad* v. *F. Khambatta,* A.I.R. 1930 Lah. 26=124 Ind.Cas. 339=11 Lah. 342=31 P.L.R. 668. An award according to which the court is required to pass judgment undr para 16, Schedule II includes a modified or corrected award. *Nanak Chand* v. *Ram Kissen,* A.I.R. 1933 Lah. 139=Lah. 139=144 Ind.Cas. 1024=34 P.L.R. 804. See also, *Hyder Sahib* v. *Giria Chettiar,* 19 Ind. Cas. 469=24 M.L.J. 483=(1913) M.W.N. 338=13 M.L.T. 349 ; *Mazhar Ali* v. *Fateh Din,* A.I.R. 1930 Lah. 219=120 Ind.Cas. 673=31 P.L.R. 337 ; *Kalu* v. *Khair,* 13 P.R. 1906=45 P.W.R. 1906.

Section 15 does not lay down that the remedies of the parties are simply confined to the provisions of s. 15. S. 32 contemplates cases where the award is invalid or illegal and it does not include cases when the arbitrator went completely out of their jurisdiction in making certain allotments in favour of third parties beyond the terms of reference. *Beharani* v. *Dhormu,* 26 Cut. L.T. 434=A.I.R. 1960 orissa 223 ; *Sabitri Debi* v. *Gayatri Debi,* 1962 B.L.T.R. 101=A.I.R. 1962 Pat. 192 (Award made on additional claim of equitable adjustment not included in original terms). If an award deals with a matter not covered by the agreement it could either be modified under S. 15(a) or remitted under S. 16(1)(a). And when such matter is dealt within the invitation of parties contained in the statements, the arbitration must be heard to have been acted with jurisdiction. *Waverlay Jute Mills Co. Ltd.* v. *Raynon and Co.,* (India) *P. L. Ltd.,* A.I.R. 1963 S.C. 90.

The award of an arbitration directing the President of India to make payment of the amount due to the contractor cannot be made in law. The mistake can be corrected either under clause (b) or cl. (c) of s. 15. *Union of India* v. *Himatsingka Timber,* A.I.R. 1964 Cal. 91 (A.I.R. 1963 Cal. 30) relied on.

856. Filing of award—Decree if necessary.—In *Bhagatram* v. *Ambala,* A.I.R. 1943 Lah. 222=209 Ind.Cas. 332=45 P.L.R. 215, it has been held by *Abdur Rahman J.* that as soon as the objections raised by a party to the filing of an award are duly considered and overruled, the award should be made a rule of the court. A decree in accordance with no award is superfluous, as the award when filed in court amonts to a decree itself; but see *Appollo Mills* v. *Bububhai,* A.I.R. 1944 Bom. 12= 45 Bom.L.R. 904=211 Ind.Cas. 11. In considering s. 15 of the Arbitration Act of 1899, it has been held not the words "on being filed" indicate the point of time from which the award is deemed to be enforceable as a decree. *Albu queer que* v. *Chatholi Bank,* 59 L.W. 182=A.I.R. 1946 Mad. 352=(1946) 1 M.L.J. 244.

857. Principle.—In submission to arbitration the general rule is that, as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot when the award is good on the face of it, object to his decision, either upon law or the facts.—*Russell,* 13th Edn., p. 187, citing *Emmerson* v. *Stimpson,* (1847) 9 L.T.O.S. 199; *Hogge* v. *Burgess,* (1858) 3 H. & N. 293=27 L.J.C.P. 66; *Bucclench (Duke)* v. *Metropolitan Board of Works,* (1870) L.R. 5 Ex. at p. 323; *Adams* v. *Great North of Scotland Rail,* (1891) A.C. 31. In the last named case *Lord Halsbury L.C.* at page 39 said: "There is no doubt that at one time the courts in both countries (England and Scotland) treated themselves rather as being in the position of courts of appeal, and examined whether or not the conclusion at which the arbitrator had arrived was sound, both in point of law and in point of fact. I think the only learned Judge who ever gave distinct expression of that view was *Lord Thurlow,* and I am the more desirous of alluding to him and doing him justice, because I think what *Lord Thurlow* says, in *Knox* v. *Symmonds,* 1 Ves.Jur. 369, rather throws some doubt upon the question whether he ever was responsible for the statement put into his mouth in the case which has been quoted at the Bar [*Colquhoun* v. *Corbet,* (1784) 2 Paton's App. 626]. *Lord Thurlow* says that is no ground for setting aside an award that the conclusion was wrong otherwise it would be a ground for setting aside all awards". In *Osmond* v. *Wortley,* 87 L.J.K.B. 822, *Lawrence J.* observed. "There is, in this case, in my opinion, nothing to show misconduct or surprise, nor is the award bad, on the fact of it. The motion therefore fails and must be dismissed with the usual result". See also, *Champsey* v. *Jivraj,* A.I.R. 1923 P.C. 66=73 Ind.Cas. 436=50 I.A. 324; *Sreelal* v. *Madan,* A.I.R. 1925 Cal. 599=88 Ind.Cas. 49=52 Cal. 100.

In *Attorney-General* v. *Kelly,* (1922) 1 A.C. 268=91 L.J.P.C. 101=126 L.T. 711=38 T.L.R. 281, *Lord Pamoor* said: "Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award; but no such issue arises in the present appeal. In *British Westing Electric and Manufacturing Co.* v. *Underground Electric Railways of London,* (1912) 81 L.J.K.B. 1132=(1912) A.C. 673, it was held that where an arbitrator had made in award expressed to be made on the basis of an erroneous opinion given upon a *special case* stated by an arbitrator under the Arbitration Act, 1889 (52 and 53 Vict. c. 49), in regard to the questions of law arising in the course of the reference, the award is subject to appeal, if that opinion is erroneous". See also, *Kelantan Government* v. *Duff*

length if time, may be treated as an agreement between the parties, that they would abide by it, even though the award contains a clause which is in excess of the terms of reference. *Kameswaramma* v. *Thammanna,* (1937) M.W.N. 1039. See also, *Vishram* v. *Gangaram,* A.I.R. 1935 Sind 235 ; A.I.R. 1926 Sind 15 ; A.I.R. 1924 All. 625 ; A.I.R. 1928 Sind 175 ; A.I.R. 1931 Sind 167.

Where an arbuitrator includes in his award points which are outside the suit and which are not referred to him at all, and such points are not separable from the rest of the award, the award is void and cannot stand, because the decision is based on a clear misapprehension of the nature of the dispute. *Lila Shah* v. *Bhola Nath,* 157 Ind.Cas. 731 = A.I.R. 1935 Lah, 52. See also, *Bachchan Lal* v. *Narottam Dutt,* 143 Ind.Cas. 423 = (1932) A.L.J. 1090 = A.I.R. 1933 All. 59 ; *Mahomed* v. *Piroj Shaw,* 138 Ind.Cas. 337 = 34 Bom.L.R. 697 = A.I.R. 1932 Bom. 341 ; *Bhalan Sha* v. *Mir Hossain,* A.I.R. 1933 Sind 295 = 27 S.L.R. 327 = 145 Ind.Cas. 439 ; *Babubhai* v. *Madhooji.* A.I.R. 1931 Bom. 343 = 134 Ind.Cas. 705 = 33 Bom.L.R. 756 ; *Hurmukhraj* v. *Japan,* A.I.R. 1922 Cal. 399 = 66 Ind.Cas. 342. An award of the arbitrators travelling beyond the reference and not warranted by the terms of reference is unenforceable. *Chunna* v. *Lala,* 151 Ind.Cas. 338 = A.I.R. 1934 All. 117. If a party to a suit which has been referred to arbitration wishes to challenge a term or a clause in the award on the ground of its being beyond the reference to the arbitrators, the only way in which he can do it is by taking objections to the award in the course of the suit in which the award has been made. *Sarafuddin* v. *Jibanessa,* 39 C.W.N. 716. The arbitrator is at liberty to reserve some parts of a reference to be dealt with separately but unless those parts are decided the award cannot but be taken to be incomplete provided the parties themselves did not expressly agree that the arbitrator was to give his award on the other points separately and that the same award might be taken as an entirely valid award whilst the award on the parts yet undertermined subsequently made would be treated as another and independent and separate award. *Ashutosh Ghosh* v. *Sudhangsu Bhusan,* 151 Ind.Cas. 916 = 59 C.L.J. 39 = A.I.R. 1934 Cal 494.

Where after reference to arbitration, the defendant subsequently offers to be bound by the oath of the plaintiff and the plaintiff makes the oath, but the arbitrators ignoring such offer make the award, the court is not competent to modify the award. *Damodar* v. *Daya Sanker,* A.I.R. 1933 All. 956. In adjudicating the amount payable by one party to another, an arbitrator has full power to direct payment by instalments. The directions as to the number, amount, mode and time of payment of these instalments are, therefore, matters within the discretion of the arbitrators and are essential parts of the award which the court has no more power to modify than it has to enhance or reduce the total sum found payable by the arbitration. Even if the order fixing the instalments is erroneous, harsh or oppressive, the error is one of substance in the adjudication of the dispute, and not of form which could be amended without affecting the decision. *J. Kaikabad* v. *F. Khambatta,* A.I.R. 1930 Lah. 26 = 124 Ind.Cas. 339 = 11 Lah. 342 = 31 P.L.R. 668. See also, *Jawahar Singh* v. *Mul Raj,* 8 All 449 = (1886) A.W.N. 210 ; *Ramsarup* v. *Bindaprosad,* 12 O.C. 23 = 1 Ind. Cas. 328 ; *Parma Dat* v. *Bipju,* 78 P.R. 1916 = 40 P.L.R. 1917 = 25 Ind. Cas. 887 = 124 P.W.R. 1916 ; *Bansilal* v. *Gopal Lal,* A.I.R. 1928 Lah. 849 ; *Mahindra* v. *Suresh Chandra,* A.I.R. 1925 Cal. 232 ; *Gopal Dinkar* v. *Ganesh Narayan,* A.I.R. 1921 Bom. 191 = 45 Bom. 512.

Where in a suit for dissolution of partnership and for accounts, the plaintiff claims interest which the defendant says he is not liable to pay and the matter in dispute is referred to arbitration, one of the points referred being whether the defendant is liable for any money and, if so, the amount due, it is not an error on the part of the arbitrator to include in his award the sum payable by the defendant as interest both on sums advanced to the firm, and on those advanced to the defendant for his personal use, and also for the period before and after the suit and up to the date of the award. *Jaharmal* v. *Birinchi*, 56 Ind.Cas. 941. A court cannot add a direction of its own in the award. *J. Kaikabad* v. *F. Khambatta*, A.I.R. 1930 Lah. 26=124 Ind.Cas. 339=31 P.L.R. 668.

859. Ss. 15, 16, 17—Setting aside an award—Application for— If any party desires that an award be set aside he must apply to the court within the time prescribed by Art. 158 of the Limitation Act. The word "the court" in s. 17 means the particular court in which the award has been filed, under s. 14(2). Section 17 certainly does not confer jurisdiction upon any court to pass a decree on the basis of an award regardless of whether its jurisdiction has been invoked under s. 14 by the arbitrator's filing the award or by any party's application for its being filed. Sections 15, 16 and 17 prescribe the acts that can be done by the court in which the award has been filed under s. 14(2). The four sections are to be read as connected with one another. *Amod Kumar* v. *Hari Prasad*, A.I.R. 1958 All. 720.

860. Clause (b)—Where the award is imperfect in form etc.— This clause permits the modification or correction of an award where the award is imperfect in form or contains any obvious error which can be amended without affecting such decision. But this cannot be strained to give the court jurisdiction to record findings on question which the arbitrator has not decided. *Tuljamal* v. *Bikhchand*, A.I.R. 1943 Sind 131=(1943) Kar. 395=209 Ind.Cas. 420. Where an award is imperfect in form and contains an obvious error it can be corrected under this clause. An issue whether a particular property was endowed property, and whether it was partible or not, was referred to arbitrators for determination. The arbitrators decided that it was not endowed property but held that it should not be partitioned and must continue as endowed property. *Held* that the award contained an obvious error which the court was competent to modify and correct. *Jani Durlabh* v. *Jani Lajja*, 2 Ind.Cas. 858. The court is bound to correct any obvious mistakes or slips in an award in the same manner in which mistakes in decrees are corrected and it is not necessary that any formal application should be made by a party for this purpose. For this reason no specific provision is made in the Limitation Act for applications to correct the award. *Hyder Sahib* v. *Giria Chettiar*, 19 Ind.Cas. 496=(1913) M.W.N. 338=13 M.L.T. 349=24 M.L.J. 483. The award must be couched in a form which would lead to finality and must not be put in a form which incites the parties to embark upon further litigation. *Sreelal Mangtulal* v. *Madan*, 88 Ind.Cas. 49=A.I.R. 1925 Cal. 599=52 Cal. 100. Where in a mortgage suit referred to arbitration the arbitrator did not allow interest on sum found due, the alleged mistake is not such as would entitled the plaintiff to treat the award as a nullity and the mistake is one which might be recitified by an application to the court. *Nazir Monzoorad* v. *Mehidi Begam*, 7 C.L.R. 206.

In *Gopal Dinkar* v. *Ganesh Narayan,* 59 Ind.Cas. 785=22 Bom.L.R. 1416=45 Bom. 512, *Macleod C.J.* said : "All questions of misconduct against the arbitrators had been dropped, and the only suggestions which would be made against the award should have been made under sub-paragraphs (*b*) and (*c*) of paragraph 12. But the court in effect directed the Commissioner to sit in appeal on the award of the arbitrators with regard to the three disputed items, and when the Commissioner supported the decision of the arbitrators, the court itself sat on appeal on the decision of the Commissioner. But the only powers the court had under paragraph 12 (*b*) and (*c*) were either to amend an obvious error which could be amended without affecting the decision, or to rectify a clerical mistake or an error arising from an accidental slip or omission. It cannot be said that the court has amended an obvious error which could be amended without affecting such decision, because the decree of the court was entirely different from the award of the arbitrators. Nor can it be said that the court has rectified a clerical mistake or an error arising from an accidental slip or omission. The court went into the merits of the dispute as regards those three items and came to a conclusion of its own, with the result that a very distinct alteration was made in the award. Where the parties agreed to have their disputes decided by their arbitrators, they agreed to accept the decision of the arbitrators whether it might be right or wrong and the court can only alter the award within the limits laid down by the Second Schedule. There is a recent decision—*Shyamlal* v. *Parshottamdass,* 58 Ind.Cas. 585=42 All. 277=18 A.L.J. 241=2 U.P. L.R. (All) 104—where it was decided that 'it is not a ground for remitting an award on matter referred to arbitration or for setting aside an award that the arbitrator has made a mistake in arithmetic, and apparently unintentionally has awarded a larger sum of money to be paid by one party to the other than he would have awarded if his attention had been directed to the mistake'. This is a stronger case, because the arbitrator's attention was directly drawn to the objections made to them and they finally decided what their award should be after hearing those objections". See also, *Mohendranath* v. *Sureshchandra,* 80 Ind.Cas. 10= A.I.R. 1925 Cal. 332. In *J. Kaikabad* v. *F. Khambatta,* A.I.R. 1930 Lah. 26=124 Ind.Cas. 339=11 Lah. 342=31 P.L.R. 668, the court observed : "Nor can it be said the award in this case contained any 'obvious error' which could be amended 'without affecting the decision on the matter referred'. It is settled law that in adjudicating the amount payable by one party to another, an arbitrator has full power to direct payment by instalments : *Jawahar Singh* v. *Mul Raj,* 8 All. 449, and *Ram Sarup* v. *Bindra Prasad,* 12 O.C. 23=1 Ind.Cas. 328. The directions as to the number, amount, mode and time of payment of these instalments are, therefore, matters within the discretion of the arbitrator and are essential parts of the award which the court has no more power to modify than it has to enhance or reduce the total sum found payable by the arbitration. Even if the order fixing the instalments is erroneous, harsh or oppressive. the error is one of substance in the adjudication of the dispute, and not of form which 'could be amended without affecting the decision' : see in this connection *Parma Dat* v. *Bipju,* 78 P.R. 1916=40 P.L.R. 1917=35 Ind.Cas. 887=124 P.W.R. 1916, *Bansilal* v. *Gopallal,* A.I.R. 1928 Lah. 849 ; *Mahindranath* v. *Sureshchandra,* A.I.R. 1925 Cal. 332, and *Gopal Dinkar* v. *Ganesh Narayan,* A.I.R. 1921 Bom. 191=45 Bom. 512."

861. Clause (c)—award containing a clerical mistake, etc.—In

Mumtaz Ali v. *Mohammad Sadat Ali*, A.I.R. 1932 Oudh 293=9 O.W.N. 803=140 Ind.Cas. 412, the courrt observed : "Paragraph 12 (*c*), Schedule II, Civil Procedure Code, expressly lays down that where the award contains a clerical mistake or an error arising from an accidental slip or omission the court may by order modify or correct such an award. It is true that the Allahabad High Court in *Shyamlal* v. *Parshottamdass*, A.I.R. 1920 All. 45=58 Ind.Cas. 585=42 All. 277 [where *Piggot, J.* observed : "When parties submit a particular matter to the final decision of an arbitrator selected by themselves, they take chance of his making a clerical or arithmetical error, just as much as they take their chance of his misinterpreting a document or refusing to believe the oral evidence of a perfectly trustworthy witness'], as quoted above, did lay down that an arithmetical error was no ground for setting aside the award ; but it is to be noted that the application in that case was made under para. 20, Schedule II, Civil Procedure Code ; in other words, in the Allahabad case the matter in dispute was referred to arbitration without the intervention of the court whereas in the case before me the arbitrator was appointed through this court. In this connection it is significant to note that para. 21, Schedule II, Civil Procedure Code, while referring to paras. 14 and 15 omits all mention of para. 12, Schedule II. This omission to my mind leads one inevitably to the conclusion that the court's power to modify or correct an award on the three grounds mentioned in para. 12, Schedule II, even after it has been embodied in a decree of the court has been left untouched.

"It, therefore, seems to me upon a careful consideration of the provisions of para. 12, Schedule II of the Code of Civil Procedure, as well as of sections 151 and 152, Civil Procedure Code, that this court has got the power to amend the decree in this case although it is based upon an award and to correct the accidental slips in the award itself. In so doing neither the decree nor the award is so altered as to affect the original intention of the arbitrator and the decision arrived at by him. By allowing this application and correcting the accidental slips made by the arbitrator in his award substantial justice is done to both parties....."

In the earlier part of the judgment, the court observed : "A judgment of a single Judge of the Madras High Court reported as *Lakshmi Narayanappa* v. *Batchayya*, A.I.R. 1927 Mad. 720, was further cited by the learned counsel for Nanpara in support of his contention that when a decree had been passed in accordance with the award, an arithmetical mistake contained in documents on which the award was based could not be corrected by the court on an application under section 152, Civil Procedure Code, but the remedy of the aggrieved party was by appeal or revision..... The Code of Civil Procedure is not exhaustive and Judicial Tribunals have always, when the necessity arose, acted upon the assumption of their being possessed of an inherent power 'to act *ex debito justitiae* and to do that real and substantial justice for the administration for which they alone exist.—See *Hukumchand* v. *Kamalanand* Sing, 33 Cal. 927=3 C.L.J. 67.

"It is, therefore, that the new section 151, Civil Procedure Code, lays down that civil courts have power to make such orders as may be necessary for the ends of justice and to prevent any abuse of the process of the court ; and it has been held that the court has an inherent power to

amend decrees and orders even in cases not covered by section 152, Civil Procedure Code.

"Section 152, Civil Procedure Code, lays down that clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either in its own motion or on the application of any of the parties."

Under this clause the court is authorised to rectify a clerical mistake or an error arising from an accidental slip or omission. To correct an error of calculation or arithmetic and to award a different decision from that awarded by the arbitrator cannot come under this clause. *Gopal Dinkar* v. *Ganesh Narayan,* 59 Ind.Cas. 785=22 Bom.L.R. 1416=45 Bom. 512. Where there is on the face of the award a patent inconsistency, such as a flat contradiction in measurement, or a mistake of arthmetical calculation, it is open to the court to which application is made for filing the award, on a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it before a decree is passed in accordance with it. *Harprosad* v. *Raghubar Dayal,* 74 Ind.Cas. 817=21 A.L.J. 541= 45 All. 628.

An award was made upon the basis of certain figures contained in certain documents relied on by both the parties and a decree was passed according to the award without any objection from any of the parties. It was subsequently found that there was a mistake in the figures, on which the award was based, and the party who was affected by the mistake applied for correction of the error. It was held that the application was not to correct an error patent and apparent on the face of the record, but to go much deeper into the matter and to reopen the accounts and the figures at which the arbitrators had arrived and the remedy lay either by review or appeal. *Makan Lakshmi* v. *Makan Butchayya,* A.I.R. 1927 Mad. 720=53 M.L.J. 38=(1927) M.W.N. 242=103 Ind.Cas. 829. But the court is bound to correct and obvious mistake or slip in an award in the same manner in which mistakes are corrected. *Hyder Sahib* v. *Giria Chettiar,* 19 Ind.Cas. 496=(1913) M.W.N. 338=13 M.L.T. 349=24 M.L.J. 483.

862. Limitation.—No specific provision is made in the Limitation Act for applications to correct an award under this section. *Hyder Sahib* v. *Giria Chettiar,* 19 Ind.Cas. 496=(1913) M.W.N. 338=13 M.L.T. 349 =24 M.L.J. 483. An objection under para. 12 or para. 14, Schedule II, Civil Procedure Code, is something different from an objection under para. 15; and Art. 158, Limitation Act, applies only to objection under para. 15, where the application is to set aside the award completely. Where a prayer is only for the modification or the remission of the award, the prayer comes within para. 12 or para. 14, and consequently Art. 158 is not applicable. *Kirotti* v. *Beharilal,* A.I.R. 1933 All. 648=(1933) A.L.J. 519 =146 Ind.Cas. 596. In the above case the court observed: "I am supported in my view by the case of *Appaya* v. *Venkataswami,* A.I.R. 1919 Mad. 877=47 Ind.Cas. 597, and the case of *Hyder Sahib* v. *Giria Chettiar* (*supra*). The application of the defendant dated 2nd January, 1932, was an application not for setting aside the award but for ignoring a portion of it and modifying it accordingly and is not barred by 10 days limitation prescribed in Art. 158." See also *Mamidi Appayya* v.

Vedam Venkataswamy, 47 Ind.Cas. 597=8 M.L.W. 171=(1918) M.W.N. 477=M.L.T. 102.

863. Appeal.—An appeal lies from an order modifying or correcting an award. *Vide* section 39 (1) (*iii*). See also, *Ram Sarup* v. *Bindra,* 1 Ind.Cas. 328=12 O.C. 23. But the appeal must be limited to the modifications and corrections only and no other ground can be urged in the appeal. *J. Kaikabad* v. *F. Khamabatta,* A.I.R. 1930 Lah. 26=124 Ind.Cas. 339=11 Lah. 342=31 P.L.R. 668 ; *Munshi* v. *Surajlal,* 17 C.W.N. 617. But the decree on such award is not appealable. *Nanak Chand* v. *Ram Kishen,* A.I.R. 1933 Lah. 139=141 Ind.Cas. 72=34 P.L.R. 34. In the above case the court observed: "Under para. 12 a court may modify or correct an award under certain conditions and surely when it does so properly it is that award and not the original one with which the decree must accord. There would be no point in permitting the court to modify or correct an award and allowing an appeal from such an order and then insisting on the court making a decree in accordance with the original award. The decree of the trial court being thus in accordance with the award no appeal lay and it follows that a second appeal is not competent. Under sub-section (2) of section 104, no appeal lies from any order passed in appeal under the section and consequently the appellate order of the District Judge upholding the modification of the award is final and not appealable." See also, *Manilal* v. *Sajjad Hussain,* A.I.R. 1926 Oudh 370=93 Ind.Cas. 273 ; *Mazhar Ali* v. *Fateh Din,* 11 Lah. 342=A.I.R. 1930 Lah. 219.

864. Order of a single Judge of a Small Cause Court.—Where a single Judge of the Presidency Small Cause Court modifies an award given by arbitrators, his decision does not amount to a decree passed on an award and therefore an application to the Full Bench of the Small Cause Court is competent. *Munisami* v. *Subbaraya,* A.I.R. 1926 Mad. 878=24 M.L.J. 66=95 Ind.Cas. 442=(1926) M.W.N. 772=51 M.L.J. 498.

865. Sections 16, 17, 30—Where the award for payment of money does not specify the actual amount to be paid the court has jurisdiction to remit the award on the ground of uncertainty and misconduct under the English Arbitration Act, 1950 section 22 and 26. *Margulies* v. *Dafnis,* (1958) 1 W.L.R. 398.

867. Award filed in Court, whether becomes a decree—old law.—An award does not become a decree because it is filed in court. It only becomes executable as a decree. The merger would only take place if by filing an award it becomes a decree in which case the the award would be merged in the decree. *Appollo Mills* v. *Babubhai,* A.I.R. 1944 Bom. 12=45 Bom. L.R. 904. In the above case the award was made on the 15th July, 1940 and the Arbitration Act came into force on the 1st July, 1940. In that case *Chagla, J.* observed: "An award is the necessary and logical conclusion of a reference. What S. 48 says is that the new Act shall apply only to those references which commence after the date on which the Act comes into force. If there are any references pending on that date, the new Act shall not apply to those references. In my opinion the expression 'reference' is wide enough to cover the necessary and logical result of a reference, *viz.*, an award.....Therefore, in my opinion, any award which is the result of a reference which was pending at the date of the commencement of the Act is saved from the appli-

cation of the New Act, and the provisions of the new Act, do not apply to such an award."

Power to remit award.

16. (*1*) The Court may *from time to time* remit the award or any matter referred *to arbitration to the arbitrator or umpire for reconsideration* upon such terms as it thinks fit—

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration *and* such matters cannot be separated without affecting the determination of the matters referred ; or

(*b*) where the award is so indefinite as to be incapable of execution ; or

(*c*) where an objection to the legality of the award is apparent upon the face of it.

(*2*) Where an award is remitted under *sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court* ;

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

867. N.B.—This section is based on para. 14 of the Second Schedule of the Code of Civil Procedure of 1908, section 13 of the Indian Arbitration Act of 1899, and section 10 of the English Arbitration Act of 1889. See now S. 22 of the English Arbitration Act of 1950.

Paragraph 14 of the Second Schedule of the Civil Procedure Code, 1908, ran as follows:—

Where award or matter referred to arbitration may be remitted.

14. The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

(*a*) where the award has left undertermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting of the matters referred ;

(*b*) where the award is so indefinite as to be incapable of execution ;

(*c*) where an objection to the legality of the award is apparent upon the face of it.

868. Changes.—This section deals with the court's power to remit and award for reconsideration. Sub-clause (1) repeats with slight change paragraph 14 of the Second Schedule to the Code and the remaining sub-sections reproduce the substance of the first sentence of paragraph 14.—*Vide Notes on Clauses.* "The alteration made in sub-section (1) is merely a drafting improvement. In sub-section (2) we have

provided for possible extension of the time within which the arbitrator or umpire shall submit his decision."—*Report of the Select Committee.*

869. Origin.—Section 13 of the Indian Arbitration Act of 1899 is based on section 10 of the English Arbitration Act of 1889, which again re-enacts the Common Law Procedure Act, 1854, section 8 [*Mills* v. *Buyers,* (1856) 3 K. & J. 66], and all cases decided under section 8 of the last Act may be cited under this section. *In re, Keighley,* (1893) 1 Q.B. 411. Para. 14 of the Civil Procedure Code is based on section 520 of the Civil Procedure Code of 1882.

870. Power of court apart from this section—object of this section.—In *In re Keighley Maxtead & Co.,* (1893) 1 Q.B. 405 at pp. 407-408, *Lord Esher, M.R.* said: "The Arbitration Act of 1889, in great measure, follows the provisions of the Common Law Procedure Act, 1854; if, therefore, any part of it is enacted in the same terms as those used in the Common Law Procedure Act, then, according to the rules which govern the decisions of the courts, if decided cases have determined the construction to be placed on the Common Law Procedure Act, we must adhere to those decisions when we are called upon to place a construction upon that part of the Arbitration Act in which the same language is used with regard to the same subject-matter. Now, the provisions of both these Acts as to referring back the decision of an arbitrator for reconsideration had their origin in the following reason, as has been frequently pointed out; previously to 1854 there had been in many cases submissions to arbitration containing a clause authorising a reference back to the arbitrators; while in other cases there had been no such clause in the submission; and it had been decided that, in the absence of such a clause in the submission, the court could not refer back the award, but where there was such a clause the award could be referred back, although only on certain specified grounds. The effect of both these Acts is to treat all submissions to arbitration (whether made by consent or compulsorily) as though they contained a clause giving the court power to refer back the award to the arbitrator or umpire, and we must therefore consider the present arbitration as though it had been an old arbitration—that is to say, prior to 1854—and the submission had contained such a clause." See also, *Hodgkinson* v. *Fernie,* (1857) 27 L.J.C.P. 66, *per Cockburn, C.J.; In re Morris* v. *Morris,* (1856) 25 L.J.Q.B. 261, but see *Vengu Ayyar* v. *Yegyam Ayyar,* 1950 M.W.N. 785=(1950) 2 M.L.J. 642=A.I.R. 1951 Mad. 414, where it has been held that the Court could not remit an award on any ground not contemplated by S 16(1) of the Act. *Sarkar* in his *Law of Arbitration* says: "Speaking generally the Indian Courts would not be permitted to follow the English decisions blindly, inasmuch as the English Statutes, as construed by the Courts, gave wider powers of remission as compared with the three specific grounds mentioned in S. 16 of the Arbitration Act, 1940. In this view of the matter in each case the question will be not what would have been the decision in England or under the Indian Arbitration Act, 1899, but whether the ground urged for the remission of the award is or not covered by the three specific grounds stated in sub-section (*a*), (*b*) and (*c*) of section 16 of the Arbitration Act, 1940."—*Sarkar's Law of Arbitration,* p. 202.

871. English case—Court's power to remit of its own motion.—

Under section 22 of the English Arbitration Act, 1950, the court is competent to remit of its own motion without any application being made. Remission is a step which a court is slow to take because there is no merit at all in arbitration unless awards are to be treated, if at all possible, as final on the facts. The court does not expect all awards to be perfect and will not remit them merely for minor clarification. The power ought not to be used to assist one side rather than the other and certainly not to relieve a party of the consequences of not making in time an application which he ought to have made. *Universal Cargo* v. *Cital,* (1957) 2 All. E.R. 70.

872. Grounds of remission of award under the English law.—In this section the power of the court to remit the award or any matter referred to arbitration is limited by clauses (*a*), (*b*) and (*c*) of sub-section (1). But neither in section 10 of the English Arbitration Act of 1889 nor in section 13 of the Indian Arbitration Act of 1899, grounds for remitting award are mentioned. In *In re Montgomery, Jones & Co.,* (1898) 78 L.T. 407, *Chitty, J.* observed: "There are four grounds upon which the matter can be remitted to an arbitrator for reconsideration. Those grounds are (1) where the award is bad on the face of it ; (2) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted ; (3) where there has been misconduct on the part of the arbitrator ; and (4) where additional evidence has been discovered after the making of the award." So also where a dispute is referred to arbitration and in the decision of which question of law becomes material, the court can interfere if error as regards question of law appears on the face of it. But where a specific question of law was referred to an arbitrator as distinct from question of law which becomes material in deciding disputes, the court cannot interfere even when the error in law appears on the face of the award. *Absalom Ltd.* v. *Great Western, etc.,* 102 L.J.K.B. 648 = (1933) A.C. 592 = 149 L.T. 193 = 49 T.L.R. 350. See also, *Barton* v. *Blacksmith,* 150 L.T. 327 ; but see section 9, sub-sections (1) and (3), of English Act of 1934. The ground which would justify the court to set aside an award may be considered sufficient to remit it. *Hodgkinson* v. *Fernie,* 27 L.J.C.P. 66 ; *In re Montgomery Jones & Co.,* (1898) 78 L.T. 407. The reported decisions of the court only show the principles which have guided the court from time to time in exercising its jurisdiction, and, though they may afford a valuable guidance, they do not restrict either the jurisdiction of the court in deciding other cases, or the duty of the court to look at the facts in each particular case. *Banters and Midland Ry.,* (1906) 59 L.T. 23. See also *Layen* v. *L. P. T. P.* (1944) 1 All. E.R. 432 ; *Kisil Micheff Ltd.* v. *Constant Smith,* (1950) 1 K.B. 616.

873. Grounds on which award could be remitted under section 13 of the Indian Arbitration Act of 1899.—In *U. M. Choudhury* v. *Jiban Krishna Ghose,* 69 Ind.Cas. 995 = 49 Cal. 646 = A.I.R. 1922 Cal. 447, *Sanderson, C.J.* observed : "By section 13 (1) of the Indian Arbitration Act, 1899, the court has power to remit the award for the reconsideration of the arbitrator or umpire. This power, however, in my judgment, should be sparingly exercised and only upon certain well-known principles. The courts in England have always been exceedingly cautious in dealing with awards as was pointed out by *Kay, L.J.* in *Keighley* and *Durant, In re,* (1893) 1 Q.B. 405 (414) = 62 L.J.Q.B. 105 = 68 L.T. 61.

The passage is as follows :—"The courts have always been exceedingly cautious in dealing with awards. *Prima facie,* an award is final and not subject to appeal ; the arbitrator is chosen by the parties who presumbaly prefer a domestic tribunal which is not bound rigidly by the rules of evidence : and a mistake of law or fact is not, *per se* a ground for sending back the award of such a tribunal. The cases lay down with sufficient clearness the rules on which the court ought to act when asked to remit an award to enable us on this appeal to say that this case is brought within the rules."

"In *Hodgkinson* v. *Fernie,* (1857) 3 C.B. (N.S.) 189 (202)=27 L.J.C.P. 66=3 Jur. 818=111 R.R. 614, *Williams, J.* in his judgment (page 202 of 3 C.B.) said : 'The law has for many years been settled, and remains so at this day, that where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge on all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of competent one. The court has invariably met those applications by saying, 'You have constituted your own tribunal'; you are bound by its decision.' The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.

'In the case of *Montgomery, Jones & Co. and Liebenthal & Co., In re* (1898) 78 L.T. 406, the Court of Appeal was considering section 10 of the English Arbitration Act of 1889, which is in all material respects similar to section 13 of the Indian Arbitration Act, and *Smith, L.J.* at page 408 said :—'I think that counsel for the respondents has correctly stated the law under that section. It was so laid down in *Keighley and Durant & Co., In re,* (1893) 1 Q.B. 405 (414)=62 L.J.Q.B. 105. I, for my part, have always understood the general rule to be that the parties took their arbitrators for better or for worse, both as to decisions of fact and decisions of law. That is clerly the law. There are, however, certain grounds upon which the matter may be remitted to the arbitrator for reconsideration. Those grounds have been correctly stated by the counsel for the respondents, and I will not recapitulate them.

"The grounds upon which the court will remit the matter for reconsideration, as stated by me, when appearing as counsel for the respondents, were (*i*) that the award is bad on the face of it, (*ii*) that there has been misconduct on the part of the arbitrator, (*iii*) that there has been an admitted mistake and the arbitrator asks that the matter may be remitted. (*iv*) when additional evidence has been discovered after the making of the award. *Chitty, L.J.* in his judgment stated again these four grounds, and approved of them." These are not, however, exhaustive. The grounds for remitting an award are much wider than those for setting an award aside under paragraph 14 ; but the jurisdiction is statutory and cannot be increased or decreased. *Aboobaker Latiff* v. *Reception Committee,* 171 Ind.Cas. 470=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410.

874. Absence of objection by parties—Duty of Court.—The mere

fact that an objection was not filed by any of the parties to the award does not altogether absolve the Court from its responsibility of deciding whether there was a competent reference and whether the award was a valid award on the face of it. There are matters which really go to the root of the award itself and irrespective of any objection by the parties, these matters had to be decided by the Court before a decree could be passed on the basis of the award. Section 16 (1) (*c*) of the Arbitration Act itself provides for such cases, namely, where an objection to the legality of the award is apparent on the face of it; then the Court may either remit the award or may supersede it and proceed to decide the suit on merit. *Deonarain* v. *Siabar Singh,* A.I.R. 1952 Pat. 461.

875. Remission on the ground of corruption by English Courts.—"In a case decided before the 1889 Act [namely *Dinn* v. *Blake,* (1875) L.R. 10 C.P. 388] the grounds of review of an award were stated to be 'corruption or fraud' : error appearing on the face of the award, mistake admitted by the arbitrator and accompanied by a request for review, and excess of jurisdiction ; but in so far as that case suggests that corruption on the part of the arbitrator would be a ground for remission, it is submitted that it would not be followed. It is difficult to conceive a case where an award would be remitted to arbitrator against whom, for instance, a charge of fraud had been made. In such a case it would be more proper that the award should be set aside ; indeed setting aside has been held to be correct remedy even when the arbitrator had acted *bona fide,* the complaint made against him being such that it is probable that his mind will be prejudiced against the party applying for the remission." *Russell,* 15th Edn., p. 264.

876. Scope of the section.—Section 15 enables the court to modify or correct an award under certain circumstances. This section empowers the court to remit the award to the arbitrator himself for reconsideration where there are omissions or defects therein which are such as cannot be modified or corrected by the court itself under section 15. *Mohun Kishen* v. *Bhoobun,* 7 W.R. 406 ; *Bata* v. *Municipal Committee,* 29 Cal. 854 (P.C.) ; *Tuljomal* v. *Bikhchand,* A.I.R. 1943 Sind 131. "This section empowers the court to remit an award for reconsideration upon certain grounds specified in the section but upon no others." *Per Oldfield, J.* in *Abdul Rahaman* v. *Yar Muhammad,* 3 All. 636 (642)=(1881) A.W.N. 34 ; but see *Gopal* v. *Khetra,* 22 C.W.N. 1933=46 Ind.Cas. 195. This section empowers the court to remit a defective award only in the cases specified there in and in no others ; *Shree Meenakshi Mills Ltd.* v. *Patel Bros.,* 71 I.A. 106=1944 A.L.J. 395=46 Bom.L.R. 841=48 C.W.N. 590 =A.I.R. 1944 P.C. 76=(1944) 2 M.L.J. 17 (P.C.). In *Badruddin* v. *Amir Begum,* 13 Ind.Cas. 520=14 O.C. 308, the court observed: "Nor is there any reason to suppose that the powers of the courts in India to review the proceedings of arbitrators are any more extensive than they are in England. These powers are defined in paragraphs 14 and 15 of the Second Schedule to the Code of Civil Procedure and, speaking broadly, the courts are authorised to interfere with the award on grounds personal to the arbitrator only when he is shown to have been guilty of corruption or misconduct or when he has acted after his jurisdiction has been withdrawn or *when the award is, on the face of it, illegal, incomplete or indefinite.*" But see the opinion of *Russell* noted in the previous topic as regards corruption etc., on the part of the Arbitrator. It is also submitted

that the statement of law does not seem to be correct. *Vide other cases* noted *infra*. Where the parties considering that the arbitrators' knowledge of law is sound have chosen their tribunal to decide their disputes outside the courts, the courts are very reluctant to interfere with the decision of the tribunal and will only do so in cases mentioned in Schedule II, paras. 14, 15 and 16, Civil Procedure Code. *Raghupati* v. *Ramgopal,* A.I.R. 1939 Cal. 557. Schedule II, Civil Procedure Code, is exhaustive. and no court has jurisdiction to go beyond the provisions of this Schedule in order to determine whether an award made in an arbitration on reference in accordance with the provisos of the Schedule can be filed or not. *Satis Chandra* v. *P. N. Das,* 16 Pat. 742=(1938) P.W.N. 228=175 Ind.Cas. 468= 19 Pat.L.T. 549=A.I.R. 1938 Pat. 231. Where the arbitrator clearly holds that the plaintiff's suit should be dismissed and that he should be dismissed and that he should be directed to apply to the revenue authorities for partition, the court acts wholly without jurisdiction for reconsideration in the absence of any of the grounds mentioned in para. 14 of Schedule II of the Civil Procedure Code. *Sheokaran* v. *Kanhaya,* 152 Ind.Cas. 1023= 37 P.L.R. 18=A.I.R. 1935 Lah. 113.

In *Tallapragada* v. *Tallapragada,* 9 Ind.Cas. 173=9 M.L.T. 251= 21 M.L.J. 263=2 M.W.N. 151 (F.B.), *White, C. J.* observed: "The grounds on which an award may be remitted are set out in section 520 (=this section). It seems clear that under this section an alleged defect in the tribunal which gave the award is no ground for remitting it." Similarly, an objection by a party that he did not agree to the terms of the reference does not give jurisdiction to the court under this section. *Palut Bhagut* v. *Monohar Bhagut,* 13 C.L.R. 171. Where obligations imposed in award complied between date of award and filing, it cannot be questioned on that ground. *Annamalai* v. *Ramaswamy,* 33 Ind.Cas. 67=(1916) 1 M.W.N. 203=19 M.L.T. 228. An award cannot be remitted simply on the vround that it is of a conditional nature. *Venuswami* v. *Chelukuri,* 15 Ind.Cas. 573=(1912) M.W.N. 901. An obvious slip on the part of the arbitrator is no ground for setting or remitting an award. *Sreelal* v. *Madan,* 52 Cal. 100=88 Ind.Cas. 49= A.I.R. 1925 Cal. 599. A court cannot amend arithmetical mistake in a private award or remit award with such mistake for reconsideration. *Raiz-ud-din* v. *Shuja-ud-din,* A.I.R. 1925 Lah. 86. A plea of payment. even if valid, is no ground for setting aside an award but only for remitting it. *Hakimulla* v. *Karim Bux,* 86 Ind.Cas. 788=A.I.R. 1925 All. 393. So no court is entitled to add to the grounds of remitting set forth in this section and where the order of remittal is made on grounds not provided therein, the remital must accordingly be held to be invalid. *Vengu Ayyar* v. *Yeggam Ayyar,* A.I.R. 1951 Mad. 414=1950 M.W.N. 785=(1950) 2 M.L.J. 642. A division of the movable is not inextricably bound with the decision of the immovables. The objection that the award was ineffective as it did not divide the movables and left some of the immovable properties joint cannot, therefore, be sustained. If there was any objection on this score, that could have been cured by a remission of the matter to the arbitrator under this section.,*Ramtaran* v. *Adhar,* A.I.R. 1953 Cal. 646=91 C.L.J. 267 ; see also *Rani Bahadur* v. *Sreekant,* A.I.R. 1943 Pat. 285=22 Pat. 103.

In a suit for partion and accounts brought by the widow of the deceased eldest coparcerner in a joint Hindu family consisting of brothers

all disputes and matters of difference were referred to arbitrator on the application of the parties. The arbitrator made their award and filed it in court. The court by its order held that that part of the award which directed payment of monthly maintenance to the plaintiff in lieu of his share was beyond the terms of reference and could not be accepted. The court then passed a decree in term of the award as accepted by it in the preliminary form by directing a partition by metes and bounds. Held, an appeal that in so far as it challenged the decree was not in accordance with or in excess of the award, was one under s. 17 and not under s. 39(v)(iii) Arbitration Act and was not barred by limitation. *Mutuk Lal* v. *Drawpati*, 64 C.W.N. 528=A.I.R. 1961 Cal. 103.

The power of the court to remit an award which has been set aside is restricted by clauses (a)(b), (c) or S. 16(1) and therefore unless a case falls under any of these clauses, the court has no power to remit to the arbitrator or umpire. *Phulchand* v. *India United,* 63 Bom. L.R. 76= 1961 Nag. L.T. 151=A.I.R. 1961 Bom. 208. Section 16(1) empowers the court to remit the award or any matter referred to arbitration to the arbitrator or umpire for reconsideration upon such terms as the court thinks fit. The power to remit the award is distinct from the power to remit any matter referred to arbitration. *Brahma Swaroop* v. *Dewan Chand*. 67 C.W.N. 647.

877. Remission to new arbitrator.—It would seem that where, by the agreement to refer, the Court has power to appoint an arbitrator in place of one who has died, and an arbitrator dies before making his award, the award may be remitted to a new arbitrator appointed by the Court in accordance with the provisions in the agreement to refer. *Russell,* 15th Edn., p. 267 ; see also *Lord* v. *Hawkins,* (1857) 2 H. & N. 55.

878. "Court may."—The court exercises this power even where the arbitrators are *functus officio. In re Strienger,,* (1901) 1 K.B. 105. In the above case *Lord Alverstone, C.J.* observed: "I think that the second award was bad. In my opinion, the old authorities are still binding upon us, and I think that when the umpire had made the first award he was *functus officio.* Having purported, as *Mellish, L.J.* puts it in *Mordue* v. *Palmer,* L.R. 6 Ch. 22 (31), to sign 'a document as and for his award he is *functus officio,* and he cannot of his own authority remedy any mistake'. He was, therefore, not in a position to make another award. But I am clearly of opinion that under section 10 of the Arbitration Act, 1889, the court has a general power and jurisdiction to remit the matters referred to him for reconsideration.....Speaking for myself, until I am corrected by the Court of Appeal, I think this is the kind of case in which the court could wisely exercise its discretion in sending the case back. And, if there is any matter which the parties desire to raise through the arbitrators, it can then be raised." In case of arbitration in pending suit, the expression "court" includes the "court" to which the file has been transferred after the reference. The court to which the case is transferred is vested with all the powers possessed by the court which was originally seized of the case and such court can deal with the case in the same manner as the original court. *Hurbhan Dat* v. *Ladli Singh,* 146 Ind.Cas. 582=10 C.W.N. 1196=A.I.R. 1938 Oudh 547.

It is entirely optional with the court to remit an award if such

award has determined any matter not referred to arbitration. *Abdullah* v. *Ali Merdan,* A.I.R. 1931 Lah. 215=12 Lah.L.J. 314=131 Ind.Cas 303. See also, *Chohar Singh* v. *Geet Singh,* 64 P.R. 1870 (F.B.) ;*Sita Ram* v. *Dhani Ram,* 92 P.R. 1903=35 P.L.R. 1904 ;*Sant Singh* v. *Jiwan Singh,* 41 P.R. 1950=63 P.L.R. 1905 ; *Union of India* v. *Bakshi Ram,* 29 Punj. L.R. 572=I.L.R. (1957) Punj. 1210 (remitting an award to the umpire for decision is discretionary). In *Baxters and Midland Railway Co., In re,* (1906) 95 L.T. 20 (23) *Fletcher Moulton, L.J.* said : "The reported decisions of the court only show the principles which have guided the court from time to time in exercising its jurisdiction, and though they may afford a valuable guidance, they do not restrict either the jurisdiction of the court in deciding other cases, or the duty of the court to look at the facts in each particular case." The decision of the court will not be interfered with on appeal unless such discretion has clearly been misused. *Odlum* v. *Vancauvor City,* (1915) 85 L.J.P.C. 95.

879. Proper remedy—Remission or setting aside.—It has already been stated in certain cases an order for setting aside an award is a proper remedy, where the complaint made against an arbitrator is such that it is probable that his mind will be prejudiced against the party applying for the remission. *Russell,* 15th Edn., p. 264 ; *Re Tidswill* (1863) 32 Beav. 213. In the last named cases *Romilly, M.R.* observed: "The objection is, in my opinion, one which would make it inexpedient to [remit the award] ; because, notwithstanding the perfect honesty and *bona fide* of an arbitrator, it is impossible, where an award has been set aside and sent back upon such grounds, that there should not be, in spite of himself, some disposition to favour one side and a disposition to make it appear that the objection to the award were useless and that the sending it back was productive of no good." Cited in *Russell, Ibid.* In *N. D. Jaggi* v. *Ganga Ram,* 76 Ind.Cas. 275, the court observed: "Now whether an award should be set aside or remitted is a question of discretion by the court, and this discretion cannot be questioned by the Appellate Court. *Odlum* v. *Vancauvor City,* (1916), 113 L.T. 795=85 L.J.P.C. 95. In *Annuing* v. *Harbley,* (1858) 27 L.J.Ex. 145, it was held that unless the court thinks that the arbitrator can no longer be trusted, it will remit the award to him though he has miscarried in the conduct of the reference."

880. Sections 13. 16, 21—"Any matter in difference—Matter left undecided.—The parties had by their application agreed to refer "all matters in dispute" to the arbitrator. The court in making the reference felt that in view of the admission of the defendant, arbitration was needed only about the difference between the claim and the sum admitted. The court accordingly ordered that this matter in difference between the parties should be referred to the arbitrator. *Held,* that though the parties desired that all the matters in dispute in the suit should be decided by the arbitrator including the plea about the legality of the contract of agency, the court understood the parties to mean that the decision of the arbitrator was required only about the difference between the sum claimed by the plaintiff and the sum admitted by the defendants. The first award did not, therefore, decide the dispute. It is true that where though the dispute is on many points, the decision of the arbitrator need not give his decision point by point. Where however the defendants raised a specific issue about the legality of the contract of agency between the parties and the issue was one of the matters in

dispute and the parties desired that it should also be referred to the arbitrator, but the Judge, however, misunderstood the position and did not refer it to him, the power to refer that portion of the dispute remained so long as the parties intended that it so referred.

The parties agreed once again to refer it to the arbitrator and the action of the court in acceding to their request could not be said to be wrong. This, apart from S. 16 (1), the reference to the arbitrator of the issues on which there was no decision either expressly or by implication was not improper. If the court lacked the power there was consensual jurisdicion in view of the agreement of the parties. The remittance of the award for a second consideration was with jurisdiction. It also follows that the second award was not a nullity. *Haji* v. *Bhikam Chand,* I.L.R. (1954) Nag. 514=A.I.R. 1954 Nag. 306.

881. Remit the award.—It has already been stated the power of the court in remitting the award is confined to the specific grounds mentioned in this section. But there is a difference of opinion whether the court can remit the award in part only. It has been held by the Judicial Commissioner's Court of Sind that when an award is sent back by the court to the original arbitrator with direction to specify definitely the land awarded and return the award so amended, and the arbitrator instead of complying with the order goes afresh into the matter and makes a fresh award, thereby depriving the party of the award made in his favour the award cannot be accepted and the arbitrator is *functus officio* except as to that portion of the award which was ordered to be amended. *Satumal* v. *Khundan Lal,* A.I.R. 1929 Sind 164=116 Ind.Cas. 590. In the course of his judgment *Rupchand, A.J.C.* said: "The question, therefore, arises, whether it was competent to the arbitrator to pass a new award diametrically opposed to the first when he was merely required to specify what lands were referred to by him. The following are the observations of *Erle, J. in Johnson* v. *Latham,* 20 L.J.Q.B. 236= 2 L.M. & P. 205 : 'Suppose an award is good as to the three points, and bad as to the fourth, and sent back as to that alone, as at present advised. I am of opinion that the arbitrator is *functus officio* as to the three, and cannot alter his judgment as to them'. Our attention has not been drawn to any Indian decision directly bearing on the point, but it would appear that the principle enunciated by *Erle, J.* would equally apply to the provisions of rule 14, Schedule II, Civil Procedure Code. In my opinion the arbitrator could not alter his judgment and nonsuit the plaintiff. His second award was beyond the scope of his authority and cannot therefore stand nor can a decree be passed on the first award unless it is amended by making it clear what lands it refers to". See also, *Anant Ram* v. *Gurditta Mal,* A.I.R. 1926 Lah. 519=7 Lah. 327.

But in *Tursi Ram* v. *Basdeo,* A.I.R. 1926 All. 567=24 A.L.J. 705= 96 Ind.Cas. 531, *Mukerji, J.* observed: "There does not appear to be any provision in the Civil Procedure Code by which a portion of an award may be remitted. The reasons are obvious. It is impossible to say for any person who is not arbitrator, how the arbitrator proceeded to frame his award. It may be that the portion objected to has an intimate connection with the portion which is not objected to. The arbitrators, therefore, must be given a free had to recast the award." See also, *Mohun Kissen* v. *Bhoobun,* 7 W.R. 406 (407). In a case under section 13 of the Indian Arbitration Act of 1899 (*Aboobaker* v. *Reception*

Committee, A.I.R. 1937 Bom. 410=171 Ind.Cas. 470=39 Bom.L.R. 476), *Wadia, J.* of the Bombay High Court pointing out the difference between section 13 of the Arbitration Act, 1899, and para. 14 of the Second Schedule of the Civil Procedure Code, observe : "It must also be pointed out that there is a difference between the Civil Procedure Code and the Indian Arbitration Act, because the Code distinctly provides for remitting *all or some of the matters* referred to arbitration for reconsideration by the arbitrator. So does section 10 of the English Arbitration Act of 1889. But under section 13 of the Indian Arbitration Act of 1899, the court must, I think, remit the award as a whole, I do not think I have any jurisdiction to remit only a part of the award for reconsideration." It is submitted that the views expressed by *Mr. Justice Mukerji* in the Allahabad case are not quite correct. *The court was quite competent to remit a portion of an award under paragraph* 14 *of the Second Schedule of the Civil Procedure Code. This sub-section* (1) *is taken verbatim from paragraph* 14 *of the said Second Schedule and as such under this sub-section also an award may be remitted to the arbitrators in part.*

A Judge remitted an award to the arbitrator and indicated particular matters which had to be dealt with by the arbitrator. In the final award the arbitrator submitted that he dealt specifically with these points and also gave certain directions for carrying out his decision on these matters into effect. *Held,* the other changes introduced in the final award were merely incidental or consequential. The changes fell within the scope of the questions remitted to him for reconsideration and the award was not vitiated. *Damodar Das* v. *Basheshar Nath,* A.I.R. 1936 Lah. 865.

882. Remission of amended award—time to time.—After an arbitrator has amended his award, a further application may be made to remit it, and if it is defective it may be remitted again. The section empowers the court to remit the matter referred "from time to time." It would seem to be doubtful, however, whether an amended award would be remitted on account of an objection which existed and could have been taken to it on the first or a former occasion. *Russel,* 15th Edn., p. 267. but see A.I.R. 1952 Pat. 461 ; *Perumal* v. *John Dearn,* A.I.R 1960 Mad. 43.

883. Discretion to remit case—S. 13(b).—In deciding whether to remit a case the court is faced with two conflicting principles. On the one hand an award in the form of a special case is intended to be and should be regarded as final subject only to the point of law raised. So far as the facts are concerned it should be regarded as entirely final. It is for the parties before the arbitrator to state the question or the questions of law which they desire to be left to the court and, while it is for the arbitrator to state the facts, it is for the parties to ensure that, so far as possible, the relevant facts are found. On the other hand, there is the principle that the court before which the case comes for argument must be able to do justice between the parties and should not be hampered by findings which in its view of the law are insufficient. It is in deciding to which of these two principles to give effect in any particular case that the judge has a discretion. The exercise of the discretion is wholly unfettered and must depend on the exact facts in each case. If in any case it would be right and proper for a judge to remit of his own volition it cannot be said that he exercises his discretion wrongly when

he accedes to an application by one of the parties. *Universal Cargo* v. *Citan,* (1957) 3 All. E.R. 234.

In case of arbitration by Bengal Chamber of Commerce it has been held that (1) an order remitting an award is made always under S. 16 of the Act and under S. 16, the consent order remitting the award must be construed as remitting it to the arbitration of the Bengal Chamber of Commerce according to the contract of the parties; (2) the Arbitration Agreement between the parties still remained operative even where an order to remit the award had been made by the court under S. 16 of the Act; (3) the consent order did not impose any term that the Rules of the Bengal Chamber of Commerce and Industry will not be applicable at all or that the conduct of such arbitration will not be according to such rules of the Tribunal. As the rules of the Tribunal permitted reconstitution of a court, there was nothing wrong, illegal or invalid when the Bengal Chamber of Commerce reconstituted its court on the ground that one of the arbitrators at first selected was unwilling to act. *D. L. Miller* v. *Daluram,* 97 Cal.L.J. 199=A.I.R. 1956 Cal. 361.

CLAUSE (*a*).

884. Clause (a)—scope of.—Para. 14 (*a*) of Schedule II, of the Civil Procedure Code, is only applicable when the matter not referred to arbitration but determined by the arbitrator cannot be separated without affecting the determination of the matters referred. When such matter can be separated, the proper remedy is that mentioned in clause (*a*) of section 15 and the court has no power to remit the award for reconsideration. *Oulad Hussain* v. *Asmad Khan,* (1936) A.M.L.J. 55. Where an arbitrator neglects to consider some of the matters referred to arbitration he is guilty of an irregularity under Schedule II, para. 14, and the award is vitiated. *Peary Lal* v. *Mahesh Chandra,* 149 Ind.Cas. 396=A.I.R. 1934 All. 493. Where a suit is referred to arbitration and the arbitrators left the main question to be decided by court, the award should be remitted for reconsideration. *Santa Singh* v. *Kahan Singh,* 146 Ind. Cas. 22=A.I.R. 1933 Lah. 530=6 Ind.Rul. (Lah.) 161. See also, *Ganesh Narain* v. *Malida,* 13 C.L.J. 299=10 Ind.Cas. 480; *Bhagwan Das* v. *Shib Dayal,* 92 P.R. 1913=22 Ind.Cas. 811=109 P.L.R. 1914. But withdrawal of question referred to does not amount to non-decision. *Hari* v. *Lakshmi,* 38 All. 380=14 A.L.J. 481=35 Ind.Cas. 833. It is well-settled that the award of an arbitrator must be a final decision on all matters requiring his determination and that it is the duty of the arbitrator to decide all matters referred to him. If he does not decide all the disputes, he commits a breach of duty. If the award has left undertermined any of the matters referred to arbitration, it is the duty of the court in a proper case to remit the award or matters so left undetermined to the arbitrator for reconsideration. *Krishna* v. *Bani,* 54 C.W.N. 796; see also *Gaja Sinha* v. *Sujat Ali,* I.L.R. (1951) Hyd. 887=A.I.R. 1952 Hyd. 46. Though the award professes to determine all matters, in truth the arbitrator may not have applied his mind to and adjudicated upon some matter or matters. If there has been really no determination of some matter by the award the condition of section 16(1)(*a*) is satisfied. But a mere error of law or fact, even an error of arithmetic, is no ground for remitting the award. *Rainarain* v. *Union of India,* 91 C.L.J. 145.

No doubt, where the award is a nullity, there is no power to remit

it. But the fact that the arbitrator undertook to decide something which was not referred to him, the matter referred to him, cannot normally avoid the entire award. This is clear for the provision of S. 16 itself because clause (*a*) of section 16(1) enjoins that the court must determine for itself whether it has been left determined or what has been determined in excess cannot be separated without effecting the determination of the matters referred. Such an error in the proceeding of the arbitrator do not make the award a nullity. The power under s. 16(1) (*a*) is discretionery. *Babuji* v. *Ganpatrao,* 1960 Nag. L.J. 447 = 63 Bom.L.R. 40 = I.L.R. (1960) Bom. 834 = A.I.R. 1961 Bom. 123.

885. Part of dispute referred left undetermined.—Where the arbitrators have left undetermined part of the matter referred to arbitration the award cannot be filed. *Biju Dhar* v. *Rajkaran,* A.I.R. 1938 Pat. 129 = 19 P.L.T. 16 = 174 Ind.Cas. 592. In such a case if filed it can be remitted for reconsideration. *Kunjlal* v. *Banwarilal,* 48 Ind.Cas. 711 ; *Annada Prosad* v. *Jogesh,* 23 Ind.Cas. 862 ; *Sadiq Ali* v. *Imdad Ali,* 3 All. 286 ; *Hakim Ulla* v. *Karim Bax,* A.I.R. 1925 All. 393 = 86 Ind.Cas. 788 ; *Irrutolla* v. *Bhikari,* 14 W.R. 469 = 6 B.L.R. 386 ; *Janardan* v. *Sambhu,* 16 Cal. 806 ; *Rajnarain* v. *Juggeswar,* 14 W.R. 247 ; *Purpshottam* v. *Jethabhai,* 17 Ind.Cas. 33 = (1912) M.W.N. 1076. In *Ganesh Narain* v. *Malida Koer,* 13 C.L.J. 399 = 10 Ind.Cas. 450, the court observed: "In so far as the fifth ground urged on behalf of the appellants is concerned, we are of opinion that it is equally well-founded. It is well-settled that an arbitrator must be careful to see that his award is a final decision on all matters requiring his determination. The obligation so to decide depends upon the question whether the submission requires that all or only some of the matters in disputes are to be determined by him. *Wrighton* v. *Bywater,* (1838) 3 M. ; W. 199 ; *Randall* v. *Randall,* 7 East 81 ; *Samuel* v. *Cooper,* 2 A. & E. 752 ; *In re Wright,* (1841) 1 Q.B. 98 ; *Whitworth* v. *Hulse,* (1866) L.R. 1 Ex. 251 ; *Doe* v. *Homer,* 8 A. & E. 235 ; *Stone ;* v. *Philips,* 4 Bing. (N.S.) 37 ; *Wakefield* v. *Lanelly,* 3 De G.J. & S. 11 ; *Mitchel* v. *Stanley,* 16 East 58 ; *Wilkinsin* v. *Page,* 1 Hare 276 ; *Fagan* v. *Fagan,* 12 Jr. Eq.Re. 483 ; and *Bowes* v. *Fernie,* 4 Myl. & Co., 150. See also authorities collected in the *Laws of England,* edited by *Lord Halsbury,* Vol. I, page 478, note (*q*). The same rule has been adopted in the American courts in a series of decisions amongst which may be mentioned, *Khime* v. *Cotara,* (1814) 2 Gall. 61 = 14 Feed.Cas. 732, and *Smith* v. *Potter,* 27 Vermont. 304 = 65 Am.Dec. 198. The position, of course, is different where the arbitrator is empowered to make one or more awards at his discretion, as in *Dowse* v. *Cox,* (1825) 3 Bing. 20 *Wrightson* v. *Bywater,* 3 M. & W. 199, and the decision of this court in the case of *Sashi Mukhi Debya* v. *Nabin Chandra,* 4 C.L.R. 92, must be taken to fall within this class." See also, *Bhagwan Das* v. *Shib Doyal,* 22 Ind.Cas. 811 = 109 P.L.R. 1914 = 92 P.R. 1913 ; *Ramji Ram* v *Salig Ram,* 11 Ind.Cas. 481 = 14 C.L.J. 188 ; *Jnanendra Nath* v. *Suresh Chandra,* A.I.R. 1928 Pat. 7 = 6 Pat. 556 = 109 Ind.Cas. 821 ; *Annada* v. *Jogesh Chandra,* 23 Ind.Cas. 867 ; *Satumal* v. *Kundanlal,* 116 Ind.Cas. 590 = A.I.R. 1929 Sind 164 ; *Sadiq Ali* v. *Imdad Ali,* 3 All. 286 ; *Purushottam Das* v. *Jethabhai,* 17 Ind.Cas. 33 = 33 M.W.N. 1076 ; *Hakim Uuuah* v. *Karim Baksh,* A.I.R. 1925 All. 393 = 86 Ind.Cas. 419 ; *Santa Singh* v. *Kahan Singh,* A.I.R. 1933 Lah. 530 = 146 Ind.Cas. 22 ; *Gopal Chandra* v. *Kshetra Mohan,* 46 Ind.Cas. 195 = 22 C.W.N. 993. In the leading case of *Randall* v. *Randall,* 7 East 81, there was an omission to determine the rent to be paid by the plaintiff, which was a point expressly referred to the

arbitrators. Similarly, in *Dandekar* v. *Dandekar,* 6 Bom. 663, there was an omission to determine one of the principal subjects of the dispute, *viz.,* to make a division of the fields. Again in *Hewitt* v. *Hewitt,* 1 Q.B. 110, and *Ross* v. *Boards,* 8 Adol. & Ellis, 290, there was a failure to determine finally the points referred.

The reason of the rule is thus stated by a Bench of the Allahabad High Court consisting of *Walsh, A.C.J.* and *Ryves, J.* in *Khublal* v. *Bishambhar Sahai,* 82 Ind.Cas. 219=22 A.L.J. 919=A.I.R. 1925 All. 103: "It is argued, on the one hand, that if an arbitrator chooses to undertake the decision of a variety of matters with the consent of parties, and he deliberately, or by an oversight without the consent of the parties omits from his decision anything really material, it is sufficient to destroy the award. The reason for that is obvious. We are discussing, be it observed, an arbitration without the intervention of the court. The tribunal derives its authority only from the consent of the parties and from the moment when it goes outside that consent, either by omitting to decide what they have submitted to him, or by deciding something which they have not submitted to him, he ceases to be clothed with the legal authority from which alone he derives his jurisdiction. About that there has been no controversy before us. Similarly, there has been no controversy with regard to a corollary which follows. If in the course of events which have happened since he took upon him his office, it has become, impossible, or no longer desirable, either in the view of the arbitrator or in the view of the parties themselves, to decide any one or another of the points originally submitted, and the parties themselves realise that the arbitrator should disregard that point, the defect which would otherwise invalidate the award, ceases to be a defect." *Mukund Ram* v. *Salig Ram,* 21 Cal. 590 (600)=21 I.A. 7. See, *Bhola Ram* v. *Hukum Chand,* A.I.R. 1929 Lah. 831=117 Ind.Cas. 89; *Alagu Pillai* v. *Veluchani,* 74 Ind.Cas. 609=A.I.R. 1923 Mad. 576; *Hari Kumar* v. *Lakshmi Ram,* 35 Ind.Cas. 833=14 A.L.J. 481=38 All. 380; *Harakh Ram* v. *Lakshmi,* A.I.R. 1921 All. 384=60 Ind.Cas. 626; *Anantlal* v. *Juada,* A.I.R. 1930 Cal. 255=50 C.L.J. 323=125 Ind.Cas. 290; *Jnanendra* v. *Suresh Chandra,* A.I.R 1928 Pat. 7=6 Pat. 556=109 Ind.Cas. 821.

It is open to parties to accept incomplete award. *Anantalal* v. *Jnadasundari,* 125 Ind.Cas. 290=A.I.R. 1930 Cal. 255=50 C.L.J. 323; *Mukund Ram* v. *Salig Ram,* 21 Cal. 590 (600)=21 I.A. 47; *Ramji Ram* v. *Salig Ram,* 11 Ind.Cas. 481=14 C.L.J. 188; *Jnanendra* v. *Suresh Chandra,* A.I.R. 1928 Pah. 7=6 Pat. 556=109 Ind.Cas. 821; but see *Allagu* v. *Veluchami,* 74 Ind.Cas. 609=45 M.L.J. 76. In the absence of any objection to an award by the party, the court it not bound to scrutinise the terms of the award, and satisfy itself before passing its decree, that it disposes of all the matters referred to arbitration; and if the award does not so dispose of them, the court is not bound to remit the award under this section. *Annamalai* v. *Annamalai,* A.I.R. 1933 Mad. 697=(1933) M.W.N. 831=38 M.L.W. 330=65 M.L.J. 376=147 Ind.Cas. 476. See also, *Ram Bhajan* v. *Udita Pandey,* 19 Ind.Cas. 405. It is not open to one of the parties to a suit, after having referred all the matters in dispute to arbitration, to withdraw a portion of the claim without the consent of the other party. *Purna Chandra* v. *Kunja Behari,* 46 Ind.Cas. 477= 28 C.L.J. 275. But where after a reference to arbitration and before the making of an award, the parties interested arrive at an agreement as to one of the matters in controversy, and the arbitrator omits to decide the

matter, or to record as part of the award the agreement of the parties, the omision does not amount to such misconduct on the part of the arbitrator as would necessarily make the award bad. *Harakh Ram* v. *Lakshmi Ram,* 60 Ind.Cas. 626=18 A.L.J. 960=43 All. 108=A.I.R. 1921 All. 384 ; *Hari* v. *Lakshmi,* 38 All. 380=14 A.L.J. 481=35 Ind.Cas. 833. Where only ministerial acts remain to be done to complete the award, it is not incomplete for that reason. *Venkata* v. *Padma Valli,* A.I.R. 1944 Mad. 324 ; *Ramji Ram* v. *Saligram,* 14 C.L.J. 188=11 Ind.Cas. 481.

When it appears from the evidence on the record that the parties agreed to the settlement of the dispute in a certain manner and gave up the remaining points which they apparently considered to be trivial, the incomplete character of the award cannot be considered to be fatal to its validity, when the arbitrator gives his award according to the agreement. *Bhola Ram* v. *Hukum Chand,* A.I.R. 1929 Lah. 831=117 Ind. Cas. 89. See also, *Darbarilal* v. *Wasu Malik,* 56 Ind.Cas. 115 ; *Gobardhandas,* v. *Jaikissendas,* 22 All. 224=(1900) A.W.N. 52. An award cast in terms agreed upon by parties does not cease to be an award. *Dulan Bai* v. *Sunderrao,* A.I.R. 1938 Nag. 132=I.L.R. 1937 Nag. 449. If the parties abandon any claim before the arbitrators, that need not appear in the award ; the award would not be vitiated by absence of reference thereto, but it may be proved by the evidence of the arbitrator . *Purushottam* v. *Jethabrai,* 17 Ind.Cas. 33=(1912) M.W.N. 1076. An award is valid, where such award is made without survey according to arbitration clause. *Nordhinger* v. *Chandmull,* A.I.R. 1924 Cal. 1051=28 Ind.Cas. 888=82 Ind.Cas. 341. Where defendant's plea has not been considered, the remittal and not setting aside of the award is proper. *Hakimullah* v. *Karim Baksh,* 86 Ind. Cas. 788=A.I.R. 1925 All. 393. Where an award decides some matters only, remaining matters cannot be considered as decided against the plaintiff. *Jhanda Ram* v. *Musa,* A.I.R. 1928 Lah. 874=29 P.L.R. 531=110 Ind.Cas. 738.

In *Allagu Pillai* v. *Veluchami,* 74 Ind.Cas. 609=(1923) M.W.N. 331= 32 M.L.T. 369=18 L.W. 26=45 M.L.J. 76=A.I.R. 1923 Mad. 576, the court observed: "The greater portion of their argument has been addressed to the plea that as the award was only partial, it is not valid and has referred to *Randall* v. *Randall,* 7 East 81, and *Bradford* v. *Bryan,* Wiles. 268. An examination of these and other cases on the point [i.e. *Risden* v. *Inglet,* Cro.Eliz. 839, *Ormelade* v. *Coke,* Cro.Jac. 355, *Wrightson* v. *Bywater,* 6 Dowl.P.C. 359, and *Symonds* v. *Swaine,* 1 Taunt. 549], shows that there is no rule of law that a partial award is invalid, but that the question has to be decided on the intention of the parties, the matter being a subject of contract between them. In the earlier cases an express contract was required but later as implied contract that award should be given on all points referred was held sufficient." Where part of an award is found to be invalid, being in excess of the arbitrator's powers, and is separable from the rest, the remainder of the award is good. In the same way because of an omission on the part of the arbitrators to decide one of the matters referred to arbitration the award cannot be considered invalid unless the omission has substantially influenced the decision given. *Ti Ti Ma* v. *Mohamed,* A.I.R. 1940 Rang. 203.

Where the whole case has been submitted to the arbitration of a person, his duty is to decide the whole dispute substantially ; he is bound

to write a judgment and give his finding on each issue although he sets forth in the award all the issues *seriatim*. *Narpat Rai* v. *Devidas,* 14 Ind.Cas. 371=13 P.W.R. 1911. See also, *Ghulam Khan* v. *Muhammad Hussian,* 29 Ind.Cas. 167=29 I.A. 51=6 C.W.N. 226=12 M.L.J. 77; *George* v. *Vastian Soury,* 22 Mad. 202; but see *Luchmee Narain* v. *Pyle,* 2 N.W.P.H.C. 150. An arbitrator is not bound to determine a matter not notified as a matter in difference or which is merely a collateral question, though it may be necessary to dispose of it with a view to deciding the main dispute. *Khanchand* v. *Kadumal,* 15 Ind.Cas. 819=5 S.L.R. 240; *Rus* v. *Waters,* 16 M. & W. 263; *Kine* v. *Atkinson,* (1847) April, 16 Ex.Ch; *Middleton* v. *Weeks,* (1613) Cro.Jac. 200; *Hawsworth* v. *Brammall,* 5 My. Cr. 281.

886. Remitting award—arbitrator deciding matters between the parties not referred.—Where the arbitrator determines matters not referred to arbitration it is open to the court to remit the award to the arbitrator again. *Abdulla Khan* v. *Ali Mardhan,* 131 Ind.Cas. 303=12 Lah.L.J. 314=A.I.R. 1931 Lah. 215. In *Narsing* v. *Ajodhya,* 13 Ind.Cas. 118= 15 C.L.J. 110=16 C.W.N. 256, the court observed: "In other words, as *Lord Halsbury, L.C.* said in *Adams* v. *Great North of Scotland Railway Company,* (1891) A.C. 31, the courts will not review awards upon the merits; they will not constitute themselves as courts of appeal to examine whether or not the conclusion at which arbitrator arrived is sound, both in point of law and in point of fact. This salutary doctrine, however, is subject to the fundamental rule that an arbitrator cannot go beyond the precise questions submitted; it will not do for him to determine any claims or demands, though existing between the parties to the submission, save only those which they have agreed that he shall decide. This is sound on principle; the submission furnishes the source and prescribes the limits of the authority of the arbitrator. The arbitrator is inflexibly limited to a decision of the particular matters admitted; he cannot take upon himself an authority which the submission does not confer. *Price* v. *Popkin,* (1839) 10 A. & E. 139= 2 P. & D. 304=L.J.Q.B. 198; *Pascoe* v. *Pascoe,* (1837) 3 Bing. (N.C.) 898= 5 Scott. 117; *Baillie* v. *Edinburgh Oil Gaslight Company,* (1835) C. & F. 629, and *Buccleugs, Duke of* v. *Metropolitan Board of Works,* (1872) L.R. 5 H.L. 418=5 Exch. 221." See also, *Hide* v. *Petil,* (1670) 1 Ch. Cas. 185; *Moshahel* v. *Konomutty,* 15 W.R. 172; *Mohammad Mumtaz* v. *Sakhwat Ali,* 28 I.A. 190=23 All. 394=5 C.W.N. 881. Again in *Juggabandhu Saha* v. *Chand Mohan Saha,* 31 Ind.Cas. 33=32 C.L.J. 237, the Court observed: "It is an elementary rule that the submission furnishes the source and prescribes the limits of the arbitrators' authority and the award both in substance and in form must conform to the submission. Consequently, as the arbitrators are inflexibily limited to a decision of the particular matters referred, if the award extends to matters not within the scope of the submission, it is void as regards the portion in excess of the submission." See also, *Jagat Hari* v. *Moran,* 26 Ind.Cas. 73; *Liloshah* v. *Bholanath,* A.I.R. 1955 Lah. 52; *Ramprotap* v. *Durga Das,* 83 Ind.Cas. 300=A.I.R. 1924 Cal. 567; *Mohammed Ali* v. *Charat Singh,* 80 Ind.Cas. 596=A.I.R. 1925 Sind 51; *Kirparam* v. *Jawahir,* A.I.R. 1932 Bom. 375=34 Bom.L.R. 737=140 Ind.Cas. 761; *Duttaram* v. *Harjimal,* A.I.R. 1930 Sind 170=121Ind.Cas. 161; *Krottapali* v. *Myeni,* 95 Ind.Cas. 740=A.I.R. 1926 Mad. 752. An award on matters of reference is without jurisdiction and if the extraneous matter cannot

be separated the court is empowered to remit it. *Ramaswami* v. *Venkataram,* A.I.R. 1926 Mad. 201=49 M.L.J. 523=91 Ind.Cas. 745; *Mansa Ram* v. *Karla Ram,* 76 Ind.Cas. 1007=A.I.R. 1923 Lah. 411; *Cordi Bai* v. *Thakur Das.* 60 P.R. 1896.

Where the reference to arbitrators does not embrace the question as to who were the partners in a particular firm, the law does not allow them to assume jurisdiction over questions which are not referred to them. It is not necessary for the arbitrators to decide who the partners are. *Kirparam* v. *Jawahar Sing,* A.I.R. 1932 Bom. 375=34 Bom.L.R. 737 =140 Ind.Cas. 761. Where the award deals with a matter extraneous to the reference, which matter can be separated therefrom, the court may modify the award or remit to the arbitrators for correction. *Mansa Ram* v. *Karta Ram,* 76 Ind.Cas. 1007=A.I.R. 1923 Lah. 411. Where the parties to the reference clothe the arbitrators with authority to make one award covering all of them and they act within the four corners of the authority, it is not open to some of the parties to contend that the arbitrators have misconducted themselves in making one award. In such a case neither the arbitration nor the award is improperly procured. *Duttaram* v. *Harjimal,* A.I.R. 1930 Sind 170=24 S.L.R. 145=121 Ind.Cas. 161. Where the case of a reference to arbitration by parties, with respect to partition or property and adjustment of accounts, an award embodying matters not referred to arbitration is delivered, the court has the discretion to remit or not to remit such an award. *Sanat Singh* v. *Jiwan Singh,* 63 P.L.R. 1905=41 P.R. P.R. 1905; *Sitaram* v. *Dhani Ram,* 32 P.R. 1903. Where all matters in difference between the parties to a suit for money due on a bond were referred to arbitration, the arbitrator had power to determine not only the amount to be paid but also the mode of payment by instalments or what interest is to be paid. *Ram Sarup* v. *Bindra Prosad,* 12 O.C. 23=1 Ind.Cas. 328. See also, *Uttam Chand* v. *Mahmood,* 46 Cal. 534=54 Ind.Cas. 285. Where a Judge refers a case to arbitration and the parties to the case appoint the same persons as arbitrators in respect of some other matters not connected with the case, the arbitrators must give separate awards instead of mixing them up and giving a general award. *Raghoo Nundan* v. *Bunwarilal,* 3 W.R. Mis. 27. One submission of disputes under several contracts and a single award are not invalid. *Graham & Co.* v. *Kewalram,* 4 S.L.R. 196=9 Ind.Cas. 712. In *Graham Trading Co.* v. *Chandulal,* A.I.R. 1935 Sind 228=159 Ind.Cas. 824, the court observed: "It urges that one award in respect of several contracts is invalid. But each of the contracts contains the same submission clause and there is no reason why a single award should not be made in respect of different contracts." The mere fact that arbitrators had taken evidence, which proved to cover matters outside their jurisdiction, would not necessarily invalidate the award or make their proceedings improper, if the award itself is within their jurisdiction. *Graham & Co.* v. *Kewalram, supra.* It is competent to an arbitrator, who is empowered to decide whether a sale should be set aside, to pass an award setting aside the sale on the vendor repaying the purchase-money. *Venusami* v. *Chilukuri,* 15 Ind.Cas. 573=(1912) 1 M.W.N. 834. Power to make partition amongst co-sharers includes right to award maintenance. *Murlidhar* v. *Mulchand,* A.I.R. 1924 Oudh 54=10 O.L.J. 226=73 Ind.Cas. 39. In *Ramdas Gurdasmal* v. *Gobindram,* 53 Ind.Cas. 337=13 S.L.R. 75, the court observed: "The last contention under this heading is that the arbitrators went beyond their jurisdiction by deciding points relating to the strangers to the reference. No doubt the ordinary rule is that, as the submission

only refers to the arbitrator the question between the parties, the moment he touches the interest of the strangers, he exceeds his authority and his award is void. But this strict rule of English law obviously cannot be applied in partition cases like this, and the reference clearly referred the question of maintenance allowance and marriage and *sradh* ceremony expenses to the arbitrators. The plaintiff himself refers to the question or presents given to sisters, etc, and marriage and *sradh* expenses among those to be settled, and he is almost necessarily estopped from raising the plea like the present one. Unless such questions are settled, there would be no final settlement of the disputes and the defendants presumably would not have agreed to the arbitration."

So also where reference recited "You will make a decision of the movable and immovable property having considered what is proper and having made a just settlement. The decision we accept in every respect." *Held,* that reference did not exclude power of arbitrators to make decision subject to such conditions affecting its tenor or devolution as could have been validly agreed to even by coparceners, themselves. *Mst. Phula* v. *Kansam Singh,* 71 Ind.Cas. 413=A.I.R. 1923 Nag. 70.

887. Scope of enquiry by Court.—No question can be put to an arbitrator as to what passed in his own mind when exercising his discretionary power on matters submitted to him. *Ti Ti Ma* v. *Mohamed Eusoof,* A.I.R. 1940 Rang. 203. *In Duke of Buccleach* v. *Metropolitan Board,* (1872) L.R. 5 H.L. 418=41 L.J.Ex. 137, *Boronchesby* observed : "The award taken by itself is something certain and fixed, and settles the rights of the parties ; but if evidence is admitted of the intention and the state of mind of the umpire when he made it, the certainty is destroyed, and its effect depends upon his memory, clearness of intellect, and perhaps upon his views and wishes taken up afterwards. Surely it would be a most dangerous thing after an award has been made which becomes of itself, the foundation or right, to allow any one to retain the power of explaining it away, or even of defeating it. We can properly investigate the acts of a judge or arbitrator in prosecuting a particular enquiry, and his judgment founded upon it ; but how can we investigate his secret thoughts or intentions ? He is the only master of them, and what he says must be conclusive, as there is nothing which can contradict or explain it."

888. Award against a party, who is not a party to the reference.—In *Rampratap* v. *Durga Prasad,* 83 Ind.Cas. 300=28 C.W.N. 424= A.I.R. 1924 Cal. 567, *Mookerjee, J.* observed : "If we test the award from the point of view of the provisions of the Civil Procedure Code, the arbitrators have plainly dealt with matters not covered by the submission and beyond the scope of the suit. The effect of a reference by the suit may be accurately described in the words of *Lord Brougham* in *Baillie* v. *Edinburgh Oil Gaslight Co.,* (1835) 3 Cl. & F. 639 (659) : 'The judicial reference is an act of the court and does not take the cause out of the court : the court still retains control over it, but the mode of enquiry and the manner of trial alone is changed by the reference, and the forum of the arbitrator is, in this restricted sense and subject to the control of the court, substituted for enquiry by the court itself.' The arbitrators on such a reference are consequently limited to questions in dispute between the parties in the case referred, and they are not competent to mix up, in their investigation and determination, other controversies wherein strangers to suit are interested. When an award has resulted for proceedings so carried on in a manner not contemplated by the law, the court

cannot be called upon to invoke in aid of the doctrine of separability which was recognised by the House of Lords in *Johnston* v. *Cheape,* (1817) 5 Dow, 247, and *Caledonian Railway Co.* v. *Lockhart,* (1860) 3 Macq. 806 = 6 Jur.N.S. 1311, and by the Judicial Committee in *Buta* v. *Municipal Committee of Lahore,* 29 I.A. 168 = (1902) 29 Cal. 854 (P.C.), and *Amir Begam* v. *Badruddin Husain,* 23 Ind.Cas. 625 = 36 All. 336 = 18 C.W.N. 755 = 12 A.L.J. 537 = 16 Bom.L.R. 413 = 27 M.L.J. 181 (P.C.). Nor can any useful analogy be drawn from the principle recognised by the Judicial Committee in *Hemanta Kumari Debi* v. *The Midnapore Zemindari Co. Ltd.,* 53 Ind.Cas. 534 = 46 I.A. 240 = 47 Cal. 485 = 24 C.W.N. 177 = 37 M.L.J. 525 = 17 A.L.J. 1117 = (1920) M.W.N. 66 (P,C,), namely, that a compromise may be recorded by the court, even though the compromise includes matters not in controversy in the suit, and the decree is limited to the subject of the litigation. In my opinion what has happened in the case before us has so radically affected the proceedings and vitiated its legality that the court will not exercise the discretion vested in it either to modify the award under clause 12 or remit the award under clause 14 of the Second Schedule of the Code. *Hari Singh Nehal Chand* v. *Kakinarah Co.,* 66 Ind.Cas. 389 = 34 C.L.J. 39." Affirmed in appeal to the Privy Council in *Ram Protab* v. *Durga Prosad,* 24 A.L.J. 13 = 43 C.L.J. 14 = 53 Cal. 258 = A.I.R. 1925 P.C. 293 = 53 I.A. 1 = 92 Ind.Cas. 633. But where plaintiff and one of the defendants agreed to a reference but award is made against all, the court should remit the award under this section. *Narain* v. *Kauha,* 3 P.R. 1872. Where all the parties to a reference represent to the arbitrator that whole of the properties in dispute belonged to them and that third persons had no interest in such properties, the arbitrator is justified in treating the whole of such properties as belonging to the parties to the reference. If, as a matter of fact, third persons had any interest in those properties, and the parties to arbitration agreed to have such properties partitioned between them by the arbitrator it is not open to one of them to contest the validity of the award on the ground that it deals with matters in which third parties are interested. *Shaikh Mahommed* v. *Shaikh Abdul,* 4 Pat. 670 = A.I.R. 1925 Pat. 810 = 7 Pat.L.T. 644 = 93 Ind.Cas. 261.

889. When award as regards extraneous matter is separable.— Where the award deals with matters extraneous to the reference, which matter can be separated therefrom, the court may modify the award or remit to the arbitrator for correction. *Mansa Ram* v. *Karta Ram,* 76 Ind.Cas. 1007 = A.I.R. 1923 Lah. 411. See also, *Amir Begam* v. *Badruddin,* A.I.R. 1914 P.C. 105 = 36 All. 336 = 17 Oudh. 120 = 12 A.L.J. 537 = 16 Bom.L.R. 413 = 19 C.L.J. 494 = 27 M.L.J. 181 = 18 C.W.N. 755 = 23 Ind, Cas. 625 (P.C.) ; *Buta* v. *Municipall Committee of Lahore,* 29 Cal. 854 = 29 I.A. 168 ; *Raghunath* v. *Ramrup,* 76 Ind.Cas. 2 = 2 Pat. 777 = A.I.R. 1923 Pat. 255 ; *Kotumal* v. *Jayramdas,* 108 Ind.Cas. 791 = A.I.R. 1926 Sind 144 ; *Mumtaz Ali* v. *Ferhat Ali,* 23 All. 394 = 28 I.A. 190 = 5 C.W.N. 881 ; *Hanu Ram* v. *Dhanna Singh,* A.I.R. 1928 Lah. 915 = 110 Ind.Cas. 401 ; *Miran Baksh* v. *Rahim,* 18 P.R. 1892 ; *Moshahet* v. *Konomutty,* 15 W.R. 172 ; *Raghos* v. *Bunwari,* 3 W.R. Mis. 27 ; *Lachmee* v. *Pyle,* 2 N.W.P. 150 ; *Harmukh* v. *Japan Cotton,* 66 Ind.Cas. 642, *vide* also notes under clause (*a*) of section 15 *ante.* If the award contains any provision which is objectionable with reference to para. 14 or para. 15 and if the provision is separable from the rest of the award, the court can enforce the award so far as it is unobjectionable. *Thirumalai* v. *Nanjayya,* A.I.R. 1941 Mad. 266 = (1940) M.W.N. 879. See also *Russell,* 15th Edn., p. 268 citing *Caledonian Ry.* v. *Lockhart,* (1860) 3 Macq.

808; *Rees* v. *Waters,* (1847) 16 M. & W. 263; *Johnstone* v. *Cheape,* (1817) 5 Dow. 247; *Winter* v. *Letterbridge,* (1824) 13 Price, 533; *Manser* v. *Heavr,* (1832) 3 B. & Ad. 295; *Prestige & Co., Ltd.* v. *Brettle,* (1938) 4 All. E.R. 346.

890. When bad part is inseparable.—"If the objectionable provisions in the award are inseparable from the rest, or not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by the faulty portion, the award will be altogether avoided." *Russell,* 15th Edn. p. 269 *citing Storke* v. *De Smith,* (1738) Willes 66; *Bows* v. *Fernie,* (1838) 4 My. & Cr. 150; *Bucclereh (Duke)* v. *Metropolitan Board of Works,* (1820) L.R. 5 M. 221, per *Blackburn, J.* at p. 229.

CLAUSE (*b*)

891. Clause (b).—The court is empowered to set aside award if uncertain. *Lal Jagroop* v. *Barkateshwar,* 3 O.L.J. 137=34 Ind.Cas. 355. Under clause (*b*), the award is to be remitted when it is indefinite as to be incapable of execution. *Raghuraj* v. *Rajeswar,* 35 Ind.Cas. 761 =3 O.L.J. 258. But where the amount is not ascertained but can be made certain, arbitration could not be held as uncertain. *Nathu* v. *Abdul,* A.I.R. 1930 Lah. 22 (23)=119 Ind.Cas. 726=11 Lah.L.J. 269. In the above case, *Bhile, J.* observed: "The last point argued was that the award is incapable of execution, because the executing court will have to make an enquiry into various circumstances before determining what each party was entitled to get. The award no doubt provides for different contingencies and a preliminary enquiry with reference to them will be necessaary; but I find no authority in support of the contention that an executing court has no authority to make an enquiry as regards the conditions to which a decree is subject. The award is not perhaps very happily worded, but, in my opinion, the intention is sufficiently clear, and there should be no difficulty in getting it executed. Another objection raised in this connection was that the arbitrators have found that a sum of Rs. 505-7-6 is due from Abdul Ghani to the appellants out of the price of the house and Abdul Ghani has been allowed to deduct the cost of writing and laying water-pipes out of this sum. The arbitrators have not actually ascertained that sum, but this also does not appear to be an insuperable obstacle in the matter of execution. Abdul Ghani will have to prove in court what he actually spent on the wiring and water-pipes and the sum so proved can then be deducted from the aforesaid amount due from Abdul Ghani. The mere fact that the amount was not actually ascertained or calculated by the arbitrators does not appear to me sufficient justification for holding the award to be uncertain; for the principle will apply that, that is sufficiently certain which can be made certain."

Similarly, in *Manindra Nath* v. *Mahanand Ray,* 13 Ind.Cas. 161= 15 C.L.J. 360, the court observed: "In so far as the second branch of the third contention is concerned, our attention has been invited to the fact that there are blanks in two places in the award. It has also been pointed out that in two other places the arbitrators have decided that certain lands are to be held under tenancy right, in respect whereof the rent is left unascertained. Finally, it has been observed that, in another instance, the rent is assessed at one rupee; but it is not specifically stated to whom that rent is payable. It may be conceded that, at first sight, it does appear that the award is open to the objection of vagueness and

uncertainty by reason of the defect mentioned. But upon close examination, it appears that there is no substance in any of the alleged defects.

"With regard to the first item, the arbitrators have laid down the principle upon which the sum payable has to be ascertained.....The arbitrators have also laid down in detail the principle upon which the particular set off has to be ascertained.....The arbitrators have also lail down in detail the principle upon which the particular set-off has to be allowed, though they have not made out the actual calculation and have left blank where a particular figure ought to have been inserted in their award. Under such circumstances, we are not prepared to hold that there is any real uncertainty in the award [*Higgins* v. *Wills,* 3 M. & R. 382 ; *Hopcroft* v. *Hickman,* 2 S. & S. 130=3 L.J.Ch. (O.S.) 43 and *Beale* v. *Beale,* (1635) Cro.Cor. 383]. The principle is that if the arbitrator has given rules for calculating the amount of money to be paid, without stating the result of such calculation, the award is sufficiently certain, on principle that that is sufficiently certain which can be made certain. [*Broom* on *Legal Maxims,* 1911, page 478]. As an illustration of this rule, reference may be made to the case of *Beale* v. *Beale, supra,* in which an award was made that one party should pay to the other all such money as he had expended in the prosecution of a suit. The award was held to be sufficiently certain, because the amount could be ascertained from the attorney's bill. The principle applicable to cases of this description was lucidly stated by *Mr. Justice Curting* in the case of *Strong* v. *Strong,* (1852) 8 Curting 560: 'When it is laid down as a principle of law that an award should be final, the meaning is not that nothing shall remain to be done to complete the execution of the award, but that the thing to be done shall have been determined and defined to a reasonable certainty.' The division in that case was to be of certain chattels, the property of a partnership, and the learned Judge in applying the above view of the law observed as follows: 'It is true that the arbitrators did not themselves actually sever the things to be divided, whether hay, grain, utensils or the like. There is nothing in the submission which requires them to effect such actual severance and mechanical distribution of those things. They adjudged in the award that the thing should be divided and they decided in what proportion. In many cases, no more is possible to be done, as in an award for the division of the partnership effects, which may happen at the time to be abroad or otherwise not in the personal possession of either party, and of which the quantity or value is not known : or, as in their nature presently divisible or susceptible of division, such as the yet immature crop or fruits of trees ; or as in the case of joint interests not in their nature capable at any time of a maternal severance, like the property in a suit. All these and many other examples, which readily suggest themselves, would seem to show that an award which purports to divide a property between two persons by prescribing a rule of division may well be final, though the property in question be not actually divided ; hav though it be incapable of division, if the award gives a dehnite and certain rule for the division, there is no want of power in the laws to apply the rule and enforce its application.....' Again, in the case of *Thorp* v. *Cole,* 2 C.M. & R. 367=4 Dowl. 437, reference to extrinsic documents was allowed for the purpose of explaining or determining an amount not named or ascertained in the award otherwise bad by reference to such document. The award was that the defendant should pay to the plaintiff's attorney a certain sum which was paid by him ; the bill

included charges relating to the plaintiffs as well as another man, the award was sufficiently certain, though it had not determined specially the plaintiff's share of the bill, for since it was stated that the bill had already been delivered, it could be ascertained by a reference to it. See also *Ramjiram* v. *Saligram,* 11 Ind.Cas. 481 (493); *Nanakchand* v. *Banarashi,* A.I.R. 1930 Lah. 425=126 Ind.Cas. 579=12 Lah.L.J. 254.

The court will make every reasonable intendment in favour of an award being a final, certain and sufficient termination of the matters in dispute, and unless and until the contrary is shown, the court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him. *Vishindas* v. *Tejumal,* 174 Ind. Cas. 334=A.I.R. 1938 Sind 59. See also *Wood* v. *Griffith,* 18 R.R. 18=36 E.R. 291.

892. Illustrative cases.—An award specifying the amount to be paid by one party to the other in pounds sterling but omitting to specify the rate of exchange at which payment is made is not bad for uncertainty but may be remitted to the arbitrators for determining the rate of exchange at which payment is to be made. *Beith Stevenson* v. *Naromal,* 80 Ind.Cas. 1009=A.I.R. 1924 Sind 117=17 S.L.R. 86. But an award not specifying the amount to be paid is not good ground for remittal if arbitrator has given rule for calculating amounts to be paid. *U. M. Chowdhury* v. *Jibankrishna,* 69 Ind.Cas. 995=A.I.R. 1922 Cal. 447=49 Cal. 646. Certain disputes between two partners in a firm were referred to arbitration. The arbitrators made an award which gave detailed instructions as to the names in which accounts should be gone into and liability of the parties determined, but it did not decree any definite sum in favour of either party. Defendant applied for execution of the award and stated in his application that a certain sum had been arrived at by him as the result of calculations in accordance with the directions given in the award as being due to him from the plaintiff and prayed that execution might be issued for that sum. The court issued execution and an attachment was ordered. *Held,* that the court had no jurisdiction to add to the terms of the award by assuming at the instance of the defendant that the sum mentioned by him in his application was due to him on the basis of the award. *Chokalingam* v. *Raman,* 84 Ind. Cas. 824=2 Rang. 587 (F.B.). Where an award directs certain produce to be sold at a market price, the amount to be realised is sufficiently certain and cannot make the award uncertain. *Vishindas* v. *Khusdas,* 174 Ind.Cas. 334=A.I.R. 1938 Sind 59. Where term of reference is restriction of alienation for ever, it is not binding on person not mentioned in the reference. *Dewanchand* v. *Hakim Rai,* 43 Ind.Cas. 674=39 P.R. 1918=37 P.L.R. 1918=28 P.W.R. 1918. After an award was signed by arbitrators but before it was filed in court one of the arbitrators added in the award the words "Rest of the plaintiff's claims should be dismissed with costs." So the decision of the arbitrators on the question of cost not being clear, the court is empowered under this section to remit the award to the arbitrators in order to have the ambiguity removed. *Anantram* v. *Gurdittamal.* A.I.R. 1930 Lah. 519=7 Lah. 327=8 Lah.L.J. 460=27 P.L.R. 541=98 Ind.Cas. 336. See also, *James Finlay* v. *Ashudamal,* 12 Ind.Cas. 631=5 S.L.R. 89.

893 Award is so indefinite as to be incapable of execution.—This clause is taken verbatim form clause (*b*) of para. 14 of the Second Schedule of the Civil Procedure Code of 1908. Under the Arbitration Act of 1899 an award could be executed as a decree but under the

present Act an award can be the basis of a judgment and decree but cannot be executed as a decree. *Jnanendra* v. *Annapurna,* A.I.R. 1927 Cal. 562 ; *Nadir Shaw* v. *Gajraj,* 43 Bom.L.R. 1006=A.I.R. 1942 Bom. 34=I.L.R. (1942) Bom. 124. So an award under S. 17 of the Arbitration Act can be the basis of a judgment and decree but it is not executable as a decree. A.I.R. 1953 Cal. 690=92 C.L.J. 181.

894. Incapable of execution.—An award is not incapable of execution simply because the executing court will have to make an enquiry into the various circumstances before determining what each party is entitled to get. *Nattin* v. *Abdul,* 119 Ind.Cas. 726=A.I.R. 1930 Lah. 22. So also an award is not incapable of execution if it is passed against firm without specifying its partners. *Kisharam* v. *Jawahir,* A.I.R. 1932 Bom. 375 ; *Louis Dreyfus* v. *Purusottam,* 56 Ind.Cas. 325=47 Cal. 29. Where joint property belonging to certain persons has been partitioned by an award made without the intervention of the court, the mere fact that no specific direction have been given by the arbitrators about the ventilators and drains existing in the properties partitioned does not render the award invalid on the ground of difficulty in execution of the award or indefiniteness in the award. *Mohammad* v. *Mohammad,* A.I.R. 1940 Lah. 24. Where an award is returned to the original arbitrator with direction to modify on specified point, whole award cannot be altered because the arbitrator is *functus officio* except as to that portion of the award which was ordered to be amended. *Satumal* v. *Khudada,* A.I.R. 1920 Sind 164=116 Ind.Cas. 590 ; *Johnson* v. *Latham,* 20 L.J.Q.B. 236=2 L.M. & P. 205. See also *Damodar* v. *Basheshar,* A.I.R. 1936 Lah. 865. The question as to whether an award is so indefinite as to be incapable of execution so as to attract the provisions of Cl. (b) of sub. s. (1) of section 16 would depend mainly on the nature of the dispute that is referred to the Arbitrator. *Union of India* v. *Joginder,* I.L.R. (1961) Cut. 544.

CLAUSE (*c*)

895. Clause (c).—This clause is based on the observation of *Williams J.* in the well-known case of *Hodgkinson* v. *Fernie,* (1857) 3 C.P. (N.S.) 189=27 L.J.C.P. 66=3 Jur.N.S. 818=6 W.R. 181, where his *Lordship* said: "The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact.....The only exceptions to that rule are cases where the award is the result of corruption or fraud.....*or where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award.* Though the propriety of this matter may very well be doubted, I think it may be considered as established. This is simply the case of a reference to an arbitrator before whom has arisen a question of law, which he has decided, and for the purpose of this motion, must be assumed to have decided ill." See also, *Champsey Bhora* v. *Jivraj Balloo Spinning,* A.I.R. 1923 P.C. 66=73 Ind.Cas. 436=50 I.A. 324=47 Bom. 578 (P.C.) ; *Satish Chandra* v. *P. N. Das,* A.I.R. 1938 Pat. 231=16 Pat. 742=19 Pat. L.T. 549=175 Ind.Cas. 468. In *British Westinghouse* v. *Underground Railway,* (1912) A.C. 673=81 L.J.K.B. 1132=107 L.T. 325, *Viscount Haldane L.C.* said: "It was further argued before your Lordships that the arbitrator was in reality made judge of law as well

as of fact, and that the well-known case of *Hodgkinson* v. *Fernie* (*supra*) was wrongly decided. I see no ground for this contention. and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie* (*supra*) to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land." See also *Union of India* v. *American States,* I.L.R. (1957) Punj. 1242=A.I.R. 1958 Punj. 60 ; *Haji* v. *Bhikam,* A.I.R. 1954 Nag. 306=I.L.R. (1954) Nag. 314. All that is necessary for an award to disclose an error on the face of it i.e., that it must contain either in itself or in some paper intended to be incorporated in it, some legal proposition which on the face of it and without more, can be said to be erroneous. *Dr. S. Dutt* v. *University of Delhi,* 1958 S.C.A. 1098=A.I.R. 1958 S.C. 1050=1959 S.C.J. 78. So where an award can be remitted to the arbitrator under clause (*c*) only when it is based on an erroneous proposition of law appearing on the face of the award or some document incorporated thereinto. It cannot be remitted on account of an erroneous conclusion on a question of fact. *Nanibala* v. *Ram Gopal* ,48 C.W.N. 721=A.I.R. 1945 Cal. 19=I.L.R. (1945) 1 Cal. 454. Where a suit on a promissory-note claiming interest is referred to arbitration and an award is filed awarding interest to the plaintiff, it is doubtful whether the want of provisions in the promissory-note for the payment of interest is the kind of objecion to legality of the award apparent on the face of it which is contemplated by para. 14 (*c*) of Sch. II of C. P. Code. *Ramnath* v. *Audhbehari,* (1934) A.L.J. 939=A.I.R. 1934 All. 939. An error of law which vitiates an award should be apparent on the face of the award itself or of any document so connected with the award as to form part of it. But where specific questions of law is specifically referred by parties to arbitrators and the latter arrive at a wrong decision of law, their award cannot be challenged though the error of law is apparent on the face of the award itself. Where, however, a specific question of law is not so referred, an erroneous decision of law may be attacked, provided such error appears on the face of the award itself or any document so closely connected as to form part of it. *Madhoram* v. *Mitsui Bhusan Kaisha,* 78 Ind.Cas. 230=A.I.R. 1925 Sind 186=19 S.L.R. 54. A mere error on a point of law whether specially referred to the arbitrators or not will not by itself justfy the court setting aside the award. No hard and fast rule can be laid down as to the type of cases in which an award may be remitted under section 16 (1) (*c*) or set aside under section 30 (*c*). Even to justify a remission of the award on the ground of an illegality apparent on its face, it must be one of such a nature as to permit of no argument, and to be patent on its face and if permitted to pass unrectified would do substantial injustice in both law, and enquity to the parties concerned. *Rathakrishnamurthy* v. *Balasubramania,* (1948) 2 M.L.I. 601. In *Kalipalli* v. *Kalipalli,* A.I.R. 1944 Mad.324=(1944) I M.L.J. 140, *Mackett J.* observed: "Now the authorities on the subject appear to be clear that a mistake of law .....can only be invoked to obtain the intervention of the court if it is a mistake of law with regard to a private right." See also *Apparao* v. *E. I. Ry. Co.,* A.I.R. 1929 Mad. 177=56 M.L.J. 269=114 Ind.Cas. 358. The error of law on the face of the award must be some legal proposition, which is the basis of the award and which is erroneous and which case be found in the award or in a document actually incorporated therewith. Besides, the legal proposition must be plainly stated, and the court cannot act upon a mere surmise that the arbitrator was acting upon a supposed legal proposition. *Benoy* v.

Bilasroy, A.I.R. 1951 Cal. 529=88 C.L.J. 202. An error of law only exists when in an award there is stated some proposition which is opposed to law and when the erroneous proposition is made the basis of the award. *Vasudeva* v. *Sundara Raja,* 124 Ind.Cas. 209=30 L.W. 868=A.I.R. 1930 Mad. 38 ; *Ramdin* v. *Ganeshilal,* 48 All. 475=95 Ind. Cas. 416=24 A.L.J. 480=A.I.R. 1926 All. 501 ; *Sreelal* v. *Madan,* 52 Cal, 100=88 Ind.Cas. 49=A.I.R. 1925 Cal. 599. The general rule is that erroneous decision on point of law by arbitrator does not entail setting aside of award. *Medapatti* v. *Gurama,* 45 Ind.Cas. 644=41 Mad. 1022=34 M.L.J. 323=24 M.L.T. 60=8 N.W. 202 ; *Alagappa* v. *Chidambaram,* A.I.R. 1931 Mad. 619=133 Ind.Cas. 522=34 L.W. 507 ; *Sartaj Fatema* v. *Jawad,* A.I.R. 1931 Oudh 6=6 Luck. 423=7 O.W.N. 1905 ; *Mangal Sen* v. *Prag Das,* A.I.R. 1931 All. 725=133 Ind.Cas. 410=(1931) A.L.J. 785 ; *Chhab Lal* v. *Swami,* 37 Ind.Cas. 807 ; *Sallah Mohammad* v. *Nathoo Mal,* 54 I.A. 427=104 Ind. Cas. 476=55 Cal. 126=A.I.R. 1927 P.C. 164 ; *Ram Din* v. *Ganeshi Lal,* 95 Ind.Cas. 416=A.I.R. 1926 All. 501=48 All. 475=24 A.L.J. 480. Clause (*c*) clearly contemplates an error which is apparent on the face of the award, 63 Bom.L.R. 76=1961 L.J. 151=A.I.R. 1961 Bom. 208 ; *Union of India* v. *Shambhu Dial,* 63 Punj. L.R. 3=A.I.R. 1961 Punj. 204. Want of stamp being a defect *de hors* the award is not covered by S. 16 (1) (*c*). *Rikhabdass* v. *Ballabhdas,* A.I.R. 1962 S.C. 551=(1962) 2 S.C.J. 311 (A.I.R. 1928 Nag. 166 and I.L.R. (1956) Nag. 783 overruled).

896. Objection to the legality of the award is apparent on the face of it.—In *Champsey Bhara* v. *Jivraj Balloo Spinning,* 73 Ind.Cas. 436=41 M.L.J. 706=25 Bom.L.R. 598=A.I.R. 1923 P.C. 66=(1923) M.W.N. 596=50 Cal. 130=47 Bom. 578=33 M.L.T. 419 (P.C.)=(1923) A.C. 480 (reversing 44 Bom. 780), *Lord Dunedin* said: "An error of law on the face of the award means, in their Lordships' view, that you can find in the award of a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can the say is erroneous." "Error of law on the face of award" means erroneous legal proposition which is the basis of the award. *Sreelal* v. *Madan,* A.I.R. 1925 Cal. 599=52 Cal. 100=88 Ind. Cas. 49 ; *Vasudeva Iyer* v. *Sundararaja Iyer,* A.I.R. 1930 Mad. 38=124 Ind.Cas. 209=30 L.W. 868 ; *Alagappa* v. *Chidambaram,* 133 Ind.Cas. 522=34 L.W. 507=(1931) M.W.N. 451=A.I.R. 1931 Mad. 619. An error of law on the face of the award must be found in the award or a document actually incorporated therein, and which is the basis of the award. *Ram Devi* v. *Ganesh Lal,* A.I.R. 1926 All. 501=24 A.L.J. 480=95 Ind.Cas. 416=48 All. 478. See also, *U. M. Chaudhuri* v. *Jiban Krishna Ghose,* A.I.R. 1922 Cal. 447=49 Cal. 649=69 Ind.Cas. 995 ; *Hodgkinson* v. *Fernie,* (1857) 3 C.B.N.S. 189=27 L.J.C.P. 66 ; *British Westing-house Electric* v. *Underground Electric,* (1912) A.C. 673=81 L.J.K.B. 1132=107 L.T. 325=56 S.J. 754 ; *Harbhan Dat* v. *Ladhi Saran,* 146 Ind.Cas. 582=10 O.W.N. 1196=A.I.R. 1933 Oudh 547. "An error on the face of an award is a very narrow ground and the jurisdiction has to be administered with great care in order that extraneous considerations not appearing on the face of the award are not introduced into the matter." *Lekhraj* v. *Vishindas,* 145 Ind.Cas. 465=27 S.L.R. 96=A.I.R. 1933 Sind 260 ; *In re Jones and Curters Arbitration,* (1922) 2 Ch. 599=91 L.J.Ch. 824=127 L.T. 622=38 T.L.R. 779=66 S.J. 611 (*per Lord Sterndale M.R.*). In the last named case *Lord Sterndale M.R.*

in an earlier part of his judgment said : "At the same time I wish to say this: I quite agree that an error on the face of the award does not necessarily arise from misconduct on the part of the arbitrator. But I think that there may be error that appears on the face of the award which may arise from misconduct—I mean, of course, technical or legal misconduct, and not moral misconduct—....." Where error of law appears on the face of the award the award must be set aside or remitted to the arbitrator to reconsider it on the lines laid down in the judgment of the court. *Barton* v. *Blackburn,* 150 L.T. 327 ; *Absalom* v. *Great Western,* 102 L.J.K.B. 648=(1933) A.C. 592 ; *In re King and Duven,* (1913) 2 K.B. 32 ; *A.G. for Manitoba* v. *Kelly,* (1922) 1 A.C. 268 ; *Across Ltd.* v. *London and Northern Trading Co.,* 45 Ll. Ref. 297 ; *Hogge* v. *Burges,* (1858) 3 H. & N. 293 ; *Buerger* v. *Barnett* (1919) 89 L.J.K.B. 161 ; *Across Ltd.* v. *London and Northern Trading Co., Ltd.* (1933) 45 L.I.L. Rep. 295 ; *Exp. Strabane* (1910) 1 Ir. R. 135. Where the disputes are referred to an arbitrator in the decision of which question of law becomes material the court can interfere under S. 16 (1) (*c*) of the Arbitration Act, 1940, if and when any error of law appears on the face of the award ; but in a case in which a specific question of law has been referred to the arbitrator for decision and he does decide it, the fact that the decision is erroneous does not make the award bad on its face. *Kapila Textile* v. *Madhava Co.,* A.I.R. 1963 Mys. 39 (Question of interest and damages involves question of fact) ; see also *Narain Das* v. *Kanpur Nagar Mahapalika,* I.L.R. (1962) 2 All 603= 1963 All. L.G., 476=A.I.R. 1963 All. 269.

897. Where the legality does not appear on the face of it.— The mere fact that the tribunal has erred in law is no ground for interference. *Ghulam Jilani* v. *Muhammad Hussain,* 29 Cal. 167=29 I.A. 51 (P.C.). In *Raghupati Dutt* v. *Ram Gopal Dutt,* A.I.R. 1939 Cal. 557, *Derbyshire C.J.* observed: "Next it was contended that the award was not in accordance with law. Now, the award itself in its operative parts is a simple and straightforward award which gives certain items of property and money to different people. On the face of the award there is no error in law. But it is said by the appellants that the arbitrators have acted on wrong legal principles in making those various items of award. It is not clear that they have ; they may or may not have taken an erroneous view of the law on some of the items, it is impossible for us to say, although we may surmise. But if they have taken erroneous views of the law in certain parts of the case, it must be remembered that they were requested by all the parties to deal with the matters in dispute and decide them. In this particular instance they were both lawyers—one was a barrister and the other was a pleader—and so had a knowledge of law which doubtless the parties intended that they should use. Doubtless the parties considered that their knowledge of law was sound and having chosen their tribunal to decide these matters outside the courts, the courts are very reluctant to interfere with the decision of the tribunal and will only do so in cases mentioned in Sch. 2, paras. 14, 15 and 16 of the Code."

The mere fact that an objection is not filed by any of the parties to the award does not alotgether absolve the court from its responsibility of deciding whether there was a competent reference and whether the award was a valid award on the face of it. These are matters which really go to the root of the award itself and irrespective of any objection by the parties, these matters have to be decided by the court before a decree can

be passed on the basis of the award. Section 16 (1) (*c*) of the Arbitration Act itself provides for such a case, namely, where an objection to the legality of the award is apparent on the face of it then the court may either remit the award or may supersede it and proceed to decide the suit on merit. *Deo Narain* v. *Siabar Singh,* A.I.R. 1952 Pat. 461. In the above case the award in an arbitration on a reference to five arbitrators, was signed only by three of them, the others two refused to sign it.

An award made in favour of an unregistered company can be filed on the application of that company, and such an application is not barred under s. 69 (1) of the Partnership Act. The fact that it is in favour of an unregistered company does not make the award illegal on the face of it within the meaning of this clause. *Satish Chandra* v. *P. N. Das & Co.,* 16 Pat. 742=(1938) P.W.N. 228=175 Ind.Cas. 468=19 Pat. L.T. 549= A.I.R. 1938 Pat. 231. In the above case *Wort J. observed* : "It is not suggested that there is any other matter which can give jurisdiction to the courts below to reject the application for filing an award. We are not left without authority with regard to this matter. I refer to the case of *Champsey Bhara* v. *Jivraj Spinning and Weaving,* A.I.R. 1923 P.C. 66= 73 Ind.Cas. 436=50 I.A. 324=47 Bom. 578 (P.C.). The subject-matter of that appeal was an arbitration award relating to certain cotton contracts and one of the matters argued before their Lordships and before the judges of the Bombay High Court was that the award given in that matter was bad in law on the face of it within the meaning of the clause [*i.e.* clause (*c*) of para. 14] to which I have just made reference. *Lord Dunedin* in deliverning the opinion of their Lordships of the Judicial Committee referred to the well-known case of *Hodgkinson* v. *Fernie,* (1857) 3 C.B.N.S. 189=27 L.J.C.P. 66, and quotes this passage from the judgment of *Williams J.* [*vide supra* under the heading clause (*c*)]. The law there laid down is in conformity with the paragraphs of the Second Schedule of the Code to which I have made reference. The question which their Lordships addressed themselves was 'Does the error in law appear on the face of the award ?' Reference was also made to the case in *British Westinghouse* v. *Underground Electric Railway,* (1912) A.C. 673=81 L.J. K.B. 1132=107 L.T. 324=56 S.J. 734, where the arbitrator had stated a *special case* and got an opinion of the Divisional Court. In making his award he stated that opinion and founded his award upon it. The opinion was held to be erroneous and so there was an error in law on the face of the award. Their Lordships referred to the case of *Landauer* v. *Asser,* (1905) 2 K.B. 184=74 L.J.K.B. 659=L.T.20=21 T.L.R. 429 (the authority of which had been doubted as being wrongly decided) but stated that in their Lordships' opinion it was not necessary to consider that point, for the present case differed from *Landauer* v. *Asser* (*supra*), in esesntial particulars. In that case the legal proposition was stated in terms and on which the award proceeded, whereas in the case before them no legal proposition is stated as a ground of the award. I might add that by the arguments in the case there was an attempt to incorporate the letters in the award but it was held that even had the letters been looked at they only contained the view of one party. The argument there endeavoured to incorporate both the letters and certain rules of the Cotton Association of Bombay but that argument was rejected as their Lordships of the Judicial Committee decided that no such argument could be supported from the wording of the award. Therefore, there was no error in law on the face of the award. When the question is put to us in this case it seems to be capable only of one answer : 'There

is nothing on the face of the award which is illegal, and it is only by reference to s. 69 and by reference to the facts of the case that we could possibly hold that applicants, Das & Company in this case were not entitled to enforce the award which they had obtained' ;;

In *Alagappa* v. *Chidambaram,* 133 Ind.Cas. 522=34 L.W. 507=(1931) M.W.N. 451=A.I.R. 1931 Mad. 619, *Curjenven J.* observed : "The next objection has reference to a mistake in calculation made by the arbitrators .....There is, I think, no doubt that even in England the law, as stated in *Russell* (11th Edn., p. 213) is that as the parties choose their own arbitrator to be the judge in the disputes between them, cannot when the award is good on its face, object to his decision either upon the law or the facts. There is indeed one case, *In re Hall and Hinds,* 133 E.R. 887, where in the case of a gross mistake made by the arbitrators the court interfered to rectify it But this has not been followed where similar circumstances have arisen more recently, as for instance, in *Phillips* v. *Evans,* 152 E.R. 1216. In that case *Baron Parke* observes, after commenting upon *In re Hall and Hinds* (*supra*) : 'I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to enquire into the merits, or we have to do so in almost every case.

"Here in India authority for the same view is to be found *in Shyama Lal* v. *Purshottam Das,* 42 All. 277=58 Ind.Cas. 585, and may further be derived, I think, from the language of Sch. 2, Civil Pro. Code. The circumstances in which the court should order an award made without the intervention of the court to be filed are stated in para. 21 ; the course is to be adopted 'where no ground such as is mentioned or referred to in para. 14 or para. 15 is found.'

"An error in calculation, to use the language of *Walsh J.* in *Shyama Lal* v. *Purshottam Das, supra,* may be so palpable and gross as to afford strong evidence of misconduct, as that word is to be understood in para. 15. But I am unable to agree that, short of accepting a presumption of this kind, a mistake in calculation can be brought within that provision. In the case of arbitration in suits, para. 12 enables the court to correct a clerical mistake or an error arising from an accidental slip or omission, and it seems to me that what I must consider to be the intentional restriction of this provision to award of that class shows that it was intended to assimilate the procedure with that which prevails in England and not to invest the court with power either to correct such errors, or to reject an award which contains them, when the award is not upon reference made through court." Where the defendant raised no plea of limitation before the arbitrators or in the subsequent negotiations and the violation of the law of limitation does not appear upon the face of the award there is no ground for setting it aside. *Alagappa* v. *Chidamboram, supra.*

In *Vaithianatha Aiyar* v. *Subramania Aiyar,* 78 Ind.Cas. 238=A.I.R. 1925 Mad. 301, the arbitrator allowed the eldest brother a certain sum of money in excess of his share in consideration of his having to look after and educate his younger brothers for many years. He called this sum a *Jeshtha-bhagam.* It was contended that the award was illegal within the meaning of para. 14(*c*) of the Schedule II to the Civil Procedure Code. In disallowing the objection the court observed : "It is suggested that in making the partition the arbitrator followed the now obsolete rule of Hindu law giving the eldest brother an extra share as *Jeshtha-bhagam,* and therefore, under s. 14, clause (*c*) of the Schedule, Civil Procedure Code, the award was illegal, on the face of it. Though he

uses the word *Jeshtha-bhagam* in para. 5 of the award, we do not think the arbitrator was applying any rule of *Jeshtha-bhagam* to the case, for, if he was doing so, he would have given a half share to the plaintiff of all the properties and only a one-fourth share to each of his brothers. He has only allowed the eldest brother to take the whole of the sum of Rs. 3,128 due to the family in consideration of his having looked after his brothers carefully for many years and by educating them enabled them to attain responsible positions in life. We do not think such an award can be said to be illegal." See also, *Vasudeva Ayyar* v. *Sundaraja Ayyar,* A.I.R. 1930 Mad. 38=30 M.L.W. 868=124 Ind.Cas. 209. An award cannot be remitted where the exposition of law by some Hindu Pundits of Benares differed from the view of Hindu law relied upon by the arbitrator. *Nanak Chand* v. *Ram Narayan,* 2 All. 181.

898. Where points of law have been referred to the arbitrators.— Where points of law are referred to arbitrators, they have a right to decide them and their decision cannot be questioned on the ground that it is not in accordance with the received interpretation. *Chhab Lal* v. *Parbati,* 33 Ind.Cas. 737=A.I.R. 1916 Oudh 285. In *Madhoram* v. *Mitsui Bhusan Kaisha,* 84 Ind.Cas. 230=A.I.R. 1925 Sind 186=19 S.L.R. 51, the court observed: "Where a specific question of law is specifically referred by the parties to the arbitrators who arrive at a wrong decision of law, their award cannot be challenged though the error of law is apparent on the face of the award itself." See also *Dinobandhu Jana* v. *Chintamani Jana,* 26 Ind.Cas. 697=19 C.W.N. 476= A.I.R. 1915 Cal. 529; *Madapalli* v. *Madapalli,* 45 Ind.Cas. 644=34 M.L.J. 323=41 Mad. 1022; *Nanak* v. *Ramnarain,* 2 All. 181; *Sarati* v. *Fatima,* A.I.R. 1931 Oudh 6=7 O.W.N. 1095=129 Ind.Cas. 322=6 Luck. 423; *Ghulam Khan* v. *Muhammad,* 29 Cal. 167 (P.C.); *Nazamuddin* v. *Ghulam,* 4 Ind.Cas. 553; *Badruddin* v. *Amir Begam,* 13 Ind.Cas. 520. In *Kelatin Government* v. *Duff Development,* (1723) A.C. 395=92 L.J.Ch. 307=129 L.T. 356=39 T.L.R 337=67. So. Jo. 437, it was contended that the award should be set aside on the ground that there is error of law appearing on the face of it. *Viscount Cave L.C.* in the course of his judgment observed: "I think it follows, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is—generally speaking—a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally, for instance, that he has decided on evidence which in law was not admissible, or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the court from the arbitrators' conclusion on construction is not enough for that purpose." See also *Racecourse Betting Control Board* v. *Secretary of State,* (1944) Ch. 114 (128); *R.* v. *Northumberland,* (1951) 1 K.B. 711 (721).

In *Adams* v. *Great North of Scotland Railway,* (1891) A.C. 31, *Lord Halsbury* treated the points as settled. After referring to *Lord Thurlow's* judgment in *Knox* v. *Symmonds,* (1791) 1 Rus. 369, he proceeds [(1891)

A.C. at pp. 39, 40] : "And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demeanour, neverthless held that the parties, having submitted that question to the arbitrator to determine it ; in their own language, the parties have agreed to accept the arbitrator's decision upon the question of law as well as his decision upon the facts. [*Simpson* v. *Emerson,* (1847) 9 L.T. (O.S.) 199]. In the Court of Queen's Bench thirty years ago, that decision was adopted as being the law which would guide the court in the decision of such question." To the same effect are the decisions of the House of Lords in *Holmes Oil Co.* v. *Punpherston Oil Co.,* (1891) 18 Pettic. (H.L.) 52, and the Judicial Committee of the Privy Council in *Attorney-General for Manitoba* v. *Kelly,* (1922) 1 A.C. 268=91 L.J.P.C. 101 ; and in *King and Deveen, In re,* (1913) 2 K.B. 32=82 L.J.K.B. 733, where *Channel J.* stated the rule concisely as follows. "It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside.....but it is equally clear that if a specific question of law is submitted to the arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator." But see *Darlington Waggon etc., Co.* v. *Harding* (1890) 7 T.L.R. 106, where it has been that intentional disregard of law would be ground for setting the award aside.

In *Attorney-General for Manitoba* v. *Kelley, supra,* the following passage occurs : "In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, be final, the courts will not enquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some documents so closely connected with it that it must be regarded as a part of his award, or unless the umpire himself states that he has made a mistake of law or fact leaving it to the court to review his decision. *Holgate* v. *Killick,* 31 L.J.Ex. 7=7 H. & N. 418 ; *Fuller* v. *Fenwick,* 16 L.J.C.P. 79=3 C.B. 705 ; *Mac Rae* v. *Lemay,* 18 Sup. Ct. Ret. 280 ; *Adams* v. *Great North of Scotland Railway,* (1891) A.C. 31 ; *British Westinghouse Co.* v. *Underground Electric Railways of London,* (1912) 81 L.J.K.B. 1132=(1912) A.C. 673." In a subsequent page it is also said. "*Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award ;* but no such issue arises on the present appeal. In *British Westinghouse Co.* v. *Underground Electric Railways of London, supra,* it was held that where an arbitrator had made an award expressed to be made on the basis of an erroneous opinion given upon a special case stated by an arbitrator under the Arbitration Act, 1889, in regard to questions of law arising in the course of the reference, the award is subject to appeal if that opinion is erroneous."

In *Absalom Ltd.* v. *Great Western (London) Gordon Village Society, Ltd.,* 102 L.J.K.B. 648=(1933) A.C. 592, *Lord Warrington of Clyffe,* observed. "I have also again read the opinion expressed in this House in

Government of Kelaten v. *Duff Development,* (1923) A.C. 195, and I think it is clear that this case decides that, in order to come within the rule that a decision of an arbitrator on a point of law is final, it must be shown that the point is specifically referred. *It recognises the distinction between cases in which a question of law is specifically referred for decision and those in which such a question is involved incidentally as in the present case."* See also *Hitchens* v. *British Coal,* (1936) 2 All. E.R. 191.

899. Error of law—when award can be set aside or remitted for reconsideration.—Where parties choose to go to arbitration—and move specially where they arbitrate before a lay arbitrator and agree to accept his decision, and they do not ask for a case to be stated on a point of law which arises during arbitration—as they are entitled to do, they cannot complain if they get something which may not appear to them to be justice unless they substantiate the very stringent grounds on which the award can be remitted, or set aside for error of law appearing on the face of it. The facts stated in the award must be taken as they stand and no interferences or suspicions as to facts in the mind of the court are sufficient to confer jurisdiction to set aside or remit the award for an error of law based on facts. *James Clark Ltd.* v. *Carters Ltd.,* ('1944) 1 K.B. 566. See also *Champsey Bhara* v. *Jivraj Balloo,* (1923) A.C. 480=92 L.J.P.C. 163.

900. S. 16(i)(c) and s. 30—Error apparent on face of award.—Facts must be based either on evidence or on admission; they cannot be formed to exist from a mere contention by one side especially when they are expressly denied by the other side. *Thawardas* v. *Union,* (1955) 2 M.L.J. (S.C.) 23=(1955) S.C.J. 445=1955 S.C.A. 862=34 Pat. 359=57 Punj. L.R. 369=A.I.R. 1955 S.C. 468. Section 16 (1) (c) covers cases in which an error of law appears on the face of an award. But in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law incidentally material (however necessary) in order to decide the question actually referred. If a question of law is specificially referred and it is evident that the parties desire to have a decision from the arbitrator about that rather than one from the courts, then the courts will not interfere even though there is authority for the view that courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, it has decided on the inadmissible evidence or on principles of construction that the law does not countenance or something of that nature. 1923 A.C. 395 Ref.

An arbitrator is not a conciliator and ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award. The single exception to this is when the parties choose specifically to refer a question of law as a separate and distinct matter. If no specific question of law is referred, either by agreement or by compulsion, the decision of the arbitrator on that is not final however much it may be within his jurisdiction and indeed essential for him to decide the question. *Thawardas* v. *Union.* A.I.R. 1955 S.C. 468=(1955) S.C.J. 445.

When what purports to be the decision of arbitrators is a nullity, there is no power to remit it. *Haran* v. *Krishna,* I.L.R. (1954) 6 Assam= A.I.R. 1955 Assam 61.

901. Sections 16 (c) and 30 (c).—A mere error in point of law whether specifically referred to the arbitrators or not will not by itself justify the court setting aside the award. There may be many cases in which the arbitrators though aware of the strict law on the subject may, in order to do substantial justice on principles of equity, decide to deviate from it. No hard and fast rule can be laid down as to the type of cases in which an award may be remitted under S. 16 (*c*) or set aside under S. 30 (*c*). Even to justify a remission of the award on the ground of an illegality apparent on its face, it must, I think, be one of such a nature as to permit of no argument and to be patent on the face of it, and permitted to pass unrectified would do substantial injustice in both law and equity to the parties concerned. It is not sufficient that there should be merely an arguable case on a point of law determined by the arbitrators. The words 'or is otherwise invalid' in S. 30 (*c*) of the Act similarly would apply to very exceptionable cases if for instance principles of natural justice had been violated by the award and in cases where it is found to be perverse and unconscionable. It is quite impossible to lay down all case which can come within the scope of S. 30 (*c*), nor I am endeavouring to do so. *Penukondu Ratha Krishamurthi* v. *Balasubramania,* A.I.R. 1949 Mad. 559=(1948) 2 M.L.J. 601.

902. Sub-section (2).—By clauses 3 and 5 of the First Schedule of the Indian Arbitration Act of 1940, arbitrators are given four months' time and an umpire is given two months' time to make the award. When an award is remitted under sub-section (1) of section 16 it is obligatory on courts to fix the time within which the arbitrators or an umpire must submit the award to the court. This time may be excluded by the court by any subsequent order. *Louis Dreyfus* v. *Rajagopala Iyer,* 70 Ind.Cas. 353=16 L.W. 657=A.I.R. 1923 Mad. 222. In cases where an award is remitted for decision of the arbitrators or umpire without fixing any time for the return to the award, the court has power to extend the time fixed by this section after the arbitrators or umpire have, after the remission, given their award. *Martirosi* v. *Subramanian,* 51 Mad. 103=27 L.W. 51=(1928) M.W.N. 107=I.L.T. 40 Mad. 111=109 Ind.Cas 70=A.I.R. 1928 Mad. 69=54 M.L.J. 49 (F.B.) See also, *Tejpal* v. *Nathumal,* 46 Cal. 1059=54 Ind.Cas. 6668.

903. Court shall fix the time.—It seems that it is obligatory on court to fix a time for submitting an award. *Vide* also, *Mohan Lal* v. *Baz Khan,* 45 Ind.Cas. 324; *Harnarain* v. *Bhagwant,* 13 All. 300 (P.C.); *Chuhamal* v. *Hari,* 8 All. 548. Section 16 (3) provides that the award so remitted shall become void on the failure of the arbitrator to reminder it and submit his decision within the time fixed. 67 C.W.N. 947.

904. Proviso to Section 16 (2).—Absence of an application for extension of the time in remitting award is not an illegality but a mere irregularity which parties can waive by their conduct; *Ramsarup* v. *Raghubir,* Mad. Law Journal Digest, 1953 Col. 20; see also, *Amarnath* v. *Uggar Sen,* A.I.R. 1949 All. 399.

905. Section 16 (2) and s. 28 (1).—Section 16 requires the court to fix a time within which a remitted award has to be reconsidered and award has to be submitted and empowers the court to extend time so fixed. That section in itself contains an exhaustive and complete provision with regard to such time. The court can enlarge this time in exercise of its powers under S. 16 and not by recourse to S. 28. S.28 enables the court to enlarge the time fixed for the making of the award and not the time fixed for filing a new award on reconsideration of an award which

has already been made. *Ganapat* v. *Ramgopal,* 59 C.W.N. 807=A.I.R. 1955 Cal. 302. Under the proviso to S. 16 (2) the court may extend the time fixed by the order of remission by a subsequent order. The proviso does not require that the subsequent order must be made before the time fixed. The discretion of the court is unfettered and may be exercised both before and after the expiry of the time. The effect of the subsequent order of extension is as if the extended time was originally inserted in the order of remission. (1868) 3 Q.B. 404.

Sub-section (3) of S. 16 does not put a fetter upon the power of endorsement of time conferred by S. 16 (2). The object of S. 16 (3) is to provide that on failure to reconsider the award remitted for reconsideration the award becomes automatically void and need not be set aside under S. 30. *Ganpatrai* v. *Ramgopal,* 59 C.W.N. 807=A.I.R. 1955 Cal. 302. Sub-section (2) is not exhaustive. Where umpire dies before filing an award or without authorising any one to file the award on this behalf, order for filing the award can be made under S. 151 C. P. Code A.I.R. 1959 Cal. 84.

906. Sub-section (3).—This section makes it obligatory for the arbitrator to reconsider the remitted award and to submit his decision within the time. The court under subsection (1) is competent to remit the award from time to time. Refusal by arbitrators to amend a clearly bad award is misconduct on their part. *Devnarain* v. *Rajimonee,* 3 W.R. 169. If the arbitrators refuse to reconsider, their award is void and is of no effect. *Mohan Kishen* v. *Bhoobun Shyam,* 7 W.R. 406. But after passing judgment in pursuance of an award, such award cannot be re-submitted to the arbitrator for reconsideration and correction. *Pohkar* v. *Punchun,* 2 N.W.P. 235. Where the arbitration is in pending case and the arbitrator refused to reconsider the award, the court is competent to set aside the award and to proceed with and decide the case on its merits. *Janardhan* v. *Shambhu,* 16 Cal. 106. See also, *Sujan Rai* v. *Jhabba,* (1895) A.W.N. 45. If the arbitrators refuse to reconsider an award properly remitted to them it becomes void. *Suryanarain* v. *Soralaya,* 9 Ind.Cas 173=9 M.L.T. 251=21 M.L.J. 263=2 MW..N. 151. In *Abdul Rahman* v. *Yar Muhammad,* 3 All. 636, at page 642, *Shankie, J.* observed. "Section 520 gives no unreserved discretion to a court in the matter of remitting awards for reconsideration; and the refusal of the arbitrators to reconsider the award will render it void only when the order remitting it was one which could be properly made under S. 520." The court is competent to pass decree on the award of the arbitrators even after their refusal to re-consider it. *Lalti Dai* v. *Baldeo Sahi,* (1881) A.W.N. 25. In *Crompton & Co. Ltd.* v. *Mohan Lal,* 25 *Ind. Cas.* 391=41 Cal. 331, an application was made to set aside an award made by the arbitrator under section 15, of the Arbitration Act of 1899. In that case in remitting the award for reconsideration the court observed: "There is a serious question in this case as to whether the claim of Crompton & Co. would not be barred by the Statute of Limitation if the award was simply set aside and the company was left to their remedy by suit.....I therefore order that the present award be set aside and the matter be remitted to the arbitrator, for further reconsideration." In *Tejpal* v. *Nathumal,* 54 Ind.Cas. 668=46 Cal. 1059, it has been held that a court has power under S. 12 of the Arbitration Act of 1899, to extend the time for making an award, even though there has been an order of remission and an award has in fact been made, and this power is not limited by section 13 of the Act.

907. Limitation.—"An objection under para. 12 or para. 14, Sch. I, Civil Procedure Code, is something different from an objection under para. 15 and Art. 158, Limitation Act, applies only to objections under para. 15 where the application is to set aside the award completely. Where the prayer is only for the modification or the remission of the award, the prayer comes within para. 12 or para. 14 and consequently Art. 158 is not applicable." *Kiroti* v. *Behari,* A.I.R. 1932 All. 648=(1933) A.L.J. 519=146 Ind.Cas. 596. See also, *Appayya* v. *Venkataswami,* A.I.R. 1919 Mad. 877=47 Ind.Cas. 597; *Hyder Saheb* v. *Giria Chettiar,* 19 Ind.Cas. 496. But now under the amended Art. 158 of the Art. 158 of the Limitation Act an objection to get an award remitted for reconsideration is to be filed within thirty days from the date of service of notice of filing of the award. The amended article runs thus:—

"158. Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for consideration	Thirty days.	The date of service of the filing the award.

908. Powers and duties of arbitrator when award remitted.—"When an award is remitted to the arbitrator all his original powers, so far as they are not affected by the order remitting the award, or the Arbitration Act, are it would seem revived. But his powers and duties cannot exceed those which are necessary to give effect to the order of the court." *Russell,* 15th Edn., p. 295. "It is duty of the arbitrator to hear fresh evidence in the following cases—(*a*) where the arbitrator has omitted to decide some matter submitted to him; (*b*) where fresh evidence has been discovered after making of the award; or (*c*) where the arbitrator had, during the proceedings in the arbitration, refused to receive certain evidence which he ought to have received. In case where the award is remited upon some question of law, the duty of the arbitrator apparently would generally be limited to hearing such evidence only as might be necessary to come to a correct legal decision.

"In cases where the award is remitted for the correction of errors apparent on the face of it, the arbitrator, as a rule, required to hear fresh evidence or to give notice to the parties that he intends to make his second or amended award." *Russell,* 15th Edn., p. 296.

909. Order remitting an award for reconsideration, whether appealable.—Section 39 of this Act lays down which orders are appealable. Under that section an appeal shall lie from the following orders:

(*i*) an order superseding an arbitration;
(*ii*) an order on an award stated in the form of a special case;
(*iii*) an order modifying or correcting an award;
(*iv*) an order filing or refusing to file an arbitration agreement;
(*v*) an order staying or refusing to stay legal proceedings where there is an arbitration agreement;
(*vi*) an order setting aside or refusing to set aside an award.

An order remitting an award for reconsideration is not an order of that description and as such no appeal lies from such an order. Under the old law also an order remitting an award for reconsideration was not open to challenge in appeal. *Santa Singh* v. *Khan Singh,* 146 Ind. Cas. 22=A.I.R. 1933 Lah. 530; *Sundar Singh* v. *Nighaiya,* A.I.R. 1925 Lah. 466=88 Ind.Cas. 920=6 Lah. 94; A.I.R. 1921 Lah. 145. Under paragraph 14 of Sch. II of the Civil Procedure Code a court was empowered to remit an award to an arbitrator upon the ground that he left undetermined one of the matters referred; but if the court after considering the

objections made upon this ground refused to remit the award for reconsideration, no appeal was competent from such refusal. *Ananda* v. *Jogesh,* 23 Ind.Cas. 268. See also, *Venusami* v. *Chidu Kari,* 15 Ind.Cas. 573=(1912) M.W.N. 901 ; *Sree Ram* v. *Deno Bandhu,* 7 Cal. 490=9 C.L.R. 147 ; *Suryanarain* v. *Sarbaya,* 21 M.L.J. 263=9 Ind.Cas. 173 (F.B.). Where the court had remitted an award under that para, and the arbitrators submitted a fresh award, and the court passed a decree in accordance with such revised award, no appeal was competent against such decree on the ground that the order of remittal under this para, was wrong. *Baland Baksh* v. *Ramchandra,* 84 Ind.Cas. 693=6 Lah.L.J. 500=A.I.R. 1925 Lah. 267 ; *Subbiah* v. *Subramaniah,* 31 Mad. 479 ; *Chohar Singh* v. *Jut Singh,* 64 P.R. 1870.

An order under the Indian Arbitration Act of 1899 setting aside an award or remitting the matter for fresh award to be made was not subject to appeal under the Act. *Saya Pye* v. *U. Kundinnya,* 76 Ind.Cas. 525=2 Bur.L.J. 193=A.I.R. 1924 Rang. 47. (But under S. 39 of the present Act an order setting aside or refusing to set aside an award is appealable.)

In the above case the court observed : "It was held in the case of *Khatum Bee* v. *Abdul Rahman,* 4 L.B.R. 249=14 Bur.L.R. 129 and *Ripley* v. *Nahapiet,* 17 Ind.Cas. 902=6 L.B.R. 88=5 Bur.L.J. 155, that no appeal lies either against an order directing an award to be filed under the Indian Arbitration Act or against an order under that Act setting aside an award.....The order in question amounts to an order refusing to file an award and the mere fact that on the original submission, the matter was remitted for the making of a fresh award cannot, in our opinion, operate so as to affect the question of appeal for which no provision is made in the Indian Arbitration Act." See also *Purushotumdas* v. *Giridhari Lal,* 8 Ind.Cas. 171=12 Bom.L.R. 852=35 Bom. 130.

In *Louis Dreyfus* v. *Rajagopala Iyer,* 70 Ind.Cas. 353=A.I.R. 1923 Mad. 222=16 L.W. 657, *Schwabi, C.J.* observed : "Now the words of the Act (*i.e.* Act of 1899) are that the court may remit the award leaving the discretion to the Judge who hears the case, and that is a discretion which has been held by a very single authority, with which I humbly agree, should not be interfered with in appeal unless there are very strong grounds for doing so, or perhaps it might be better put, unless it is clear that the learned Judge has not exercised a judicial discretion."

After an award was signed by arbitrators but before it was filed in court one of the arbitrator added in the award the word "Rest of the plaintiffs' claim should be dismissed with costs." When the award was filed the court finding that the award was not clear as regards the costs remitted it to arbitrators. The arbitrators amended the award and parties were made to pay their own costs in the suit. The court ignored both the interpolation by one of the arbitrators before first filing the award and the amendment after it was remitted and passed a decree with proportionate cost. *Held,* that the order fell under S. 104 (1) (*c*) [=section 39 (1) (*c*)] of the Civil Procedure Code and was appealable. *Mul Raj* v. *Kishori Lal,* A.I.R. 1926 Lah. 518=98 Ind.Cas. 336=7 Lah. 327=8 Lah. L.J. 460=27 P.L.R. 541. Where a court remits an award for reconsideration and the arbitrators refuse to reconsider it, and the court proceeds with the suit and passes a decree, the question whether the award was properly remitted under this section or not, is one which could be entertained in an appeal from such a decree. *Abdul Rahman* v. *Muhammad,* 3 All. 636=(1881) A.W.N. 34. An order remitting an award is an interlocutory order under S. 591 of Civil Procedure Code of 1882 and the legality of such an order

can be challenged in an appeal from the ultimate decree passed on the merits. *George* v. *Vartian Savry,* 22 Mad. 202. An appeal lies from a decree made in accordance with an award only where the decree is in excess and not in accordance with the award. *Sital Ram* v. *Dhani Ram,* 32 P.R. 1903. See also, *Tallapragada* v. *Tallapradgada,* 9 Ind.Cas 173 (F.B.).

910. Appeal.—An objection to an order remitting the award to the arbitrators for reconsideration can be taken under S. 39 (*vi*) against the order setting aside or refusing to set aside an award. The order remitting the award for reconsideration is not a "case decided" within S. 115 C. P. Code and therefore no revision lies therefrom. *Zaralbibi* v. *Shamsuddin,* A.I.R. 1946 Sind 141 = I.L.R. (1946) K. 21. Since there is no appeal against the order of remittal, because none is provided for by the statute, it is competent for the aggrieved party to plead irregularity of the remittal in an appeal against the order of the court upholding the award. *Vengu Ayyar* v. *Yegyam Ayyar,* A.I.R. 1951 Mad. 414.

When an award is accepted on certain points and remitted for reconsideration only on the remaining points the order would amount to a refusal to set aside an award on the points the award is accepted, and, as such, will be appealable. The term "setting aside or refusing to set aside" occurring in S. 39 (1) (vi) will include setting aside or refusing to set aside" occurring in S. 39 (1) (vi) will include setting aside or refusing to set aside an award in part as well. *Joyantilal* v. *Surendra,* 1956 Nag.L.J. 538 = A.I.R. 1956 Nag. 245 = 1956 M.P.L.J. 46 (D.B.).

911. Revision.—No revision lies against an order remitting an award to the arbitrators for reconsideration as there are other remedies by way of appeal after the final decision of the case by the court. *Lal Chand* v. *Kishori,* (1888), A.W.N. 123. An order under S. 16, remitting an award for reconsideration by the arbitrators, does not decide a case within the meaning of S. 115, and hence such an order is not open to revision. Since an objection as to improper remission of the award can be taken in appeal against the order setting aside or refusing to set aside the award, a revision application under S. 115 is incompetent and would not properly lie. *Zaralbibi* v. *Shamsuddin,* I.L.R. (1946) Kar, 21 = 227 Ind.Cas. 123 = A.I.R. 1946 Sind 141. In *Sita Ram* v. *Dhani Ram,* 92 P.R. 1903, it has also been held that the refusal of a court to remit an award which decides matters not referred to arbitration is subject to revision. But a revision lies against a decree based upon an award on the ground of material irregularity, only when such irregularity concerns the proceedings of the court and not those of arbitrators. *Ibid.* See also, *Haradhan Datt* v. *Ladhi Saran,* A.I.R. 1933 Oudh 547 = 10 O.W.N. 1196 = 146 Ind.Cas. 582.

Judgment in terms of award.

17. Where the Court sees no cause to remit the award or any of the matters referred to arbitration *or to set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it,* proceed to pronounce judgment according to the award, and upon judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

912. N.B.—This section follows with minor alterations paragraph 16 of the Second Schedule to the Code. There is substantial difference between paragraph 16 and S. 15 (1) of the Indian Arbitration Act which is based on section 12 of the English Arbitration Act of 1889. Herein lies one of the substantial points of difference in the existing law : "Under the 1899 Act (following the English law) an award is executable as a decree (see also 43 Bom.L.R. 1006) but is not a decree for all purposes. 1934 Act of Parliament has changed the English law in this respect, and by this section it is proposed to standardise the law in the direction of proving that judgment shall be pronounced in the terms of the award and that decree shall follow."—*Vide Notes on Clauses.*

913. .Paragrah 16.—Paragraph 16 of the Second Schedule of the Civil Procedure Code ran as follows : —

"Paragraph 16. (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award."

914. Section 15 (1).—Section 15 (1) of the Indian Arbitration Act, 1899, ran as follows : —

"15 (1) An award on a submission, on being filed in Court in accordance with the foregoing provision, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court." *Vide Nadir Shaw* v. *Gajrat,* 43 Bom.L.R. 1006 = A.I.R. 1942 Bom. 34 = I.L.R. (1942) Bom. 124.

915. Section 12 of the English Act of 1889.—Section 12 of the English Act of 1889 runs as follows : —

"12. An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or to the same effect."

916. Section 10 of the English Arbitration Act of 1934.—Section 10 of the English Arbitration Act of 1934 runs as follows : —

"10. Where leave is given section twelve of the principal Act to enforce an award in the same manner as a judgment or order, judgment may be entered in terms of the award."

917. Difference between this section and section 15(1) of the Indian Arbitration Act.—Under section 15 (1) the necessity of obtaining a judgment is removed. *Selby* v. *Whitebread,* (1917) 1 K.B. 736. Under the old section an award when filed was to be executed like a decree but was not itself a decree. *E. D. Sassoon* v. *Randall,* A.I.R. 1922 P.C. 374 = 49 I.A. 366 = 50 Cal. 1 = 32 M.L.T. 19 = 37 C.L.J. 336 = 44 M.L.J. 758 = 27 C.W.N. 660 = (1923) M.W.N. 372 (P.C.). See also, *Ramsahai Mull More* v. *Joylall,* 32 C.W.P. 606 = A.I.R. 1928 Cal. 840 ; *Chaitram* v. *Hardwari Mol,* 55 Cal. 499 ; *Lala Bhugat* v. *Ambala Bank,* A.I.R. 1943 Lah. 222 ; *Pannalal* v. *Chaman,* A.I.R. 1947 Lah, 54 = 225 Ind.Cas. 8. Award on submission could not be made a decree of court. It was only to be filed in court. *Damodar* v. *Bisheshar,* A.I.R. 1929 Lah. 882 = 124 Ind.Cas. 318. But it could be executed as a decree. *Janandra Mohan* v. *Annapurna,* A.I.R. 1927 Cal. 562. No decree need be passed on an award to which the Arbitration Act applies. The passing of a decree therefore was a superfluous act for doing of which a Judge had no legal

sanction. It was consequently a nullity and a surplusage which must be ignored and was no bar to the application to enforce the award. *People Bank* v. *Lakshan Ram,* 173 Ind.Cas. 11=40 P.L.R. 79=A.I.R. 1938 Pesh. 3. See also, *Krishna Gopal* v. *Lakshmi Bai,* I.L.R. 1938 All. 389=175 Ind.Cas. 297=(1938) A.L.J. 210=A.I.R. 1938 All. 232 ; *People Bank* v *Padam Lal,* 177 Ind.Cas. 659=A.I.R. 1938 Pesh. 54 ; *Anath Nath* v. *Monmotha Nath,* 184 Ind.Cas. 652=A.I.R. 1939 Cal. 482 ; *Udoychand* v. *Bhagirati Lal,* 61 C.L.J. 515 ; *Achraj Singh* v. *Achrajram,* 27 S.L.R. 109=142 Ind. Cas. 489=A.I.R. 1933 Sind 78 ; *Denmal* v. *Firm of Lalchand,* 133 Ind.Cas. 65=A.I.R. 1931 Sind 97 (F.B.) ; *Albuqueerque* v. *Chatholic Bank,* A.I.R. 1946 Mad. 352=(1946) 1 M.L.J. 244=1946 M.W.N. 213=59 M.L.W. 202. Though an award was executable as a decree of a court, the court had no power under section 15 of the Arbitration Act of 1899 to pass a decree on the basis of the award. *Ganendra Mohan* v. *Bhabanicharan,* 34 C.W.N. 268=127 Ind.Cas. 60=A.I.R. 1930 Cal. 468. But according to this section where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the court must, after the time of making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award and upon the judgment to pronounced a decree shall follow. Now in England also judgment is permissible on such awards. *Vide* S. 10 of the English Arbitration Act of 1934. Now in England "an award may be enforced, by leave of the High Court or a judge thereof ; in the same manner as a judgment or order ; and judgment may be entered, where such leave is given, in terms of the award. *Vide* S. 26 of the English Arbitration Act, 1950 and *Russell,* 15th Edn., p. 249. An award made but not filed before the institution of a suit by one of the parties could be filed under S. 15 of the old Arbitration Act, even after the institution of the suit. *Balkissen* v. *Brijmohan,* 41 C.W.N. 1198. The proceedings for enforcement of an award under S. 15 of the Arbitration Act, 1899, were governed by S. 47, Civil Procedure Code, and an appeal was competent from an order rejecting such application *Kanhaiyalal* v. *Peoples Bank,* 151 Ind.Cas. 881=35 P.L.R. 635=A.I.R. Lah, 49. When S. 15 of the Arbitration Act speaks of the award "being enforceable as if it were a decree of the court," the expression has to be read as including both the manner of execution and the time within which execution must take place. *Nadir Shaw* v. *Gajraj,* 43 Bom.L.R. 1006.

918. Function of court deciding objection under this section.— An arbitrator is a judge of all matters whether of fact or of law and a court hearing objections against an award is not a Court of Appeal sitting in judgment over the award. *Muhammad* v. *Shakir,* 78 Ind.Cas. 278=10 O.L.J. 142=10 O. & A.L.R. 55 ; *Badruddin Hasan* v. *Amir Begam,* 13 Ind.Cas. 520=14 O.C. 308, on appeal to P.C. *Amir Begam* v. *Badruddin,* 23 Ind.Cas. 625=36 All. 336=18 C.W.N. 775=16 Bom.L.R. 413 (P.C.) ; *Ghulam Khan* v.*Muhammad Hassan,* 29 Cal. 167=29 I.A. 51 (P.C.) ; *Shyam Lal* v. *Parshottam Das,* 58 Ind.Cas. 585=18 A.L.J. 241=42 All. 277.

919. Scope of the section.—This section is based on paragraph 16 of Schedule II. Civil Procedure Code, which corresponds to section 522 of the Code of 1882. A proceeding is to be initiated by filing an award under section 14. *Jaikishan* v. *Ramgopal,* A.I.R. 1944 Lah. 398. "This section provides that where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set

aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow. Looking at the words of this section, it is fairly clear that it is open to the court to see whether there is any cause to remit or set aside, the award part from the application which a party may make for the purpose of getting the award remitted or set aside. The section clearly lays down that if an application is made, it has to be decided on the merits, and if the application is rejected, a judgment is to be pronounced in accordance with the award. If the application is allowed, the award naturally be remitted or set aside, in which case other appropriate orders would have to be passed. While making this provision the section does seem to contemplate that the court may proceed to consider the question whether the award should be remitted or set aside even though an application may not have been made before it by any party to the award. In such a case if the court *suo motu* sees any cause to remit or set aside the award, the court may make that orders. If the court sees no cause to remit or set aside the award, even so, the court must wait until the period for making an application under S. 33 has expired, and, if an application is made, until the application is refused. It would, therefore, be clear that on a fair and reasonable construction of the words used in section 17, the court has jurisdiction to consider the question of remitting or setting aside the award *suo motu.*" *Hastimal,* v. *Hiralal*, A.I R. 1954 Bom. 243. The following conditions must be complied with before the court may pronounce judgment upon award and before the decree can follow under this section : (*a*) The court has given notice to the parties of filing the award ; the time for making an application to set aside the award has expired or if such application has been made, it has been refused ; (*b*) Where the court sees no cause to remit or set aside the award. All these conditions are cumulative and must be strictly fulfilled. If not, the court may and ought to aside the judgment and decree which follows. *Ganesh Mal* v. *Keshoram,* 55 C.W.N. 349 ; *Katha Appa Ram* v. *Mohammad,* A.I.R. 1949 Mad. 256. After refusing to set aside an award the court must pass a judgment on merits. Decree on award in the absence of judgment is null and void. *Amode Kumar* v. *Hari Prosad,* A.I.R. 1958 All. 720. Application by a party to an award to make it a rule of court and to pass a decree in accordance with it is competent under this section read with R. 10. *Gangaram* v. *Radha,* A.I.R. 1955 Punj. 145=57 Punj.L.R. 253. Where there is no valid submission, there could be no award on which a decree could be made by the court and if it is so made it is passed on something which is not an award. *Ghafooran* v. *Abdul Hamid,* 174 Ind.Cas. 766=(1938) O.H.N. 457=(1938) O.L.R. 215=(1939) O.A. 367=A.I.R. 1938 Oudh 154 ; *Gosho* v. *Mulchand,* 196 Ind. Cas. 15=A.I.R. 1941 Sind 111. Under the section the court is to wait at least for a period of thirty days from the date of the service of notice of filing of the award before pronouncing judgment on the award. *Subha Rao* v. *Ramalinga,* A.I.R. 1934 Mad. 619=67 M.L.J. 377=40 M.L.W. 364=58 Mad. 1 ; *Udit Singh* v. *Ram Lakhan,* A.I.R. 1933 All. 313=145 Ind.Cas. 403 ; *Ravibhai* v. *Dahyabhai,* 59 Ind.Cas. 811 ; *Vellu Pillay* v. *Appasami,* 9 Ind.Cas. 197 ; *Goorapa* v. *Narayana,* 17 Ind.Cas. 431 ; *Rungaih* v. *Govinda Swami,* 15 L.W. 160=A.I.R. 1922 Mad. 179. But such a judgment can be passed within the prescribed period if the parties so desired. *Pandurang* v. *Amrit Rao,* A.I.R. 1931 Nag. 112=134 Ind.

Cas. 282=27 N.L.R. 240; but see *Sri Krishna* v. *Relumal,* 9 S.L.R. 183=54 Ind.Cas. 845 (where it has been held that the statement of the parties that they would not object to the award does not amount to estoppel and the statement of the parties may be retracted within the period on the ground of fraud or mistake); *Kamta Prosad* v. *Uman prosad,* 76 Ind.Cas. 33=A.I.R. 1924 Oudh 344.

Where objections are filed to an award, the court ought to give a chance to the party of proving his objection by evidence and to deal with the objections judicially. The court ought to accept the award of the arbitrator as final as regards any statement made by him in the award as to the conduct of proceedings, without taking evidence in the matter or finding that the evidence adduced in support of the objection is insufficient. *Subba Rao* v. *Ramainga,* 152 Ind.Cas. 157=40 L.W. 364=A.I.R. 1934 Mad. 619=67 M.L.J. 377. Where an arbitrator is called upon only to declare the right of the parties to share in the proceeds of sales of land and he gives the award without taking his accounts in view of lack of sufficient data, the award cannot be said to be incomplete and the parties can enforce it through a court. *Nana Kwaku* v. *Nana Sir Ofori Atta,* 143Ind.Cas. 147=37 L.W. 401=A.I.R. 1933 P.C. 46. Now to enforce such an award the procedure laid down in this section is to be followed. Where an award has been given on a reference and objections are filed but no orders are passed either accepting or rejecting them, it is not competent for the court to dismiss the suit on the merits. *Dina* v. *Kalika,* (1941) R.D. 284=(1941) O.A. Supp. 353. An award for or against a joint Hindu family business, in its trading name is a perfectly good award, and judgment may be passed upon such an award under this section. *Munshilal* v. *Moor Bros.,* 51 C.W.N. 563. The jurisdiction of Civil Courts is to effect an imperfect partition of a Mahal is barred by S. 220 (*n*) of the C.P. Land Revenue Act. *Narayan* v. *Mohanlal,* I.L.R. (1950) Nag. 823=A.I.R. 1951 Nag. 297. Persons not party to arbitration agreement cannot take benefit under a decree passed in terms of the award. *Chouthmal* v. *Ramchandra,* A.I.R. 1955 Nag. 126=I.L.R. (1955) Nag. 100.

Where there is a further claim made by the plaintiff and the award professing to be made of and concerning the matters referred, is silent regarding such further claim, the award amounts to adjudication that the plaintiff has no such further claim. *Union of India* v. *Bakshi Ram* 59 Punj. L.R. 572=I.L.R. (1957) Punj. 1210.

920. Mandatory character of the section.—The provisions in s. 17 are mandatory and the court has no jurisdiction to pass a decree in terms of the award without complying with the provision of the section. *Kammuthu* v. *Krishnaswamy,* (1958) 2 M.L.J. 142; (1951) M.L.J. 93=A.I.R. 1951 Mad. 658.

921. Award a nullity—Procedure as in this section still should be followed.—It is well settled that a decree which is a nullity may be ignored and it is not necessary to get such a decree set aside. But what the Arbitration Act contemplates is that if an award is on the file of the court unless steps are taken to have that award set aside a certain definite results must follow and that definite result is the result indicated by the Legislation in S. 17. Therefore, it is not open to a party to assume that an award which has been filed and in respect of which a notice has been served upon him is a nullity. He must go to court and get it set aside. *Sarker* v. *Amritalal,* I.L.R. (1954) Bom. 686=56 Bom.L.R. 89=A.I.R. 1954 Bom. 293. If no application is filed the party in whose favour the award

is made is entitled to a decree upon the award or if the application is filed and has been dismissed on merits, then also the party in whose favour the award is made is entitled to a decree. It is only when an application to set aside an award having been made in time and the application having succeeded that the party in whose favour the award is made is not entitled to a decree in terms of the award under S. 17. Hence, the only proper interpretation to give to S. 17 is that it contemplates all applications to set aside an award and all applications to set aside an award filed under S. 33 and not under S. 30. Section 30 does not deal with applications to set aside an award at all. It deals with what the powers of the court are where an application is made to set aside an award. But when a court wants to decide what is the right of a party to apply to set aside an award and what procedure he should follow, then the court has got to them to S. 33. Thus the Arbitration Act contemplate only one application to set aside an award and to such an application Art. 158, (now Art. 119(2)) Limitation Act applies. *Ibid.* An award given on reference without the intervention of the Court has no legal existence, nor is it capable of upholding any right or title as comprehended thereunder unless it is made a rule of the court within the meaning of the Arbitration Act itself. *Wali Mohammad* v. *Pana M.T.*, A.I.R. 1960. Pat. 128.

922. Scheme of Section 17.—The scheme of s. 17 is that after an award has been filed an opportunity is given to the party challenging or disputing the award to file an application to set aside the award and the application has got to be filed within the period of limitation prescribed by Art. 158 (now Art. 119(*b*)), Limitation Act. If no application is filed, the party in whose favour the award is made is entitled to a decree upon the award, or if the application is filed and dismissed on merits, then also the party is whose favour the award is made is entitled to a decree. It is only when an application to set aside an award having been made in time and the application having succeeded that the party in whose favour the award is made is not entitled to a decree in terms of the award under S. 17. Hence the only proper interpretation to give to S. 17 is that it contemplates all applications to set aside an award and all applications to set aside an award filed under S. 33. Thus the Arbitration Act contemplates only one application to set aside an award and to such an application Art. 158, [now Art. 119(b).] Limitation Act, applies ; *Sarkar* v. *Amrital*, A.I.R. 1954 Bom. 293 ; contra *Haji Ebrahim* v. *Pannalal*, I.L.R. (1949) 1 Cal. 245. Court hearing an application for setting aside an award cannot constitute itself a Court of Appeal over the decision of a point of law. *Gulzarilal* v. *Busi*, A.I.R. 1953 Cal. 621. The award referred to in S. 17 is the award which the Court accepts and following it passes judgment and decree. There is no indication in the Act as to what should happen after the Court remits the award. *R.T. Perumal* v. *John Deapin*. 72 Mad.L.W. 609=9 L.R. (1959) Mad. 859=A.L.R. 1960 Mad. 43=(1960) 1 M.L.J. 199=(1960) 30 Com.Cas. 340. The Civil Court before whom the award is filed and challenged is bound by the provisions of the Civil Procedure Code and the rules of pleading apply with full force. *Union of India* v. *Jogendra Singh & Co.* I.L.R. (1961) Cut. 544. An award can be filed in a Court in which a suit with respect to the disputes which form the subject matter can be filed. *Kalooram* v. *Gangadass* I.L.R. (1963). 13 Raj. 1090.

923. "Remit the award or any of the matters referred to arbitration."—The court has power to remit the award or any

matter referred to arbitration to the arbitrators or umpire for reconsideration in cases mentioned in sub-section (1) of section 16. Under section 16 the court is empowered to remit all the awards filed before it for reconsideration of the arbitrators. Under the old law (*i.e.*, under para. 14 of the Second Schedule of the Procedure Code) an award made without the intervention of court and where application was made under para. 20 to file the award, the court was empowered to file it under para. 21, on fulfilment of conditions mentioned therein but was not at liberty or remit the same for the reconsideration of the arbitrators or umpire. *Bija Dhar* v. *Raj Karan,* 174 Ind.Cas. 592=19 Pat.L.T. 16= A.I.R. 1938 Pat. 129 ; *Karamchand* v. *Jasodhar,* A.I.R. 1927 Lah. 347= 100 Ind.Cas. 896 ; *Mga Tok* v. *Nga Kasim,* 14 Ind.Cas. 978=5 Bur.L.T. 55 ; *Riaz-ud-din* v. *Shuja-ud-din,* A.I.R. 1925 Lah. 86=78 Ind.Cas. 1042 ; *Bhagwan* v. *Shiv,* 22 Ind.Cas. 811=92 P.R. 1913=109 P.L.R. 1914 ; *Dandikar* v. *Dandikar,* 6 Bom. 663 ; *Jagroop* v. *Barkoteswar,* 34 Ind.Cas 335=3 O.L.J. 137 ; *Subramniam Chetty* v. *Velian Chetty,* 24 Ind.Cas. 132. So under the old law if such an award was defective in any way an application under para 20 was to be dismissed. *Jagroop* v. *Barkateshwar,* 34 Ind.Cas. 355=3 O.L.J. 137 ; *Ganesh Narain* v. *Malida Koer,* 10 Ind.Cas. 450=13 C.L.J. 399 ; *Bhagandas* v. *Shiv Dial,* 22 Ind.Cas. 811=92 P.R. 1913=109 P.L.R. 1914. In *Bijadhar Ram* v. *Rajkaran,* A.I.R. 1938 Pat. 129, the court observed : "Under para. 21 of Schedule II, Civil Procedure Code, the court is directed to file an award where it is satisfied that the matter was referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in para. 14 or 15 is proved. One of the grounds mentioned in para. 14 is where the award has left undetermined any of the matters referred to arbitration. As I have said, there is no dispute that the arbitrators in the present case have left undetermined part of the matter referred to arbitration. The award therefore cannot be filed and the order of the court below is set aside." But now the court is empowered to remit all the awards to the arbitrators or umpire for re-consideration where the conditions mentioned in s. 16 are fulfilled.

924. Set aside the award.—The grounds for setting aside an award are given in section 30 *post*. *Vide* notes thereunder.

925. Application.—The word "application" has not been defined either in this section or anywhere in the Arbitration Act or in the Limitation Act. "Application" as defined in R. 2 sub-rule (2) of the Civil Rules of Practice and Circular Orders. Vol. I, contemplates an oral application also therefore there is no need for an application, under s. 17. to set aside an award to be in any particular form with courtfee affixed thereon. The counter affidavit filed by the respondents is application for passing a decree in terms of an award, filed within 30 days of the service of the notice of the petition counter attacking the genuineness and validity of the award and praying that the court might be pleased to pass an order dismissing the petition is an application within the meaning of this section with a sufficient compliance with the terms thereof. It is not necessary to make it in any particular form or to affix court fee stamp of any value. *Ramaswami* v. *Muthiralayee,* A.I.R. 1954 Mad. 560 ; see also *Gopalji* v. *Chaganlal,* A.I.R. 1921 Bom. 419 =45 Bom. 1071.

926. Objections whether within time.—The question whether the objections raised on behalf of the opposite party to the validity of the

award were put in within time is not purely one of law. It is a mixed question of fact and law. *Pratap* v. *Union,* A.I.R. 1956 Assam 85.

927. "Time for making application to set aside the award has expired".—Under the original Art. 158 of the Limitation Act an application to set aside an award was to be filed within 10 days from the date when the award was filed in court and notice of the filing was given to the parties. There was no time limit to get an award remitted for reconsideration of the arbitrators. But under the amended Art. 158 (now Art. 119(b)) of the Limitation Act an application to set aside an award or to get an award remitted for reconsideration must be filed within 30 days from the date of service of the notice of filing of the award. So the court must wait for 30 days after the service of notice of filing of the award before pronouncing judgment according to the award. *Vide Lachhu* v. *Ganesh Das,* A.I.R. 1936 Pesh. 135 ; *Subba Rao* v. *Ramalinga,* 152 Ind. Cas. 157=40 L.W. 364=67 M.L.J. 377 ; *Velu Pillay* v. *Appaswami,* 9 Ind.Cas. 197=21 M.L.J. 444=2 M.W.N. 141 ; *Subbayya* v. *Papayya,* A.I.R. 1920 Mad. 789=123 Ind.Cas. 5. See also, *Sahib Rai* v. *Chait Ram,* 28 Ind.Cas. 427=96 P.L.R. 1915 : *Seetaram* v. *Rupram,* 42 Ind.Cas. 266=13 N.L.R. 172 ; *Sheo Prokash* v. *Sriram,* 63 Ind.Cas. 399=19 A.L.J. 404. Where a court accepts an award filed by the arbitrators without giving the parties time to file exceptions to the award, there is material irregularity in the exercise of the discretion, and the order accepting the award should be set aside. *Udit Singh* v. *Ram Lakham,* 145 Ind.Cas. 403=(1933) A.L.J. 149=A.I.R. 1933 All. 313 ; *U Ba Thein* v. *U Po Mya,* A.I.R. 1930 Rang. 207=128 Ind.Cas. 847 ; *Rangiya* v. *Gobinda Swami,* 71 Ind.Cas. 266 ; but see *Ganga Narain* v. *Ram Chand,* 20 W.R. 311=12 B.L.R. 48 ; *Ravibhai* v. *Dahyabhai,* A.I.R. 1921 Bom. 32=59 Ind.Cas. 811=45 Bom. 832 ; *Sooroporaja* v. *Narayanarau,* 17 Ind.Cas. 431 ; *Sri Krishin* v. *Relumal,* A.I.R. 1916 Sind 79=34 Ind.Cas. 845=9 S.L.R. 183 ; *Bankulal* v. *Chhotey Mian,* A.I.R. 1931 All. 453=133 Ind.Cas. 31=53 All. 669=(1931) A.L.J. 442. In the last-named case, the court observed : "We are not prepared to reverse the judgment of the court below because full ten days' time has not given. Section 99, Civil Procedure Code, lays down that no irregularity in any proceeding in a suit not affecting the merits of the case should be permitted to reverse or substantially vary a judgment." See also *Ghulam Mustafa* v. *Holima,* 21 Ind.Cas. 298 ; *Sohamori* v. *Chatta,* 23 Ind.Cas. 591.

An appeal lies from decree passed without giving ten days' time for objection. *U Ba Thein* v. *U Po Mya,* A.I.R. 1930 Rang. 307=128 Ind. Cas. 847 ; *Najiruddin Albert Purah,* 29 All. 584=(1907) A.W.N. 184. But in other cases it has been held that such an order is liable to be set aside only in revision. *Achaber Pande* v. *Kuldip,* 76 Ind.Cas. 307= A.I.R. 1925 Rang. 103 ; *Rooji* v. *Dayabhai,* 59 Ind.Cas. 811=A.I.R. 1921 Bom. 32=45 Bom. 832. A court is not bound to go beyond the *prima facie* facts in matters of limitation and to enquire how long he took to obtain copies. *Chandrayya* v. *Appalamma,* 140 Ind.Cas. 11= A.I.R. 1932 Mad. 588. When a special case is stated limitation runs after court expresses opinion. *Lakshman* v. *Ramchandra,* 48 Bom. 663 =84 Ind.Cas. 378=A.I.R. 1925 Bom. 92. If an award be not objected to by the parties within the period allowed by Art. 158, (now Art. 119(b)) of Third Division of Schedule I, Schedule II, of the Limitation Act, an objection even on the ground of fraud cannot legally be heard afterwards. *Mehta Kashi Ram* v. *Dadabhoy,* 124 P.R. 1890. But this article applies only to applications referred to in this section only, *i.e.*, appli-

cations to set aside an award on any of the ground mentioned in s. 30. *Muhammad* v. *Muhammad,* 8 All. 64=(1886) A.W.N. 2. See also, 2 N.L.R 81.

928. Application to set aside purported award which is barred.—By enacting Art. 158 (now Art. 119(b)) of the Limitation Act the Legislature meant to fix a definite time within which the existence and the validity of an award could be challenged after the award is filed in court and to provide an expeditious method of getting an award translated into a judgment and made enforceable as such. Award includes a bogus award. When therefore, a party to arbitration has debarred himself from applying to set a purported award aside he cannot come to the court, and, as it were, point out to the court the ground on which the court should set aside the award itself under the powers reserved in the earlier part of s. 17, for, that would mean, for all practical purposes, repealing Art. 158 as now amended [at present Art. 119(b)] and the only way to make that Article and the generality of the Arbitration Act fit into a coherent whole is by supposing that the words in section 17 of that Act ending with "set aside an award" are superfluous. *Umadutt* v. *Chandrao,* 230 Ind. Cas. 252=A.I.R. 1947 Bom. 94.

929. "Time for taking copies is to be excluded."—Time requisite for obtaining copy of the award is to be excluded from the period of 30 days. *Sovachand* v *Hurry, Bun.* 46 Cal. 721=53 Ind.Cas. 46=23 C.W.N. 280. In *Ghulam Khan* v. *Muhammad Hasan,* 29 Cal. 167 (1937)=29 I.A. 51, *Lord Mac Naughten,* observed : "It is to be observed that by the Limitation Act, Schedule II, Article 158, (prior to its amendment) the period of limitation prescribed for an application under the Code to set aside an award is a period of 10 days only from the time when the award is submitted to the court exclusive of the time requisite for obtaining a copy of the award (Limitation Act s. 12)." See also *Das* v. *Dayalal,* A.I.R. 1933 Rang. 38=142 Ind.Cas. 835 ; but see *Kalian* v. *Rochan Bai,* 27 Ind.Cas. 371=8 S.L.R. 190. As regards application of s. 4 of the Limitation Act, *vide, Johur Mull* v. *Kashi Prosad,* I.L.R. (1942) 2 Cal. 160=203 Ind.Cas. 426=A.I.R. 1942 Cal. 566.

930. Power of court to extend the time.—Under section 5 of the Limitation Act, the court has no authority to receive an application to set aside an award after the time prescribed by Article 158 of the Act. It is competent to the court to extend the time prescribed by that Article. *Surya Narain* v. *Banvari,* 17 Ind.Cas. 7=18 C.L.J. 35=18 C.W.N. 626. See also, *Gaya Singh* v. *Harbilas,* A.I.R. 1930 All. 711. *Sitaram* v. *Rupram,* 42 Ind.Cas. 266=13 N.L.R. 172 : *Edajit* v. *Tulsidas,* 2 B.H.C.R. 270 ; *Dinditta* v. *Babu Ram,* 100 Ind.Cas. 955=A.I.R. 1927 Lah. 273=8 Lah. 274. But where an application containing an additional ground of objection to the validity of an award was filed beyond time in addition to the one already filed within time it was held that the court had discretion to allow the additional ground to be added by way of amendment or to entertain it of its own motion if it thought that the ground was such as to render a reference to arbitration or the award based thereon absolutely invalid. *Bhagwan Din* v. *Fakir Singh,* 20 Ind.Cas. 773 =16 O.C. 233. The court is also not entitled to shorten the period prescribed in the article. *Kamta Prosad* v. *Uma Prosad,* 76 Ind.Cas. 33=9 O. & A.I.R. 703=A.I.R. 1924 Oudh 244 ; but see *Bankey* v. *Chotey,* A.I.R. 1931 All. 34. Where a decree has been passed on an award without giving the parties time for filing objection for setting aside the award the appellate court is competent to remand the case ordering the lower court to give parties an opportunity of filing applications to set aside the award within

the prescribed number of days of the receipt of the appellate court order. *Ruddaraju* v. *Ruddaraju,* 17 Ind.Cas. 431=(1912) M.W.N. 1232. Where an award is illegal and void *ab initio* and the illegality is apparent on the face of it, the court should take judicial notice of it, it is not necessary that the parties should file objections to the award within the time prescribed under Art. 158 of the Limitation Act. *Lala* v. *Abdus,* 17 Ind. Cal. 320; *Haranarain* v. *Chaudhrani,* 13 All. 300 (P.C.).

931. Validity of an award, presumption of—In *Cargey* v. *Aitcheson,* 26 R.R. 298=2 B. & C. 170=2 Bing. 199, *Best J.* said: "An award should always be supported, unless there be some unanswerable objection to it." An award against father and sons in dispute relating to partition of joint family properties where interests of sons are not adverse to that of father who consented to award, is binding upon the sons also. *Chidambaran Chettiar* v. *Subramanian Chettiar,* 85 M.L. 980=(1952) 2 M.L.J. 524=A.I.R. 1953 Mad. 492.

932. Award without intervention of court—Objection as to non-registration filed after Limitation—Effect—An objection to an award, made without intervention of court, that it could not be enforced for want of registration, or for other reason, filed after the expiry of the time for making an application to set it aside, cannot be enterained and the court is competent to pronounce judgment according to it under s. 17 of the Act. *Seonarani* v. *Prabhu,* I.L.R. 37 Pat. 252=1598 B.L.R. 181= A.I.R. 1958 Pat. 252 (F.B.).

933. "No application is made."—This section provides that if no application is made to set aside the award or if the court has refused to set aside the award, the court shall proceed to give judgment according to the award. *Lala* v. *Abdus,* 17 Ind.Cas. 320. See also *Baldeo* v. *Abdur,* A.I.R. 1932 Oudh 156=9 O.W.N. 191=137 Ind.Cas. 151. The jurisdiction of the court to embody an award in a decree is not dependent upon any application by a party that it should be accepted. The power of court to exercise jurisdiction under ss. 15 to 17 or s. 30 and 33 is derived from the filing of the award before it under s. 14. *Sheoram Prosad* v. *Gopal,* A.I.R. 1959 Madh. Pra. 102=1959 H.P.L.J. 87=1959 Jab. L.J. 24=1959 M.P.C. 31.

934. Whether court can act suo motu.—The words used both is SS. 17 and 30 are wide enough to include the jurisdiction of the court to deal with matters covered by those sections *suo motu. Hastimal* v. *Hiralal,* A.I.R. 1954 Bom. 243. In the above case the court observed: "It would appear that under the English law the court has a similar powers to set aside an award, apart from the motion made by the parties in that behalf. For *Russell,* while dealing with the power of court to remit or set aside the award observes: 'The court has further an inherent power to set aside an award, which is bad on its face; either as involving an apparent error in fact or law, or as not complying with the requirements of finality or certainty. The inherent power to set aside also extends to an award which exceeds the arbitrator's jurisdiction, and possibly to cases where fresh evidence has become available' *Russell* on *Arbitration,* 15th Edn., p. 263": but see *Umadutt* v. *Chandrao,* A.I.R. 1947 Bom. 94=48 Bom.L.R. 675. It has been held by the Karachi Court that there is nothing in this section to exclude the power of the court to set aside an award *suo motu* for proper reasons. *Motummal* v. *Haji,* I.L.R. 1943 Kar. 390 Section 17 empowers the court to remit or set aside an award suo motu, apart from the application which a party may either for remission of the award or its reversal. *Deepnarain* v. *Dhaneshwari,* 1959 Pat. L.R. 262=1959 B.L.J.R.

723=A.I.R. 1960 Pat. 201 (the objection envisaged under s. 17 of the Arbitration Act is an objection under s. 30)

935. Agreement to refer to arbitration—Reference on behalf of minors.—Where in a suit to which minors are parties an order of reference is made without complying with the requirements of Or. 32, R. 7 C. P. Code and in appeal from the decree based on the award filed by one of the minors, the attention of the court is drawn to the illegality committed by the trial court while making to order of reference, it is not possible for the appellate court to shut its eyes to the illegality and it is open to it to set aside the entire decree of the trial court. *Gopal* v. *Sundari,* A.I.R. 1955 Pat. 277=1955 B.L.J.R. 52; see also A.I.R. 1952 Pat. 461.

936. Award or agreement to compromise.—The parties to a partition suit referred the matter to the arbitration of certain Amins. When the Amins had decided what they were going to do, the parties to the partition suit joined together with the Amins and certain local gentlemen and executed a document by which they agreed that the parties shall be bound to compromise the suit upon certain terms which were annexed to the document which was signed by the parties. It was held that the document was not an award but an agreement to compromise. *Purna Chandra* v. *Jagat Bandhu,* 45 C.W.N. 381.

937. Effect of agreement not to file objection.—Agreement not to object to the award on ground other than those of fraud, cannot prevent a party to the agreement from moving to set aside on ground of illegality on the face of it. *Rangiah* v. *Govind Swami,* A.I.R. 1922 Mad. 179=45 Mad. 466=15 L.W. 160=(1921) M.W.N. 793=71 Ind.Cas. 266. In the above case the court observed : "I do not think that the agreement not to object can fairly be taken to cover the extraneous matters which are not properly the subject-matter of the award at all. It is also established that such an agreement does not cover fraud unless it is expressly excepted, that is, the parties may agree that it shall not be raised. It was held by *Chitty J.* in *Tullis* v. *Jackson,* (1892) 3 Ch. 411= 67 L.T. 340=61 L.J.Ch. 655, that fraud may be expressly excepted, that is, the parties may agree that it shall not be raised, though in *Peason* v. *Dublin Corporation,* (1907) A.C. 351 (362)=77 L.J.P.C. 1, *Lord James Hereford* says : 'As a general principle I incline to the view that an express term that fraud should not vitiate a contract would be bad in law.' Again in *Mackey* v. *Auve,* (1834) 2 A. & E. 356=41 R.R. 456, it was held that a clause precluding the parties from bringing action against the arbitrators or impeaching their award unless for fraud did not debar a party to the deed from moving to set aside the award for illegality on the face of it, though no fraud or collusion appeared." It is not competent for the parties by an agreement to oust the jurisdiction of the court to set aside an award, if misconduct on the part of the arbitrators were shown or if it were shown that the award was improperly procured, when the parties desire that the award should be enforced under the provisions of the Arbitration Act. *Hardwary Mull* v. *Ahmed Musaji Selaji,* 13 C.W.N. 63=1 Ind.Cas. 371.

In *Parasram* v. *Topandas,* A.I.R. 1928 Sind 81=21 S.L.R. 253=102 Ind.Cas. 183, the court observed : "He has relied on the observations of *Fawcett A.J.C.* in *Ramchand* v. *Govindram,* 13 S.L.R. 75=53 Ind.Cas. 337, in support of the view that an agreement to recognise an award beyond the scope of the disputes mentioned in the reference was binding on the parties to the reference. This judgment was set aside on appeal on another point and the appeal court, had, therefore, no occasion to deal

with the observations relied upon by the learned Judge below. A similar point, however, came up a year before *Crouch A.J.C.* in *Naraindas* v. *Kewalram,* 11S.L.R. 43=42 Ind.Cas. 706, where a contrary view was taken and it was held that such an agreement was void under s. 28, Contract Act, as being one not to enforce rights conferred by the Arbitration Act in respect of the contract to refer and was even otherwise inoperative as restricting the discretion vested in the court by statute to set aside an award when it was sought to be filed and made a rule of the court..... The observation of *Crouch A.J.C.* apply with greater force to an award passed on a reference made through the court, in a pending suit, as in that case the arbitrators derived authority from the court, and their award must be confined to the matters in dispute in the suit. See *Ram Protap Chamaria* v. *Durga Prosad Chamaria,* A.I.R. 1925 P.C. 293=53 Cal. 258= 53 I.A. (P.C.)" See also, *Khudiram* v. *Chandicharan,* 35 Ind.Cas 358=1 P.L.J. 306, *per Atkinson J.* But see *Kahan Singh* v. *Mohantal,* 34 Ind. Cas. 177=44 P.W.R. 1916; *Ram Jawaya* v. *Devi Ditta,* 34 Ind.Cas. 192.

938. Waiver.—Any irregularity of procedure may according to the rulings of the English Court, be waived. *Maung Myin* v. *Maung Yan Aung,* 4 B.R. (1897-1910), Vol. 11, for further discussion of this topic, *vide* notes under s. 30 under the heading "*Estoppel-Waiver.*"

939. Whether the court is to see whether the matter has been referred to arbitrators.—Where the question of the partition of the family properties of a joint Hindu family was referred to arbitration and some of the members of the joint family were not parties to the reference, the award given in pursuance of such reference partitioning the family property was invalid and could not be filed under paragraph 21 of Schedule II of the Civil Procedure Code. *Chotey Lal* v. *Keshwar Narain,* 48 Ind.Cas. 953. Where an award made without the intervention of the court was filed in court, it has been held that it has power to decide whether there was a reference to arbitration on behalf of the parties and whether there was any matter in dispute between the parties to be referred to arbitration. *Radha Kissen* v. *Asha-Mal Ishar Das.* A.I.R. 1926 Lah. 91=7 L.L.J. 603=92 Ind.Cas. 705. In the course of the judgment the court observed : "It was next argued (grounds 8 and 9) that the court had no power to decide the two matters it did, but was confined to deciding any objections under paragraphs 14 and 15 of the Second Schedule, Civil Procedure Code. This is obviously wrong; for the opening words of paragraph 21 of the Second Schedule were inserted to set at rest this question, as to which different views had been taken by some of the High Courts. See also, *Ganesh Singh* v. *Kashir Singh,* 28 All. 621=(1906) A.W.N. 136; and *Mansa Ram* v. *Mangal Sain,* A.I.R. 1922 Lah. 149 (Lahore High Court) and *Dip Chand* v. *Sahib Din,* 5 S.L.R. 92. The case reported as *Sasson & Co.* v. *Ramdutt,* A.I.R. 1922 P.C. 374, is not against this view as it was a case under the Indian Arbitration Act and and not under the Code of Civil Procedure. *Pakhordas Jasiromal* v. *Forbes,* 6 S.L.R. 127, is not in point for the same reason. (See also, *Maung Tum* v. *Maung Parhok,* A.I.R. 1923 Rang. 199). The last two cases were decided taking into consideration of the wordings of para. 21 of the Second Schedule of the Civil Procedure Code. That para was as follows : "*Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon* and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award."

The words in italics were added by Act of 1908, because it was held in certain cases before the amendment, that the court had no jurisdiction to enquire into the factum or validity of the submission and award (*vide Samal Nathun* v. *Jaishankar,* 9 Bom. 254 ; *Venkatesh* v. *Chanapgardu,* 17 Bom. 674 ; *Tejpur* v. *Mahommed,* 20 Bom. 596) while in other cases a quite opposite view has been taken. *Manulal* v. *Vannal,* 29 Bom. 621 (F.B.) ; *Mahomed* v. *Hakiman,* 25 Cal. 757=2 C.W.N. 529 ; *Micharaya* v. *Sadasiva,* 4 Mad. 319 ; *Chintamallayya* v. *Thadi Gangireddi,* 20 Mad. 89=7 M.L.J. 61 ; *Amrit Ram* v. *Dasrat Ram,* 17 All. 21=(1894) A.W.N. 187 ; *Ganesh Singh* v. *Kashi Singh,* 28 All. 621. But in the new Arbitration Act there is no such section. One of the grounds for setting aside an award is that an award has been improperly procured or is otherwise invalid. Section 24 makes provision for reference to arbitration by some of the parties in a pending suit.

Although as a general principle a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings, yet as proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the Civil Procedure Code, the proposition cannot be of universal application to such proceedings. *Binayak Das* v. *Nalini,* 70 Ind.Cas. 459=26 C.W.N. 804=A.I.R. 1922 Cal. 226. In *Hasmit Hussain* v. *Sidiq Hasan,* A.I.R. 1927 All. 128=98 Ind.Cas. 1012, the court observed. "Where parties have a common interest it is not sufficient that certain persons should go and seek to refer the dispute pending between them and the other party to arbitration, without taking steps to consult the other persons who had such common interest and get their authority to represent them on their behalf. If one or more interested parties, says *Russell,* submit a dispute to arbitration they cannot bind the other interested parties without express authority, but still bind themselves nonetheless effectually for that, and if they undertake, that such other parties shall perform the award the fact that those parties are not bound will form no excuse for breach of the undertaking. (*Russell* on *Arbitration,* 10th Edn., page 24)." See also, *Mudy* v. *Osam,* (1628) Iill. 30=124 E.R. 121 ; *Chotteylal* v. *Madoi,* 48 Ind.Cas. 953 ; *Jnanendra* v. *Jiten,* 32 C.W.N. 108. But where one of the parties to the reference is a minor, the court should decide before disposing of the application whether the reference to arbitration was for the benefit of the minor. *Jainath* v. *Kamalanath,* 7 Ind.Cas. 31. See also, *In the matter of Raman Kissen Sett* v. *Hurolal Sett,* 19 Cal. 334 ; *Balaji Narayan* v. *Nana Bin,* 27 Bom. 287. Where the next friend or the natural guardian of the minor is a party, the award is binding if it is for the benifit of the minor. *Sadasiv* v. *Ramchandra,* 56 Ind.Cas. 399=22 Bom.L.R. 266=44 Bom. 202 ; *Balaji* v. *Nana,* 27 Bom. 287 ; *Ramnarain* v. *Sreemoty,* 1 W.R. 280 ; *Temmakal* v. *Subbammal,* 2 M.H.C. 47 ; *Raman Krishna* v. *Hurrolal,* 19 Cal. 334 ; *Mg Po* v. *Ma Daung,* 29 Ind.Cas. 800.

940. Award dealing with property of strangers—Binding effect. —Once it is found that the reference to arbitration was made voluntarily and the reference was not illegal for any other reason, then the agreement must be held to be binding on the parties and if the award purports to interfere with the rights of the strangers it would not affect the rights of the strangers. But as between the parties its provisions must be held to be operative if its validity could not be otherwise questioned. *Radha* v. *Shattar,* A.I.R. 1957 All. 406 ; see also A.I.R. 1928 Cal. 275.

941. Ss. 17, 30, 33—Application under Ss. 30, 33—Considerations. —The award was filed in court on 18th July, 1951. An application

under s. 33 for challenging the validity of the arbitration agreement was presented on the 17th January, 1952 and an application under s. 30 for the setting aside of the award was presented on the 12th February, 1952. Thus the petitioner took advantage of both the remedies available to him under the laws for challenging the validity of the award. The application under s. 30 was held by the court to be barred by time. The application under s. 33 was dismissed on the short ground that only one application lies for securing a declaration that the award was invalid. *Held,* that when the court preceded to discuss the application under s. 30 on the ground that the application was barred by time, it was incumbent upon the court to pronounce upon the application under s. 33 and to decide whether the arbitrative agreement, and consequently the award which was given in pursuance of that agreement was or was not invalid. If after hearing the parties, the court came to the conclusion that the award was not invalid it was perfectly justified in pronouncing judgment in accordance with the award. The action taken by the court in not proceeding to consider the objections of the petitioners in regard to the validity of the award, was contrary to the express provisions of law. *United India* v. *Bhagat,* 56 Punj. L.R. 115=A.I.R. 1954 Punj. 171; See also *Deepnarain* v. *Dhaneshwari,* 1959 Pat. L.R. 262=1959 B.L.J.R. 723 =A.I.R. 1960 Pat. 201.

942. Invalid award.—*Vide* notes under s. 30, *post.* In *Rala Ram* v. *Bansilal,* A.I.R. 1932 Lah. 239=33 P.L.R. 163=13Lah. 528, *Sir Shadi Lal C.J.* said : "The award can now be challenged, not only on account of irregularities in the procedure of the arbitrator but also on the ground that it was made by a person who had not been properly appointed to act as arbitrator." See also, *U Sim* v. *Central Plumbing,* A.I.R.1935 Rang. 94=12 Rang. 675.

943. Award in arbitration pending suit without order of reference.—If the parties to a pending suit agree to refer their dispute and proceed to arbitration without an order of reference by the court, the arbitration is not under the provisions of the Arbitration Act, 1940. An award obtained in such arbitration is invalid and illegal and cannot be enforced under the provisions of the Arbitration Act or in the suit under the general law of contract or as accord or satisfaction or as a compromise under Order 23, Rule 3, Civil P. C. sections 21 to 25 read with s. 47 have provided a specific machinery for arbitration in a suit and amount to a clear prohibition of the suit otherwise than by recourse to such machinery. An award otherwise obtained is illegal and invalid. It is, therefore not enforceable by separate action even if a separate suit to enforce a valid award is maintainable. *Jugaldas* v. *Purusottam,* A.I.R. 1953 Cal. 690=92 C.L.J. 181; see also A.I.R. 1949 Cal. 350 (354)=I.L.R. (1945) 2 Cal. 70 A.I.R. 1950 Orissa 169=I.L.R. (1950) Cut. 1.

944. "Shall Proceed to Pronounce Judgment."—A Party may indeed apply to have the award set aside on one of the grounds mentioned in s. 30. But where no such application is made, and where the court does not remit the award to the reconsideration of the arbitrators there is no option in the court but "to pronounce judgment according to the award." *Dilsukhi Rai* v. *Badri Chand,* 83 Ind.Cas. 26=A.I.R. 1924 pat. 603=3 Pat. 839=(1924) Pat. 170=6 Pat.L.T. 212; *Govind Singh* v. *Bhirgu Nath,* 82 Ind.Cas. 16=22 A.L.J. 676=46 All. 686=A.I.R. 1924 All. 788; *Luchmee* v. *Pyle,* 2 N.W.P. 150; *Gangaprosad* v. *Banaspati,* A.I.R. 1936 Nag. 246. *Tulsiram* v. *Jhanaklal,* A.I.R. 1936 Nag. 197. The court is bound to follow the same procedure where the objector does not appear

to support his objection or fails to substantiate his case. *Nainsakh* v. *Umadai,* 7 *All.* 253=5 A.W.N. 12; *Pestonjee* v. *Manickjee,* 12 M.I.A. 112; *Ibrahimali* v. *Moshin,* 18 All. 422 (F.B.). Where a party has omitted to take steps to get an award set aside within the prescribed period of limitation, he cannot be allowed to object to the award on the ground of fraud or dishonesty of the arbitrator or his failure to decide all the matters in dispute. *Khan Chand* v. *Kodumal,* 15 Ind. Cas. 819=5 S.L.R. 240. A court has no jurisdiction to deal judicially with the merits of a case determined by arbitrators, but is bound to pass judgment according to their award. Accordingly, it cannot decree interest which the arbitrators have not awarded. *Mohanlall* v. *Joynarain,* 23 W.R. 105. The portion of the award which is outside the scope of the reference should not be embodied in the decree of the court. *Kolava Kolana* v. *Poddri Narayana,* 57 Ind.Cas. 982=38 M.L.J. 470. Where the partners of a firm in their partnership-deed agreed to refer their disputes to arbitration, and the reference made in pursuance of this agreement gave the arbitrators a power to make partition, but omitted a power to sell, it was held on the award being made a rule of court, that the court had no power, to order the sale of certain property of which the arbitrators were unable to make partition, and the sale of which they recommended on that ground. *Chunimony* v. *Nistrani,* 3 C.L.R. 357. The presence of the parties is not necessary to enable the court 'to pronounce judgment according to the award." *Raghunath* v. *Bridhi Chand,* 83 Ind.Cas. 26=1924 Pat. 170=3 Pat. 839=A.I.R. 1924. Pat. 603. Where an application for setting aside an award is dismissed for default and the court gives a decree according to the award, the decree passed is not *ex parte. Ibid.* But where objection to an award are dismissed in default and a decree follows upon the award, an application for restoration and decision of the objections on the merits ought not be dismissed merely because such restoration might affect the decree. The validity of the decree in such a case would depend upon the finding of the court after considering the objections on the merits, *Makundaram* v. *Naubat,* 57 Ind. Cas. 200=18 A.L.J. 756=2 U.P.L.R. (A) 253.

Where the arbitration agreement requires arbitrators to divide all property belonging to deceased among his heirs, they have no power to go outside the references and create trust or give directions thereto. Even if they do so the court should excise that portion of the award from the decree. *Chouthmal* v. *Ram Chandra,* I.L.R. (1955) Nag. 100=A.I.R. 1955 Nag. 126.

945. No Judgment on valuer's decision.—No judgment can be pronounced upon a valuer's decision who is not an arbitrator. *Chooney-money* v. *Ram Kinkor,* 28 Cal. 155=5 C.W.N. 242. See also *Macanghten* v. *Rameshwar,* 30 Cal. 831; *Collins* v. *Collins,* 26 Beav. 306; *Luds* v. *Burrows,* 2 East: 1; *In re Carus Wilson and Greeve,* (1886) 18 Q.B.D. 7 (9).

946. Upon the Judgment so Pronounced a decree shall follow.—In *Quarban Ali* v. *Ashraf Ali,* 4 All. 219, *Shankie* J. observed: "When parties have a difference and carry it into court, and agree to submit it to arbitration, and as in this case bind themselves to abide by the decision of the arbitrators, they are following a course of their own freewill, and one which the court in no sense compels them to adopt. When the award has been made by the arbitrators, and the usual conditions have been fulfilled, the court proceeds to give judgment according to the award, and upon the judgment so given a decree follows, which decree is to be enforced in the manner provided by the Code for the execution

of decrees." In *Sahdeo Singh* v. *Madhu Singh,* A.I.R. 1927 All. 120=24 A.L.J. 1036=98 Ind.Cas. 993=49 All. 178, *Mukerji J.* observed : "An award must be an award in accordance with the provisions of paragraph 16, clause (1), of Sch. II in order that a decree passed upon it may not be appealable. This is perfectly clear from the language used in clause (2) of paragraph 16. The words are 'upon the judgment so pronounced.' The words 'so prononced' imply that the award should be one contemplated by clause (1) of paragraph 16. That clause contemplates an award with respect to which, if an application for its setting aside has been made, *the application has heen considered and refused.* In this particular case an application to set aside the award was made, but was never considered by the learned Assistant Collector and therefore, the award could not be the basis of an unappealable decree. This was decided so long ago as in the year 1896 in *Ibrahim Ali* v. *Mohsin Ali,* 18 All. 422=(1896) A.W.N. 137 (F.B.) by a Bench of six Judges of this Court. The same opinion was expressed in *Nazimuddin Ahmad* v. *Albert Pueeh,* 29 All. 584=4 A.L.J. 450=(1907) A.W.N. 184. [See also *Jafar* v. *Abdul,* 208 Ind.Cas. 187=A.I.R. 1943 Oudh 304. But an award does not become decree because it is filed in court. *Apollo Mills* v. *Babu Bhai,* 43 Bom. L.R. 904=A.I.R. 1944 Bom. 12.] As recently as on the 24th of April, 1926, a Bench of two Judges in First Appeal No. 479 of 1922—*Tursi* v. *Basdeo,* A.I.R. 1926 All. 567—decided the same thing, viz., an award must be in conformity with clause (1) of paragraph 16 of Sch II of the Civil Procedure Code in order that a decree passed on it might be unappealable." In a suit for money where all matters in dispute are referred to an arbitrator, he has power to determine not only the amount to be paid but also the mode of payment and can, therefore, direct payment by instalments. *Ram Sarup* v. *Bindra Prosad,* 1 Ind.Cas. 328=12 O.C. 23. That case was decided under s. 522 of Act XIV of 1882. In the course of judgment the court observed : "I am referred to a case *Kalu and another* v. *Khair Din,* 13 P.R. 1906, in which *Mr. Justice Reid* held that the word 'award' in the last sentence of section 522 of the Code means the modified award under section 518. According to that view there is no appeal against the decree of the Subordinate Judge. A contrary view was taken in the case of *Jawhir Singh* v. *Muli Raj,* 8 All. 449 where *Mr. Justice Mahmud* held that the word 'award' in the last sentence of section 522 must be understood to mean the award as given by the arbitrators and not as amended by the court under section 518."

Where an objection was taken to referring court's jurisdiction to entertain the suit but no objections to award were filed by either of the parties, the court has no option but to give a decree in accordance with the award, and it is not open to either party to object to the validity of the award on any ground by appeal or revision. *Mohammad Khan* v. *Co-operative,* A.I.R. 1937 Lah. 268. When an award becomes a decree of the court it can be executed. *Kolava Kolanu* v. *Poddri,* 57 Ind.Cas. 982=38 M.L.J. 470 ; *Sashi* v. *Lalit,* 52 Cal. 314=86 Ind.Cas. 245=29 C.W.N. 663 (P.C.).

947. Decree passed without waiting for 30 days.—"The act of the court in passing judgment before the expiry of 30 days would be at the most an illegality according to the Sind decision reported in A.I.R. 1916 Sind. 79=34 Ind.Cas. 845, or a mere irregularity according to the Allahabad decision in A.I.R. 1931 All. 453=53 All. 669, which might or might not be liable to correction in a court of revision." *Malshankar* v. *Narshidas,* A.I.R. 1953 Sau. 129. But the Madras High Court has held

that in such a case that the order thus passed was one without jurisdiction and in such a case an appeal does not lie and the only remedy of the aggrieved party is an application under s. 115 C. P. Code. *Krishnamma* v. *Chennayya,* 1948 M.W.N. 607=61 L.W. 571=(1948) 2 M.L.J. 365=A.I.R. 1949 Mad. 276=4 D.L.R. (Mad.) 60 see also *Gameshmal* v. *Keshoram,* 55 C.W.N. 349. Where the court did not wait till the expiry of the time allowed for making application, but proceeded to pronounce judgment immediately after the parties had by that time represented that they have no objection to the same, the judgment can not be said to be a nullity. *Perayya* v. *Chenchu Suba,* (1961) 1 Andh. W.R. 84=A.I.R. 1961 A.P. 159= 1961. And L.T. 119. The dismissal or a premature application can not operate as a bar to making of a proper application when the right to apply has matured. *Union of India* v. *K.P. Mandel,* A.I.R. 1961 Cal. 118.

948. Finality of the decree in accordance with the award.—This section is based upon paragraph 16 of the Second Schedule of the Civil Procedure Code of 1908 which again was based on section 522 of the Civil Procedure Code of 1882. The general rule is that finality follows the award. *Shama Sundaran* v. *Abdul Latif,* 27 Cal. 64=4 C.W.N. 92; *Ghulam Khan* v. *Muhammad Hussain,* 29 Cal. 167=6 C.W.N. 266=25 P.R. 1902 (P.C.)=29 I.A. 51. In the last-named case *Lord Macnaghten,* said: "The award having been duly made and not having been corrected or modified, and the application to set it aside having been refused, the subordinate Judge had no option, but to pronounce a decree in accordance with it." See also *Hans Raj* v. *Sundarlal* 80 P.R. 1908=35 Cal. 648=35 I.A. 88 (P.C.); *Debendra* v. *Sarbamangala,* 8 C.W.N. 916. All that is required that there should be a valid award (*Joy Prakash* v. *Sheo Gholam,* 11 Cal. 37; *Debendra* v. *Aubhoy,* 9 Cal. 905; *Kombi Acheu* v. *Panui Acheu,* 21 Mad. 405; *Indur Subbarami* v. *Kondadai Raja Mannar,* 26 Mad. 47), made within the time allowed by the court (*Chuha Mal* v. *Hari Ram,* 8 All. 548), though not submitted to the court within that time. (*Debendra Nath* v. *Sarbamangala,* 8 C.W.N. 916).—*O'Kinealy's Civil Procedure,* page 770. So according to the section where the decree is in accordance with the award no appeal shall lie from such a decree, except so far as the decree may be in excess of or not in accordance with the award. *Gour Chandra* v. *Secretary,* 17 W.R. 30; *Madhusudan* v. *Odoito Chunder,* 12 W.R. 85=8 B.L.R. 316 (note); *Ramiruddi* v. *Mummaraddi,* 5 M.H.C.R. 404; *Kombi Achen* v. *Panji Achen,* 21 Mad. 405; *Alim* v. *Mohidino,* 6 S.L.R. 164=19 Ind.Cas. 348; *Surboree* v. *Anandva,* 20 W.R. 226; *Kulsam* v. *Ali,* 39 Ind.Cas. 730=15 A.L.J. 452=39 All. 401; *Bacha Sahib* v. *Abdul Gunni,* 38 Mad 256=14 M.L.T. 314=25 M.L.J. 507= 21 Ind.Cas. 308=(1914) M.W.N. 142; *Bahadur Singh* v. *Puran Singh,* 30 All. 151; *Wali Muhammad* v. *Bahawal Buksh,* 21 Ind.Cas. 925=28 P.R. 1914; *Hans Raj* v. *Sundar Lal,* 80 P.R. 1908; *Joy Mangal* v. *Mohan Ram,* 23 W.R. 429 (P.C.); *Kanta Prosad* v. *Jodha Singh,* 7 Ind. Cas. 99=7 A.L.J. 890; *Fakaruddin* v. *Murlidhar,* 5 Ind.Cas. 621; *Mangal Sein* v. *Gobinda Ram,* (1886) A.W.N. 151; *Jagamandeo* v. *Piari Lal,* (1881) A.W.N. 17; *Vagirathi* v. *Ram Ghulam,* 4 All. 283=(1882) A.W.N. 34; *Deo Narain* v. *Jaisir.* (1886) A.W.N. 151; *Protap Chunder* v. *Huromonee,* 20 W.R. 226; *Huro Sundaree* v. *Sridhar,* 17 W.R. 352=12 B.L.R. 488 (N.); *Rambhajan* v. *Shee Kissen,* 11 W.R. 140; *Deonarain* v. *Jaisri,* (1885) A.W.N. 259; *Haranand* v. *Dayal Chand,* 2 C.L.J. 142; *Wazir Mahtoon* v. *Lalit Singh,* 7 Cal. 166=8 C.L.R. 505, *Shama Sundaram* v. *Abdul Latif,* 27 Cal. 61=4 C.W.N. 92; *Chariman, Purnea Municipality* v. *Sira Sankar,* 33 Cal. 899; *Hans Raj* v. *Sundar Lal,* 35 Cal.

648 (P.C.)=35 I.A. 88; *Abdul Ali* v. *Anwar Ali*, 11 C.W.N. 220; *Debendra Nath* v. *Sarbamangala*, 8 C.W.N. 916; *Punna Lal* v. *Sofan*, 89 P.R. 1902=120 P.L.R. 1902 (F.B.); *Ghulab Khatun* v. *Chaudhuri*, 32 Ind.Cas. 250=99 P.R. 1915; *Dial Chand* v. *Khuda Baksh*, 6 Ind. Cas. 963=73 P.W.R. 1910; *Sita Ram* v. *Dhani Ram*, 92 P.R. 1903= 35 P.L.R. 1904; *Narpat Rai* v. *Debi Das*, 1 P.L.R. 1911=12 P.W.R. 1911=9 Ind.Cas. 385; *Ram Saran* v. *Muhammad Nawas*, 14 P.L.R. 1918; *Narain* v. *Madan Lal*, 28 P.R. 1916; *Harnam Singh* v. *Harnam Singh*, 27 P.L.R. 1910; *Sasti* v. *Tarak*, 8 B.L.R. 315; *Ram Narain* v. *Patti Ram*, 34 Ind.Cas. 105=1 Pat. L.J. 90=2 Pat. L.W. 411; *Bhola Nath* v. *Bata Krishna*, A.I.R. 1927 Pat. 135=95 Ind.Cas. 321=7 Pat. L.T. 739; *Khudiram* v. *Chandi*, 35 Ind.Cas. 358=1 Pat. L.J. 306; *Kharag Nath* v. *Nake Leddi*, 35 Ind.Cas. 914; *Sagar Mall* v. *Hira Maharaj*, A.I.R. 1926 Pat. 164=91 Ind.Cas. 799; *Walji Mathura Das* v. *Ebji Umersey*, 29 Bom. 285; *Siva Prosad* v. *Lachman*, 46 Ind.Cas. 785; *Chet Kanwar* v. *Puthu Singh*, 27 Ind.Cas. 424=2 O.L.J. 129=17 O.C. 386; *Alimson* v. *Mohodino*, 19 Ind.Cas. 348=6 S.L.R. 168; *Batcha Sahib* v. *Abdul Gunny*. 38 Mad. 256=25 M.L.J. 507: *Vlthi Nath* v. *Brithilinga*, 31 Ind.Cas. 206=2 M.L.W. 960=18 M.L.T. 374.

An appeal against a decree on an award is incompetent under the clear provision of this section if the decree is not in excess of, or contrary to, the award. *Govind Chand* v. *Gurudah Mal*, 39 P.L.R. 51. But the finality which attaches to a decree made in accordance with an award, as provided by this section refers only to a case in which such decree is made by the court of first instance, and does not apply to a case in which such decree is made for the first time by the appellate court in reversal of the order of the first court. *Abdul Taher* v. *Azmut Bibi*, 2 C.L.J. 80; *Chintamani Aditya* v. *Haladhar*, 2 C.L.J. 153=10 C.W.N. 601. An award once it is made and filed in court extinguishes all claims covered by the submission and is conclusive of the matters which it decides until it has been set aside by legal process. Any party dissatisfied with the award can apply under this section of the Act. *Bal Krishna* v. *Brijmohan*, 42 C.W.N. 367. See also *Krishna Gopal* v. *Lakshmi*, I.L.R. 1938 All. 389=175 Ind.Cas. 297=(1938) A.I.R. 412=(1938) A.L.J. 210=A.I.R. 1938 All. 232; *Bhikari* v. *Gobind*, (1892) A.W.N. 238; *Khan Chand* v. *Khoduman*, 15 Ind.Cas. 819=5 S.L.R. 240; *Mul Chand* v. *Uttam Chand*, 20 Ind. Cas. 185=156 P.W.R. 1913=275 P.L.R. 1913 *Kalia Kolam* v. *Narayanamurthi*, 57 Ind.Cas. 982=38 M.L.J. 470. The decision given by arbitrators when it becomes final, puts an end to all the controversies between the parties. It is no longer open to any of the parties to say that he is entitled to reagitate a point which had been taken either in attack or in defence on the ground that the arbitrators have not given any finding on it. *Ganpat* v. *Bhagwat Dayal*, (1937) A.W.R. 805=(1937) A.L.J. 1141. But a subsequent suit is not barred where there was no valid submission. *Kwamin* v. *Bendentu* 11, 170 Ind.Cas. 423=A.I.R. 1937 P.C. 247.

No appeal lies from a decree made in accordance with an award; it is immaterial whether the validity of the award is challenged on the ground of the illegality of the procedure of the arbitrator or on account of the invalidity of the reference which constitutes the foundation of his authority. *Rala Ram* v. *Banshi Lal*, 13 Lah. 528=136 Ind.Cas. 11=33 P.L.R. 163=A.I.R. 1932 Lah. 239. See also, *Hari Sankar* v. *Ram Piyari*, 74 Ind.Cas. 834=45 All. 441=21 A.L.J. 326; *Mahommed Valli* v. *Valli Asmala*, A.I.R. 1924 Bom. 324=26 Bom.L.R. 171=79 Ind. Cas. 723: *Sat Bharai* v. *Jamiat*, A.I.R. 1933 Lah. 426=14 Lah. 165;

Wiran v. *Hira,* A.I.R. 1931 Lah. 126=12 Lah. 408; *Uttam* v. *Kakoo,* 132 Ind.Cas. 180=12 L.J. 89; *Gurah Ditta* v. *Phokar Ram,* A.I.R. 1927 Lah. 362=8 Lah. 693; *Balkishan* v. *Sohan Singh,* A.I.R. 1929 Lah. 476=116 Ind.Cas. 559=10 Lah. 871; *Baldeo Sahai* v. *Abdul Rahim,* A.I.R. 1932 Oudh 156=9 O.W.N. 191=137 Ind.Cas. 151; *Sivaprosad* v. *Lachman,* 46 Ind.Cas. 785. But where a decree is passed on an award and it is found that part of the decree was in excess of the award, that portion of the decree which has exceeded the award, cannot be supported in appeal and is liable to be set aside. *Dina* v. *Kalika,* (1914) R.D. 284=(1941) A.W.R. (Rev.) 404. After the passing of the decree no suit will lie to have the award set aside. *She Hpan* v. *Ma Chit Nyein,* 56 Ind.Cas. 677=13 Bur.L.T. 34=10 L.B.R. 106; *Pannalal* v. *Rupa,* A.I.R. 1945 Oudh. 92=1944 O.W.N. 345. But a minor can bring such a suit where such reference was made without obtaining leave of the court under Order XXXII, rule 7. *Davulum* v. *Davulum,* 32 Ind.Cas. 881=39 Mad. 853.

There is no right of appeal against the order of the court remitting the award to the arbitrator, *R. T. Perumal* v. *Johu Deavis,* 72 Mad.L.W. 609=I.L.R. (1959) Mad. 859=A.I.R. 1960 Mad. 43=(1960) 1 M.L.T. 199=(1960) 30 Com.Cas. 340.

949. Setting aside decree under Order of Rule 13 of the C. P. Code.—Order 9, Rule 13, C. P. Code, enables the court to set aside an *exparte* decree in a case where the summons was not duly served but it does not provide for a case where the decree under s. 17 is passed without complying with its mandatory provisions and before the expiry of the time for applying to set aside the award. Although the provisions of Order 9, Rule 13 cannot be made applicable to the proceedings for setting a judgment pronounced under section 17 of the Arbitration Act, the principles of Order 9, Rule 13 should be followed and the judgment and the decree passed under s. 17 should be set aside where such decree was passed without duly giving the notice of the filing of the award or without allowing the time for applying to set aside the award to expire. It is settled law that the court has the inherent power and duty to correct injustice and to set aside a judgment and order passed *exparte* without notice to the party. The court has also inherent power to recall the previous order or decree if it is without jurisdiction. A decree passed under s. 17 before the expiry of the time for applying to set aside the award is without jurisdiction. *Ganeshmal* v. *Keshoram,* 55 C.W.N. 349; see also *Esup* v. *David,* 6 D.L.R. (Mad.) 158=A.I.R. 1951 Mad. 658 (1)=1951 M.W.N. 80=(1951) 1 M.L.J. 93.

950. Binding effect of decree based in award—Res judicata.—A judgment and decree based on award is final and as such a judgment and decree would constitute a *res judicata, Vyankatesh* v. *Sakharam,* 21 Bom. 465. In the above case *Jardine J.* observed: "The chief question argued is whether a judgment and decree of a court passed under s. 522 of the Code of Civil Procedure according to an award can constitute a *res judicata* as held in *Wazeer Mahton* v. *Chuni Singh,* 7 Cal. 727, a case on the Code of 1859. Perhaps some doubt is thrown on that decision by the view taken by *Turner C J.* and *Kindersley J.* in *Keshava* v. *Rudran,* 5 Mad. 259, where a decree passed upon the oath of a party under ss. 9 and 11 of the Indian Oaths Act was held not to create the estoppel. *Jenkins* v. *Robertson,* L.R. 1 H.L. Sc. 117, being cited to show that there was no *judicium.* The same case has been relied on by *Mr. Khare.* In differs from a reference to arbitration under Chapter XXXVII of our Code

inasmuch as there was no such reference of the matters in dispute, but, as observed by the *Lord Chancellor* in his judgment, 'the interlocutor in the former action having been the result of a compromise between the parties, it cannot be considered as a *judicium* nor can it be admitted as *res judicata.*' The case is explained by *Vaughan Williams J.* in *In re South American & Mexican Company, Ex parte Bank of England,* (1895) 1 Ch. 37, as no decision whatever upon the general law. In the appeal from that learned Judge, *Lord Harshell L.C.* and *Lindley L.J.* held that a judgment by consent cannot be reopened. *Per the Lord Chancellor* (p. 50) : 'The truth is that a judgment by consent is intended to put a stop to litigation between the parties just as much as a judgment which results from the decision of the Court after the matter has been fought to end.' *A fortiori* a judgment and decree passed after solemn investigation by arbitrators on the award may constitute *res judicata.*" See also, *Gopal* v. *Brojendra,* 5 C.L.R. 388 ; *Harprased* v. *Raghubir,* 74 Ind.Cas. 817=21 A.L.J. 541=45 All. 628 ; *Guru Charan* v. *Uma Charan,* 70 Ind.Cas. 985=26 C.W.N. 940 ; *Chintamallaya* v. *Thadi Gangireddi,* 20 Mad. 89=7 M.L.J. 61 ; *Sasi Sekhareswar* v. *Lalit Mohun,* A.I.R. 1925 P.C. 34=86 Ind.Cas. 245=29 C.W.N. 633=52 I.A. 79=52 Cal. 314 (P.C.) ; *Nagendra* v. *Harendra,* 11 Ind.Cas. 457=16 C.W.N. 457 ; *Ghulam Muztazu* v. *Changoomal,* 5 S.L.R. 71=11 Ind.Cas. 192 ; *Gobindrao* v. *Ambalal,* 11 Ind. Cas. 366=13 Bom.L.R. 352=35 Bom. 310 ; *Rachanbai* v. *Motumal,* A.I.R. 1937 Sind. 110=31 S.L.R. 55=160 Ind.Cas. 623 ; *Amar Singh* v. *Eichtola,* A.I.R. 1932 Lah. 378=137 Ind.Cas. 846=33 P.L.R. 365. But an award given by arbitrators in a mutation proceeding is no bar to a subsequent suit for possession in a Civil Court. *Girdhari* v. *Ram Baran,* 32 Ind.Cas. 761=14 A.L.J. 85. Though some persons do not join in submitting a dispute to arbitration, the award does not become invalid or ineffectual between the persons making the reference. It is binding on them especially when it has been acted upon. *Dharnidhar* v. *Sakharam,* 71 Ind.Cas. 860.

The mere fact that an arbitration award is not strictly in accordance with the terms of the reference to arbitration, does not render the decree, in which the award is incorporated, void for want of jurisdiction, and the decree operates as *res judicata* to bar a subsequent suit in respect of the same course of action. *Sibnath* v. *Mohesh Chander,* 59 Ind.Cas. 89. Where no objection is taken to an award under Schedule 2, and a decree is passed in accordance with its terms, the decree is binding on the parties there to and cannot be subsequently treated as nullity because the arbitrators had wrongly decided a mixed question of fact and law which had arisen before them. *Madan Mohan* v. *Narain,* A.I.R. 1929 All. 521=(1929) A.L.J. 540=117 Ind.Cas. 361. But even after an award is enforced under the Arbitration Act, it is open to a party affected by it to sue for its being set aside on the ground that the arbitrator had acted without jurisdiction. *Echholz* v. *Amar Nath,* A.I.R. 1935 Lah. 76=157 Ind.Cas. 796. See also *Mohan Shah* v. *Dewan Chand,* 81 Ind.Cas. 1024=A.I.R. 1924 Sind 60 ; *Sasoon & Co.* v. *Ramdutt,* A.I.R. 1922 P.C. 374. The decision of a matter by the arbitrators without jurisdiction does not operate as *res judicata. Harashankar* v. *Raghuraj,* 29 All. 519 (P.C.) 34 I.A. (P.C.). See also, *Chuma Kunwar* v. *Beharilal,* A.I.R. 1934 All. 117=151 Ind.Cas. 338 ; *Gosho* v. *Mulchand,* 196 Ind.Cas. 15=A.I.R. 1941 Sind. 111. One who is not a party to the reference is not bound by the award. *Hira Singh* v. *Ganga Sahai,* 6 All. 322=11 I.A. 20. See also, *Srinivasa* v. *Sitamma,* 4 Ind.Cas. 1114=5 M.L.T. 199.

951. Notice.—Where notice was not issued to party to dispute and

party not made party before the arbitrators. the party is not bound by award. A.I.R. 1958 Manipur 38.

952. Ss. 16, 17, 39.—There is no right of appeal against the order of the court remitting the award to the arbitrator. The Court has jurisdiction to remit an award only on one of the ground specified in s. 16 and under no other ground. Where, therefore, the court remits an award on any ground other than those specified in s. 16 such an order will be without jurisdiction. In such case one of the grounds on which a revised award can be sought to be set aside is that it was the result of an invalid order of remittal. And on this view, an appeal from the decree based on the revised award is competent.

The award referred to in s. 17 is the award which the court accepts and following it passes judgment and decree. There is no indication in the Act as what should happen after the court remits the award. Sub-section (2) of s. 16 implies that the arbitrator shall submit his decision to the court within the time fixed by the court. It is not clear whether the decision so submitted should be treated as a new award which has again to be filed. It is also not clear whether the parties would urge their objections to the validity of the decision submitted by the arbitrator. The opening words of 16 (1) appears to contemplate the court remitting the award from time to time. It may be, if the court is satisfied that one of the grounds mentioned in clauses (a), (b) and (c) of s. 16 (1) exists of the decision submitted by the arbitrator, or as one may call it, a revised award, it may again remit the award to the arbitrator. But if the court sees no cause to remit the award or set aside the award, the court shall pronounce judgment according to the award and a decree will follow upon the judgment so pronounced. In this respect it is not possible to hold that because an order remitting the original award is bad, it follows that the decree passed on the basis of the revised award can be said to be in excess of or not otherwise in accordance with the award. *Perumal* v. *John Deavis*, A.I.R. 1960 Mad. 43 Though the order rejecting the applicant under s. 33 of the Arbitration Act was passed on the same date as the judgment in the case, all the same they were two distinct orders independent of each other. Under clause (vi) of Sub (1) of S. 39 of the Act an appeal should have been filed by the appellant against the order refusing to set aside the award. *Beniprosad* v. *Krishna Kumar*, (1961) M.P.L.J. (Notes) 258.

An order refusing to set aside an award is appealable under s. 39 but a decree based on the award is not. Where the order of the court is composite, which on one hand disinisses the objections of a party to the award, and on the other, pronounces judgment on the basis of the award, then such an order should be treated as an order falling under S. 39 and an appeal is maintainable against it. *Raja Brojendra* v. *Bute Saha*, 1962 Jab. L.J. 194 = 1962 M.P.L.J. 1044 = A.I.R. 1962 M.P. 377 = 1962 M.P.C. 398.

When s. 39 is read with s. 17 of the Act it becomes clear that when the stage of challenging award has passed and when other conditions specified under S. 17 have been satisfied, the court has to pronounce judgment in accordance with the award. Naturally, therefore, the only ground of appeal against a decree under s. 17 is when the decree itself goes either in excess of or is not in accordance with the award. When the grounds of appeal do not suggest that the decree is either in excess of or not in accordance with the award but on the contrary the grounds urge that the decree is in terms of the

award which is bad, then such an appeal is not entertainable under s. 17 of the Act. Under S. 17 a ground of appeal which goes to challenge an award in the very same ground on which an application to challenge an award under S. 33 has already failed, is barred both by the express language of the conditions mentioned in S. 17. *Union of India* v. *N. P. Singh*, 66 C.W.N. 1074=A.I.R. 1963 Cal. 1.

953. Appeal, grounds of.—No appeal shall lie from a decree based on an award, except on the ground that it is in excess of or not otherwise in accordance with the award. In *Ghulam Khan* v. *Muhammad Hassan*, 29 Cal. 167=29 I.A. 51=4 Bom.L.R. 161=12 M.L.J. 77=6 C.W.N. 226. *Lord Macnaghten* said : "Their Lordship would be doing violence to the plain language and the obvious intention of the Code, if they were to hold that an appeal lies from a decree pronounced under s. 522, except in so far as the decree may be in excess of or not in accordance with the award." [The above Privy Council case has overruled by implication the following amongst other cases :—*Saturjit* v *Golab Koer*, 24 Cal. 469 ; *Maung Tha Aung* v. *Maung Tha Sun*, 2 B.L.R. 105 ; *Boonjad* v. *Nathu*, 3 Cal. 375 ; *Ganga Narain* v. *Ramchand*, 12 B.L.R. 48 ; *Joy Prokash* v. *Sheo Golam*, 11 Cal. 37 ; *Debendra* v. *Abhoy*, 9 Cal. 905 ; *Kali Prosanna* v. *Rajani*, 25 Cal. 757 ; *Mohammad* v. *Hakiman*, 25 Cal. 757 ; *Nandaram* v. *Nemchand*, 17 Bom. 357 ; *Jhangi Ram* v. *Budho Rai*, 84 P.R. 1901 ; *Bhagwan Singh* v. *Ram Koer*, 38 P.L.R. 1906 ; *Walji* v. *Ebji*, 29 Bom. 285 ; *Inder* v. *Kande Dai*, 26 Mad. 47 ; *Shithal* v. *Chaturbhuj*, 31 All. 450=6 A.L.J. 496=2 Ind.Cas. 263.] Where the appeal court is debarred by the last clause of section 522 of the Civil Procedure Code from entertaining an appeal as regards the validity of the award, it cannot remand the suit for decision on merits. *Krisham Chetti* v. *Muthu Palaudi*, 22 Mad. 172. But an appeal will always lie from a decree which is based on award, where the decree is in excess of the award or is not in accordance with the award. *Deb Narain* v. *Rajmonee*, 3 W.R. 168 ; *U. Sein* v. *The Central Plumbing*, A.I.R. 1936 Rang. 94=12 Rang. 675=156 Ind.Cas. 414 ; *Ghastiamal* v. *Jamiat Rai*, 14 Ind.Cas. 284=120 P.W.R. 1912=118 P.L.R. 1912 ; *Devat Ram* v. *Lachu Ram*, A.I.R. 1930 Lah. 477 =127 Ind.Cas. 365=31 P.L.R. 81 ; *Bansilal* v. *Gopal Lal*, 110 Ind.Cas. 298=A.I.R. 1928 Lah. 849 ; *Gondi Bai* v. *Thakur Das*, 60 P.R. 1896 ; *Goran Ditta* v. *Pokhar Ram*, A.I.R. 1927 Lah. 362=9 Lah.L.J. 569=140 Ind.Cas. 202=8 Lah. 693 ; *Mohunlal* v. *Joynarain*, 23 W.R. 105 ; Ram *Bhajan* v. *Sri Kishen*, 11 W.R.140=2 B.L.R. A.C. 260 ; *Chunilal* v. *Dhandin*, 4 Ind.Cas. 1042=90 P.L.R. 1909=111 P.W.R. 1909 ; *Sadak Ali* v *Indro Ali*, 3 All. 286 ; *Jawahar Singh* v. *Mulraj*, 8 All. 449 ; *Kandi Bai* v. *Thakurdas*, 60 P.R. 1896 ; *Bansi Lal* v. *Gopal Lal*, 110 Ind.Cas. 298=A.I.R. 1928 Lah. 849 ; *Ghangalraya* v. *Raghasa*, 52 Ind.Cas. 569=37 M.L.J. 100 ; *Tursi* v. *Basdeo*, A.I.R. 1926 All. 567=96 Ind.Cas. 531=24 A.L. J. 705. An appeal will not lie where the decree is in accordance with the award but the judgment is not. *Bepin Behari* v. *Krishna Behari*, 8 C.L.J. 475.

But there is a conflict of views as to whether an appeal lies from a decree passed in accordance with award, where the latter is based on invalid reference. The Calcutta High Court in majority of cases and the Oudh Court have held that where the reference is invalid the decree passed in accordance with the award is appealable. *Ghafooran* v. *Abdul*, A.I.R. 1938 Oudh 154=174 Ind.Cas. 766=(1938) O.W.N. 475=(1938) O.L. J. 215 ; *Golnur Bibi* v. *Abdur Samad*, A.I.R. 1931 Cal. 211=130 Ind.Cas. 209=58 Cal. 628=52 C.L.J. 298=35 C.W.N. 238 ; *Imtiaz Khan* v. *Dost*

Mohammad, A.I.R. 1933 Oudh 384=147 Ind.Cas. 189=9 Luck. 73=10 O.W. N. 790 ; *Durga Charan* v. *Debnath,* A.I.R. 1931 Cal., 109=34 C.W.N. 813= 130 Ind.Cas. 137 ; *Fanindra* v. *Dwarka,* 25 C.W.N. 832 ; *Girija Nath Roy* v. *Kanailal,* 43 Ind.Cas. 169 ; *Twang* v. *Sona,* 87 Ind.Cas. 633=52 Cal. 559=29 C.W.N. 886 ; *Saturjit* v. *Dalhin,* 24 Cal. 469 ; *Joy Prokash* v. *Sheo Golam,* 11 Cal. 137 ; *Parshid Narain* v. *Ghanshyam,* 9 C.W.N. 873 ; *Dooly Chand* v. *Mamuji,* 41 Ind.Cas. 295=A.I.R. 1917 Cal. 481 ; *Ramesh* v. *Karunamoyi* 33 Cal. 498 ; *Tej Singh* v. *Ghasi Ram,* A.I.R. 1927 All. 563=102 Ind.Cas. 236=49 All. 812. But a contrary view was taken by the High Courts at Madras, Allahabad, Bombay, Patna, Lahore and Rangoon. *Ma Ngwe* v. *U Min,* A.I.R. 1936 Rang. 240=163 Ind.Cas. 590 ; *U Sein* v. *Central Plumbing,* A.I.R. 1935 Rang. 94=156 Ind.Cas. 414=12 Rang. 675=(where Page *C.J.* discussed all the earlier case) ; *Tella Pragada* v. *Tella Pragada,* 9 Ind.Cas. 173=21 M.L.J. 263 (F.B.) ; *Batcha Sahib* v. *Abdul Gunny,* A.I.R. 1914 Mad. 675=21 Ind.Cas. 308=38 Mad. 256 ; *Lutawan* v. *Lachya,* A.I.R. 1914 All. 446=21 Ind.Cas. 989=36 All. 69 (F.B.) ; *Hari Shankar* v. *Ram Piari,* A.I.R. 1923 All. 502=74 Ind.Cas. 834=45 All. 441 ; *Saroj Singh* v. *Phul Kumari,* A.I.R. 1926 All. 202=90 Ind.Cas. 904=48 All. 226 ; *Tej Singh* v. *Ghasi Ram,* A.I.R. 1927 All. 563 =102 Ind.Cas. 236=49 All. 812 ; *Mahomed Valli* v. *Valli Asmal,* A.I.R. 1924 Bom. 324=79 Ind.Cas. 723 ; *Khudi Ram* v. *Chandi,* A.I.R. 1916 Pat. 190=35 Ind.Cas. 358=1 Pat.L.J. 306 ; *Garan Ditta* v. *Pokhar Ram,* A.I.R. 1927 Lah. 362=104 Ind.Cas. 202=8 Lah. 693 ; *Bal Kishan* v. *Sohan Singh,* A.I.R. 1929 Lah. 476=166 Ind.Cas. 559=10 Lah. 871 ; *Wiran Walli* v. *Hiranand,* A.I.R. 1931 Lah. 126=131 Ind.Cas. 348=12 Lah. 408 ; *Ralla Ram* v. *Bansi Lal,* A.I.R. 1932 Lah. 239=136 Ind.Cas. 11=13 Lah. 528 ; *U Sein* v. *Central Plumbing,* A.I.R. 1935 Rang. 94=156 Ind.Cas. 414=12 Rang. 675. See also, *Maung Tun* v. *Maung Tun,* A.I.R. 1929 Rang. 225= 7 Rang. 26=119 Ind.Cas. 212 ; *Champsey* v. *Jioraj,* 47 Bom. 578=73 Ind. Cas. 436 (P.C.) ; *Khan Chand* v. *Kodumal,* 15 Ind.Cas. 819=5 S.L.R. 240 ; *Sri Kishen* v. *Relumal,* 34 Ind.Cas. 845=9 S.L.R. 193 ; *Emna Bai* v. *Fakir,* A.I.R. 1922 Sind 1=15 S.L.R. 165=65 Ind.Cas. 50. The parties had referred in explicit terms to the arbitrators one and one issue only, while in the case there were two important issues. The first issue which was also an important issue in the case was not referred to the arbitrators and consequently it was the duty of the court to give its decision regarding that issue on the material placed before it by the parties. As this was not done the judgment and the decree of the court below were set aside, the case was remanded for fresh decision after giving its finding on issue No. 1. The appeal was competent because only a part of case was referred to arbitration and the case did not fall within ambit of section 17, Arbitration Act. *Sardar Ali* v. *Ghulam Mahammad,* P.L.D. 1952 B. J. 30.

Whether an award be valid or invalid, no appeal lies from the decision of the Judge of first instance as to the validity of the award, except in cases where a decree pronounced in pursuance of the award is in excess oi not in accordance with the provisions of the award itself. *Khudiram* v. *Chundi Charan,* 35 Ind.Cas. 358=1 P.L.J. 306. See also *Ram Narain* v. *Pati Ram,* 34 Ind.Cas. 105=1 P.L.J. 90 ; *Charaja Baksh* v. *Sri Narain,* 1 Ind.Cas. 693 ; *Badri* v. *Ram,* A.I.R. 1931 Oudh 345=134 Ind.Cas. 474 ; *Kharag Nath* v. *Nakkeddi,* 35 Ind.Cas. 914 ; *Raicharan* v. *Amrita Lal,* 5 Ind.Cas. 98=11 C.L.J. 131 ; *Kanakka* v. *Nagatinga,* 32 Mad. 510=4 Ind. Cas. 871=19 M.L.J. 480 ; *Chairman* v. *Shiv Sankar,* 33 Cal. 889 ; *Sagar Mal* v. *Hira Maharaja,* 91 Ind.Cas. 799=A.I.R. 1926 Pat. 164 ; *Chetkunwar* v *Puthu Singh,* 27 Ind.Cas. 424=17 O.C. 386 ; *Sumitra* v. *Ganesh,* 16

Ind.Cas. 595 ; *Baldeo* v *Abdul,* A.I.R. 1932 Oudh 156=137 Ind.Cas 151= 9 O.W.N. 191 ; *Kombi Achen,* v. *Panji Achen,* 21 Mad. 405 ; *Kanaka* v. *Nagalinga,* 4 Ind.Cas. 871=19 M.L.J. 480 ; *Nidamurthi* v. *Gogi Porthilinga,* 25 Ind.Cas. 583=(1914) M.W.N. 865 ; *Venkata Chalam* v. *Ramanathan,* 70 Ind.Cas. 410=A.I.R. 1922 Mad. 429=(1921) M.W.N. 423=15 L.W. 111 ; *Subbiah Iyer* v. *Subramania Aiyar,* 31 *Mad.* 479 ; *Annamalai* v. *Annamalai,* (1933) M.W.N. 831=A.I.R. 1933 Mad. 697=65 M.L.J. 376 ; *Vella Hanimayya* v. *Mullangichuna,* 29 Ind.Cas. 512 ; *Vythinatha* v. *Bhithilinga,* 31 Ind.Cas. 206 ; *Harichand* v. *Indar Sen,* A.I.R. 1934 All. 95 ; *Samput* v. *Kisan,* A.I.R. 1929 Nag. 264=119 Ind.Cas. 694 ; *Behari Lal* v. *Chuni Lal,* 29 All. 457 (F.B.) ; *Kanta Prosad* v. *Jodha Singh,* 7 Ind. Cas. 99=7 A.L.J. 890 ; *Mahomed Valli* v. *Valli Asmal,* 79 Ind.Cas. 723= 26 Bom.L.R. 171 ; *Shidgonda* v. *Bhimgonda,* A.I.R. 1935 Bom. 78=36 Bom.L.R. 1222.

Where the Judge refuses to consider the objections to an award on the ground that they were time-barred, and a decree is passed in accordance with the award, no appeal lies and an application for revision is competent. *D. B. Das* v. *Daya Lal,* A.I.R. 1933 Rang. 38=142 Ind.Cas. 835. But see *Raiji Bhai* v. *Dayabhai,* 59 Ind.Cas. 811=45 Bom. 832=22 Bom.L.R. 1454=A.I.R. 1921 Bom. 32 ; *Walji Mathura* v. *Elji Unersey,* 29 *Bom.* 285=6 Bom.L.R. 1132. The language of s. 17 does not confirm or create any right of appeal at all. All that the section does is to curtail the existing right of appeal so as to give finality to a decree passed on an award in certain circumstances. *Ram Balu* v. *Lakshmi Narain,* 1962 All L.T. 999=1962 All W.R. (H.C.) 794=A.I.R. 1963 All. 252.

954. Arbitration Act ss. 17, 39 (vi)—Art. 182 (2) (now Art. 136) of Limitation Act.—The expression "where there has been an appeal" must be read with the words in column 1 of Art. 182, (now Art. 136) viz., "for the execution of a decree.....or order of any Civil Court." An appeal has to be filed against the order or decree sought to be executed to give a fresh start of limitation under column 3(2) Art. 182, (now column 3 (1) in Art. 136). An appeal against a degree which imperils the decree sought to be executed would not furnish a fresh start of limitation. An appeal was filed against dismissal of objections to an award but no appeal was filed against the decree passed on award. The appeal was dismissed for default. The decree-holder took out the execution of the decree. *Held,* that limitation began from the date of the decree and not from the date when the appeal against the dismissal of objection against award was dismissed for default, *Kripal Shah* v. *Sri Harkishan,* A.I.R. 1957 Punj. 273.

955. Ss. 17 and 30.—Apart from an application filed by a party the court has an inherent right to refuse to recognise an award it happens to be inflicted by a patent illegality or something of that kind. The scheme of ss. 17 and 30 clearly supports that view. Hence even if the application of a party to set aside an award is time-barred, the court can refrain from passing a decree in terms of award if the award is defective. *Ismail* v. *Hansraj* A.I.R. 1955 Raj. 153. In an appeal under s. 17, the appellate court has under O. 41, R. 33, C.P.C. every jurisdiction to set aside the entire decree of the trial court when it comes to the conclusion that the order of reference itself was vitiated which made all the proceedings subsequent to that order wholly infructuous. *Gopal* v. *Sundari,* A.I.R. 1955 Pat. 277=1955 B.L.J.R. 52.

The general principle that where a court has inherent lack of jurisdiction, mere consent of parties cannot confer jurisdiction has no applica-

tion to arbitration proceedings where the arbitrator is a person appointed by agreement. *Union of India* v. *Radhanath,* I.L.R. (1961) Cut. 278=A.I.R. 1961 Orissa 143 (principle of estoppel will apply). It is not the function of the court before which an award is filed for making it a rule of the court, to scrutinise the award on merits as it is sitting in appeal on the verdict of the arbitrator. *Bhatu Kuer* v. *Firm Tara Chand,* 63 Punj. L.R. 924= A.I.R. 1962 Punj. 173. The filing of an award in court is a *sine qua non* to an order either under s. 17 making the judgment in terms of the order or to an order setting aside on any of the grounds mentioned in s. 30. *Sanapala Suryanarayana* v. *Sanapala Ramchandra,* (1962) 1 An L.T. 446 =(1962) 1 Andh. W.R. 326=A.I.R. 1963 Andh. Pra. 8.

956. Section 17 and 39—Appeal lies under which section.—On an application for the filing of an award, objections raised thereto that there was no valid reference at all were dismissed and a decree in terms of the award was passed. On the question whether an appeal lay against this under s. 17 or s. 39 of the Arbitration Act, it was *held* that an appeal could not be under section 17, because, it was not on the ground that the decree was in excess of the award but only on the ground that there was no valid reference. But an appeal preferred can be deemed to be one under s. 39 of the Act as one from an order refusing to set aside an award. *Ram Alam* v. *Dukhan,* 1950 A.W.R. 304=A.I.R. 1950 All. 427=1950 A.L.J. 248. Sections 17 and 39 contain all the remedies provided for in this Act to aggrieved parties against the order of the court before whom the award was filed. Section 17 refers to the decree and section 39 refers to all kinds of orders which are appealable. Section 39 (1) (iii) makes an order modifying or correcting an award appealable. It also makes an order refusing to set aside the award appealable. But an order refusing to modify or correct an award is not included in it, nor does this come as one of the grounds specified in s. 17 on which a decree can be challenged in appeal. *Antarijami* v. *Ketaki,* 17 Cut.L.T. 176=A.I.R. 1952 Orissa 173. Where a court passed a complete order dismissing the objections by the defendant on the one hand and on the other adopting the award, passed on a reference with the agreement of parties, and further directed a decree to be passed in terms of the award the judgment can be treated as an order refusing to set aside an award and appealable under s. 39 (vi). To hold otherwise that the decree was only passed in terms of the award and falls under s. 17 and therefore not appealable would have the effect of nullifying the provision of s. 39 clause (vi). *Ishwar Dei* v. *Chhtdu,* A.I.R. 1952 All. 802=1952 A.L.J. 403; see also *Antarjami* v. *Ketaki supra.*

The Arbitration Act makes it clear that a reference to arbitration could be made only in accordance with the Act and the procedure prescribed by the Act should have been followed before ss. 17 and 39 of the Act barring appeals from decrees on awards, could be invoked. *Kotamma* v. *Mangamma,* 1956 Andhra W.R. 517.

957. Ss. 17, 39(1)(vi).—Under the Civil Procedure Code, an award had to be filed after the expiry of the time prescribed to set aside an award or after the dismissal of such an application, if filed. But under the Arbitration Act, an application to set aside an award can be entertained only when the award is filed in court under s. 17 of the Act, the court has no jurisdiction to pronounce judgment in accordance with the award till it has disposed of an application filed to set aside the award. In the circumstances, when the court pronounces judgment without expressly dismissing a petition filed to set aside the award, the order made

may reasonably be construed as a compromise one involving a decision on the application to set aside the award also. Thus where a party files objection to an award filed in court and the court, rejecting, passes a decree in terms of the award under S. 17, the rejection of those objections would amount to a dismissal of petition for setting aside an award and, in this view, the order is a composite order refusing to set aside the award and also making a decree in terms of the award. An appeal would therefore lie under s. 39 (i) (vi) against the order refusing to set aside the award. *Amara* v. *Aata,* 1956 Andhra W.R. 394 ; see also *Haridas* v. *Badhu,* A.I.R. 1956 Him. Pra. 42.

958. Ss. 17, 39.—An order directing an award to be returned to the arbitrator as his court was not a proper forum for filing it is not an order refusing or setting aside an award and it does not fall under any head of the appealable order enumerated in s. 39, Arbitration Act. But if it is found that the Judge had jurisdiction in the matter and that he has wrongly declined to exercise jurisdiction with which he was vested, the order can be challenged by a revision petition under s. 115 C. P. Code, *Pratap* v. *Union,* A.I.R. 1956 Assam 85. The order refusing to set aside an award and decree are both appealable, as Ss. 17 and 39 are not mutually exclusive. *Ram* v. *Gopal,* A.I.R. 1959 Madh.Pra. 102=1959 Jam.L.T. 24 =1959 M.P.C. 31=1959 M.P.L.J. 87. New question of law or fact or a mixed question of law and fact cannot obviously be taken for the first time in the appellete court if it appears that no specific issue was raised on that question earlier and the party did not get full opportunity to adduce all available evidence bearing on the issue. *Union of India* v. *Jogender Singh & Co.,* I.L.R. (1961) Cut. 544.

959. Modified award—whether finality attaches to.—Apart from the provisions contained in this section there is no other provision under which judgment may be pronounced on a modified award. A judgment on a modified award must therefore be taken as pronounced under this section and bars the maintainability of an appeal against the judgment. *Nilmani* v. *Dakshineswar,* A.I.R. 1932 Cal. 713=138 Ind.Cas. 843=36 C.W.N. 1069=I.R. 1932 Cal. 529 ; *Kalu* v. *Kahir,* 13 P.R. 1906 ; but see *Jawahir Singh* v. *Mul Raj,* 8 All. 449=(1886) A.W.N. 210. The order modifying the award is appealable under section 39 (1) (iii). Cf. *Kaikabad* v. *Khanbata,* A.I.R. 1930 Lah. 26=124 Ind.Cas. 339=11 Lah. 342=31 P.L.R. 668, where the court observed : "If the appellant's view be correct, the modifications were not in accordance with, but were in excess of the award and therefore, an appeal lies under para. 16 (2) of Sch. 2 of the Code. If, on the other hand, the respondent's contention were accepted, the Subordinate Judge's order, made under para. 12, is clearly appealable under s. 104 (*c*). We hold, therefore, that the appeal is competent in so far as it relates to the modifications and corrections made to the award by the learned Subordinate Judge. We are, however, equally clear that the scope of the appeal must be limited to the points mentioned above....." See also, *Gurunditta* v. *Pokhar Ram,* A.I.R. 1927 Lah. 362=8 Lah. 693 : *Nanak Chand* v. *Ram Kishan,* A.I.R. 1933 Lah. 139=141 Ind.Cas. 172=34 P.L.R. 34 ; *Subbiah* v. *Subramaniah,* 31 Mad. 479=18 M.L.J. 485 ; *Joymungal* v. *Mohan Ram,* 23 W. R. 429 ; *Mazhar Ali* v. *Fateh Din,* A.I.R. 1930 Lah. 219=120 Ind.Cas. 673=31 P.L.R. 337, where the court observed : "It is quite clear that what the trial court did was to modify the award under para. 12. From this an appeal lay under s. 104 (1) (*c*), Civil Procedure Code, while under sub-section (2) of that section no second appeal lies.....Where an award is modified under para. 12 the only

award according to which judgment can be pronounced is the modified award. It follows that the right of appeal against the decree is only given where the decree is in excess of or not in accordance with the award according to which the judgment is pronounced, *i.e.*, the modified award." But see, *Ram Khelwan* v. *Ram Nagina*, A.I.R. 1935 Pat. 109=153 Ind. Cas. 764 ; *Tursi Ram* v. *Vasdeo*, A.I.R. 1926 All. 567=96 Ind.Cas. 531= 24 A.L.J. 705 ; *Purna Chandra* v. *Kunj Bihari*, 46 Ind.Cas. 447=28 C.L.J. 275 ; *Ram Sarup* v. *Bindra Prosad*, 1 Ind.Cas. 328=12 O.C. 23.

960. Appeal when lies under this section.—No appeal lies from a decree based upon a judgment pronounced in accordance with an award except upon one or other of the two grounds prescribed in this section. *U Sein Central Plumbing*, A.I.R. 1935 Rang. 94 ; see also 9 Ind.Cas. 173 ; A.I.R. 1914 Mad. 675 ; A.I.R. 1914 All. 446 ; A.I.R. 1923 All. 502 ; A.I.R. 1926 All. 202 ; A.I.R. 1927 All. 563 ; A.I.R. 1924 Bom. 326 ; A.I.R. 1916 Pat. 190 ; A.I.R. 1927 Lah.362 ; A.I.R. 1929 Lah. 476 ; A.I.R. 1931 Lah. 126 ; A.I.R. 1932 Lah. 239. If the Legislature has provided that once a decree is drawn in terms of the award the decree can be challenged before the appellate court only on two specific grounds it is illogical to hold that the jurisdiction of the Revisional Court should be wider than the jurisdiction of the appellate court. *Hastimal* v. *Hiralal*, A.I.R. 1954 Bom. 243.

961. Waiver of right of appeal.—The question whether the agreement between the parties merely dispenses with the rules of procedure without giving up the right of appeal or whether it constitutes the court an arbitrator making its award binding on the parties and depriving them of the right of appeal must be decided on the events of each particular case. *Kalu Singh* v. *Paras Mal*, A.I.R. 1953 Ajmer 36 ; see also A.I.R. 1949 Mad. 267 and A.I.R. 1953 Ajmer 31.

962. Appeal when court acts as an arbitrator.—Where parties to a suit agreed that the trial Judge should decide the case after hearing certain documentary evidence and making an inspection of the locality and further agreed to accept his decision, it was held that there can be no appeal from the decision of the court in this case because the Judge was constituted an arbitrator and his decision was virtually an award. *Baijnath* v. *Dhani Ram*, A.I.R. 1929 All. 557=117 Ind.Cas. 107=(1929) A.L.J. 1024=51 All. 886. See also, *Nidamorthi* v. *Thamana*, 26 Mad. 76 ; *Sambu* v. *Paiki*, A.I.R. 1925 Nag. 463=21 N.L.R. 84=90 Ind.Cas. 550. In the last-named case the court observed : "Where both parties agree in a particular matter to abide by the finding of the court in respect to it, such finding if final and no appeal lies against it, the decisions in such case being in the nature of an arbitrator's award. I need only mention *Sayad Zani* v. *Kalabhai Lalubhai*, 23 Bom. 752=1 Bom.L.R. 366 ; *Shahzadi Begam* v. *Muhammad Ibrahim*, 59 Ind.Cas. 787=43 All. 266=19 A.L.J. 14 ; *Nidamorthi Mukkarati* v. *Thammana Ramayya*, 26 Mad. 76 and *Sita Nath Goswami* v *Baikuntha*, 9 Ind.Cas. 296=38 Cal.421." See also, *Changalaraja* v. *Raghava*, 52 Ind.Cas. 569=37 M.L.J. 100 ; *Chinna* v. *Venkta*, 36 M.L.J. 291=51 Ind.Cas. 827. The only question to be considered is whether the court is acting as a court or as an arbitrator. *Md. Ishaq* v. *Balmukund*, A.I.R. 1929 All. 116=113 Ind.Cas. 762.

963. Arbitrator position of—whether same as that of a commissioner.—The contention that the position of an arbitrator is like that of a commissioner appointed by court is obviously untenable. The essential difference between a commissioner and an arbitrator is that the former is an officer selected and appointed by the court, in whose selection

the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the court has no choice. The parties may challenge the decision of the commissioners before the court passing a final decree. But in the case of arbitrators they cannot challenge their award except on the ground mentioned in this Act. *Radhey Lal* v. *Kanhai Lal,* 18 Pat. 193=(1939) P.W.N. 591=A.I.R. 1939 Pat. 526.

964. Ss. 17, 39 and 41—Application for instalment filed before passing of decree as per award—Jurisdiction of court to consider—Refusal of instalments—Appeal.—Pending the proceeding before arbitrators the defendants applied to the court for giving direction to arbitrators to consider the question of payment by instalments. The court reserved orders on application as well as on objection. While making the award the arbitrators expressly stated that they could not consider the defendants' prayer for instalments, as not within the terms of reference. A fresh application before the court for instalments was made under O. 20, R. 11 and S. 151, C. P. Code. But the court referred it holding that it had no power to add to the award of the arbitrators and grant instalments to the defendants. On appeal from the decree, held that although at the time of reference to arbitrators, no question of instalment had been raised, it was open to the defendants, in view of O. 20, R. 11 to make a prayer to the court for instalments even at the time of passing of the decree. The appeal from the decree, on the question of instalment would be maintainable. *Biswanath* v. *Sudhir,* 60 C.W.N. 786=A.I.R. 1957 Cal. 21.

965. Ss. 17 and 41.—Under s. 17 the court is either to remit or set aside an award and in case when the court finds no reason to either, to pass a judgment in terms of the award. The court is not called upon under the Act, to wait and find out whether its order refusing to remit or set aside the award has become final and unassailable in the sense that the appeal is gone or appeal if taken is dismissed in order to assume jurisdiction to proceed to pronounce judgment in accordance with the award. The court dealing with the award is not required to look beyond itself, and must proceed to deal with the matter on the footing that so far as it is concerned there is an order of refusal irrespective of the fact that an appeal might be taken or has been taken against the order or that the order passed by the court might be set aside. The case is analogous to one in which the court is required to pass a preliminary decree. When the award is set aside in appeal the judgment and decree in terms of the award is superseded and the appellate court when setting aside or varying an award can and indeed should give direction for setting aside on varying the decree based on that award. *Scottish* v. *Saraswamti,* 63 C.W.N. 800=A.I.R. 1960 Cal. 22.

966. Revision.—In *Jatindra Mohan* v. *Manindra Nath,* A.I.R. 1937 Cal. 52, the court observed: ('It seems to us that where the jurisdiction of the court to make the order of reference is attacked, the court has power to revise the order in revisional jurisdiction." See also, *Kali Charan* v. *Sarat Chunder,* 30 Cal. 397 ; *Brindessare Pershad v. Janke Prasad,* 16 Cal. 482 ; *Madura Mills* v. *Krishna,* A.I.R. 1937 Mad. 405=171 Ind.Cas. 690=45 L.W. 405. A revision is competent where the court exceeds its jurisdiction and acted with material irregularity in the conduct of the proceedings. *Debiruddin* v. *Amina Bibi,* 78 Ind.Cas. 335=A.I.R. 1935 Cal. 475. Court's omission to give notice of the filing of the award to the parties is a serious irregularity and is good ground for revision. *Ranjit Chandra* v. *Bisseswar Ram,* 94 Ind.Cas. 115=A.I.R. 1926 Cal. 1018 ;

Gopinath v. *Naresh,* 63 Ind.Cas. 243. In *Ajaz Ali* v. *Mt. Zohora,* A.I.R. 1932 All. 76=134 Ind.Cas. 30=(1931) A.L.J. 906, *Sen, J.* observed: "If the Subordinate Judge has gone wrong and there appears to be good reason for according to *Mr. Khwoja's* contention that he has gone wrong the application is not entitled to the benefit of S. 115, Civil Procedure Code. This court is reluctant to interfere in revision where the order of the court below is substantially just." See also, *Gopal Das* v. *Baij Nath,* 48 All. 239=91 Ind.Cas. 930=24 A.L.J. 235=A.I.R. 1926 All. 238. The court on receipt of the award against certain persons who were not parties to the orders of reference should have *suo motu* set aside the award against them. Not doing so amounts to material irregularity in the exercise of its jurisdiction. In such case the High Court can interfere under S. 115 C.P. Code. *Durga* v. *Phulu,* A.I.R. 1952 H.P. & B. 48.

In *Baldeo Sahai* v. *Abdul Rahim,* A.I.R. 1932 Oudh 156=137 Ind. Cas. 151, the court after quoting para. 16, Schedule II, of the Civil Procedure Code, observed: "The intention of the provisions quoted above clearly is to give finality to a decree passed in accordance with the decision of the arbitrator. In *Ghulam Jilani* v. *Muhammad Hussain,* 29 Cal. 167=29 I.A. 51, a reference was made to arbitration through court. The award made by the arbitrators was accepted by the Subordinate Judge, who passed a decree in accordance therewith. On an appeal against the decree of the Subordinate Judge, one of the objections raised was that the award was bad having reference to S. 462 of the Civil Procedure Code (which corresponds to Order XXXII, rule 7, of the present Code) inasmuch as a minor defendant's guardian had agreed without leave of the courts to refer the case to arbitration. A Full Bench of the Punjab Chief Court decided that the appeal did not lie but suggested that an application might be made in revision. Accordingly, an application in revision was filed and a Devision Bench of that court varied the decree in some respects. There was an appeal to their Lordships of the Judicial Committee against the decision of the Full Bench as well as against the decision of the Division Bench.....Referring to the application in revision which was heard by the Division Bench, they made the following remarks: "Their Lordships are inclined to agree with the view of *Clark, J.* that in the case of an award a *revision would be more objectionable than an appeal.* (See also, *Narphatrai* v. *Devidas,* 9 Ind.Cas. 385=1 P.L.R. 1911; *Armani* v. *Armani,* 31 Ind.Cas. 458; *Batcha* v. *Abdul,* 38 Mad. 256=21 Ind.Cas. 308; *Mohidin* v. *Ramaswami,* 65 Ind.Cas. 676=41 M.L.J. 490=14 L.W. 349; *Mayawanti* v. *Tulsi,* 49 Ind.Cas. 979=31 P.W.R. 1919; *Muhammad* v. *Najju,* A.I.R. 1936 Oudh 150; *Emnabai* v. *Fakir,* 65 Ind.Cas. 50=15 S.L.R. 105). If an application in revision were admissible in a case like the present, the finality of any award would be open to question. Their Lordships however are of opinion that such an application is incompetent.

"These remarks seem to us to be fully opposite to the present case. In fact it seems to us that, if anything, the remarks apply with greater force in view of the change made by the Legislature in para. 15, Sch. 2, which corresponds to S. 521 of the old Code. Before the enactment of the present Civil Procedure Code, there existed a conflict in the present Civil Procedure Code, there existed a conflict in the decision of the various High Courts in this country as to whether or not an appeal could lie from a decree passed in accordance with an award which was invalid and illegal. At the end of the clause (*c*), para. 15, the Legislature have now added the words 'or being otherwise invalid', which did not find a place in the

old S. 521. The result of this amendment is that even in the case of an invalid award if the party concerned fails to impeach it before the court making the reference or if his objection on the ground of the invalidity of the award is disallowed and a decree is passed in accordance therewith the award becomes final and the decree passed upon it is not open to appeal." See also, *Puranchand* v. *Ramnath,* 84 Ind.Cas. 490=A.I.R. 1925 Oudh 227 ; *R. K. Misra* v. *Kundan Lal,* I.L.R. (1949) Nag 272=A.I.R. 1949 Nag. 349=1949 N.L.J. 408 ; *Jaffar* v. *Abdul Gaffur,* 208 Ind.Cas. 187=A.I.R. 1943 Oudh 304. The above argument has received added force in view of new section 30 which incorporates para. 15 of the Civil Procedure Code after making some alterations (*vide* notes under S. 30, *post*) and of new clause (vi) of sub-section (1) of section 39, which allows appeal from an order setting aside or refusing to set aside an award. See also, *Gulab Khatum* v *Chaudhuri,* 32 Ind.Cas. 250=99 P.R. 1915=207 P.W.R. 1915 ; *Debiruddin* v. *Amina,* A.I.R. 1925 Cal. 475=78 Ind.Cas. 335 ; *Lutawan* v. *Luchiya,* 21 Ind.Cas. 939=36 All. 69=12 A.L.J. 57. In *Debiruddin* v. *Amina, supra, Page, J.* observed: "Whether the minor is entitled to dispute the validity of the award in a suit, I express no opinion ; but having regard to the provisions of section 115, Civil Procedure Code, I find myself unable to come to the conclusion that in that case there was any error of law or in respect of jurisdiction committed which calls for the exercise of the jurisdiction which the High Court possesses under the provisions of this section." Contra: *Davalure Ramayya* v. *Davalure Venkata,* 32 Ind.Cas. 881=39 Mad. 853=30 M.L.J. 465.

Although the intention of this section is to give finality to decree passed in accordance with the decision of the arbitrator, yet it cannot be said that in no possible case a revision can be entertained against such decrees. If for instance it can be shown that the lower court acted altogether without jurisdiction in passing a decree in terms of the award, it would be permissible to entertain a revision under section 115. *Harbhan Dat* v. *Ladh Saran,* A.I.R. 1933 Oudh 547=146 Ind.Cas. 582=10 O.W.N. 1196. See also, *Sheo Paltan* v. *Sukhdeo,* A.I.R. 1923 Oudh 235=74 Ind. Cas. 401=26 O.C. 107 ; *Mohidin* v. *Ramaswami,* A.I.R. 1921 Mad. 271= 41 M.L.J. 276=65 Ind.Cas. 674 ; *Ahmed* v. *Atlas Trading,* 31 Ind.Cas. 80=66 P.R. 1915 ; *Thakurdas* v. *Ramdas,* 23 Ind.Cas. 950. If the arbitrators or courts act without jurisdiction or with material irregularity, the High Court can revise the order. *Savarala* v. *Kumaru,* A.I.R. 1935 Mad. 184=41 M.L.W. 51=(1935) M.W.N. 263=155 Ind.Cas. 381 ; *Debiruddin* v. *Amina Bibi,* A.I.R. 1925 Cal. 475=78 Ind.Cas. 335 ; *Rajagopala* v. *Rangaswami,* A.I.R. 1916 Mad. 969=31 Ind.Cas. 458 ; *Delhi Cloth* v. *Kidari Pershad,* A.I.R. 1921 Lah. 369. But where the High Court is invited to exercise its jurisdiction under S. 115, it will not deal with the case is if it is dealing with objections to commissioner's report or an appeal on facts in first or even in second appeal. Jurisdiction under S. 115 is not to be lightly exercised. It is an extraordinary jurisdiction and should be used only on appropriate occasion. *Hassomal* v. *Kishinchand,* A I.R. 1936 Sind 172=30 S.L.R. 271=166 Ind.Cas. 365. In *Bikalal* v. *Acharatlal,* A.I.R. 1925 Bom. 341=87 Ind.Cas. 910=49 Bom. 535=27 Bom.L.R. 423, *Macleod, C.J.* said : "It seems necessary to point out again, as has been done in many other cases, that there is no obligation on the High Court to interfere on an application made under s. 115, even if facts are proved which brings the application within the section. It is purely a matter of discretion, and we cannot lay down any rules how

that discretion is to be exercised. Whether the court will interfere or not is entirely for the court which hears the application to decide on the particular circumstances of the case before it." See also, *Krishna Bihary* v. *Mohammad,* A.I.R. 1933 Oudh 327 ; *Nabi* v. *Mahmud,* A.I.R. 1939 Oudh 238. High Court is not bound to interfere if substantial justice has been done. *Har Prasad* v. *Bhagwati,* A.I.R. 1933 All. 924.

Revision is generally objectionable in cases of awards and a court should not interfere unless it finds not only illegality but some substantial harm resulting from that illegality. *Lakshmamma* v. *Gorle,* A.I.R. 1932 Mad. 157=61 M.L.J. 761=(1931) M.W.N. 961=34 M.L.W. 725=136 Ind.Cas. 207.

The scope of S. 115, Civil Procedure Code, is very limited and the High Court cannot interfere in revision merely because the lower court has taken a mistaken view as to what does or does not constitute misconduct on the part of the arbitrator. *Kesholal* v. *Laxman Rao,* I.L.R. 1940 Nag. 659=1940 N.L.J. 393=A.I.R. 1940 Nag. 386. No revision is maintainable against an order passing a decree in terms of an award. *Ram Sarup* v. *Hardwari,* 190 Ind.Cas. 257=(1640) O.W.N. 794 ; *Balak Ram* v.*Ramjiwan,* 158 Ind.Cas. 11=(1935) O.W.N. 1036 ; *Mohammad* v. *Orajju,* 157 Ind.Cas. 649=(935) O.W.N. 920 ; *Rup Narain* v. *Nandrani,* 152 Ind.Cas. 99=11 O.W.N. 1203=A.I.R. 1934 Oudh 494.

Where a Munsif overruled all objections as to the validity of a reference and passed a decree in terms of the award but the lower appellate court *held* the reference to be invalid and directed the case to be tried and disposed of according to law, *held* that the order of the lower appellate court amounted to a "case decided" within the meaning of S. 115, C. P. C. as the appeal pending before it was a case which was entirely disposed of by its order. *Mahomed* v. *Sirajul Huq,* 1949 A.L.J. 288=A.I.R. 1949 All. 771. An erroneous decision on a point of law does not, no doubt, entitle a party to file a revision under S. 115. C. P. Code. but where such a decision is a result of a misunderstanding by the court of the nature and scope of the proceedings before it, it is open to revision, as where an application is taken to be for filing an award, which is not, and is erroneously held to be barred by limitation under Art. 178 of the Limitation Act. *Jai Kishen* v. *Ram Lal,* 46 P.L.D. 232=A.I.R. 1944 Lah. 398. The consideration by an appellate court of an objection to the legality of an award which had not been raised before the trial court, is a material irregularity covered by S. 115(c) C. P. Code. *Hari Shankar* v. *Ameraoti,* 46 P.L.R. 108=A.I.R. 1944 Lah. 280. The court on receipt of the award against the brothers also who were not parties to the order of reference should have *suo motu* set aside the award against them. Not doing so amounts to irregularity in the exercise of its jurisdiction. *Urga* v. *Phulu,* A.I.R. 1952 H.P. and B. 48. Where the lower court having jurisdiction to pass a decree, passed it in terms of an award with the consent of both the parties, thereto but without waiting for 30 days the High Court refused to interfere in revision. *Trivedi* v. *Munshi Das,* A.I.R. 1953 Sau. 129.

The law as regards the revisional jurisdiction under the present Act may be summarised in the words of *Scott-Smith, J.* in *Allah Din* v. *Badsha Begam,* 45 Ind.Cas. 647=99 P.W.R. 1918, which are as follows : "He admits, however, that he cannot point to any error in the procedure of of the court but merely to the errors in the procedure of the arbitration. In *Sita Ram* v. *Dhani Ram,* 92 P.R. 1903=35 P.L.R. 1904, it was held although a revision lies against a decree based an arbitration award on the ground of material irregularity, yet that material irregularity must have

reference to the proceedings of the lower court and not to those of the arbitrators. Now it is admitted that in the present case the lower court followed the correct precedure. It follows, therefore, that there is no ground for revision." See also, *Hansaraj* v. *Gangaram*, 88 P.R. 1902 (F.B.) ; *Panmal* v *Soman*, 89 P.R. 1902 (F.B.) ; *Bhikhalal* v. *Achrital*, 87 Ind.Cas. 910=27 Bom.L.R. 423=A.I.R. 1925 Bom. 341=49 Bom. 423 ; *Ram Sarup* v. *Mohan Lal* A.I.R. 1933 Lah. 692=143 Ind.Cas. 309=34 P.L.R. 651=14 Lah. 715 ; *Kanhiyalal* v. *Narain Singh*, 28 P.R. 1916 ; *Parma Dat* v. *Bapuji* 35 Ind. Cas. 887=78 P.R. 1916=124 P.W.R. 1916 ; *Delhi Cloth Mill* v. *Kedari Prosad*, 64 Ind.Cas. 363=A.I.R. 1921 Lah 396 ; *Shib Rai* v. *Chait Ram*, 28 Ind.Cas. 427=96 P.L.R. 1915 ; *Gurdit Mal* v. *Basant Mal*, 89 Ind.Cas. 240=A.I.R. 1925 Lah. 619 ; *Annamali* v. *Annamali*, A.I.R. 1933 Mad. 697=(1933) M.W.N. 831=38 L.W. 330=65 M.L.J. 376 ; *Rama Swami* v. *Venkatarama*, A.I.R. 1926 Mal. 201=91 Ind.Cas. 745 ; *Sukhamala* v. *Babulal*, A.I.R. 1920 All. 258=59 Ind.Cas. 75=42 All. 525, *Krishna Behari* v. *Mahomed*, A.I.R. 1933 Oudh 327.

If a judgment is delivered according to award giving less than 10 day's time for filing objection, failure to give full ten days' time is not an irregularity vitiating the judgment and the judgment cannot be reversed unless such failure affects the merits of the cases. *Bankay Lal* v. *Chotey Miyan*, A.I.R. 1931 All. 453 ; *Udit* v. *Ram*, A.I.R. 1933 All 313 ; but see, *Acha Box* v. *Kuldip*, A.I.R. 1925 Rang. 103 ; *Tursi Ram* v. *Basdeo*, A.I.R. 1926 All. 567=96 Ind.Cas. 531. Where a Judge refuses to consider the objections to an award on the ground that they were time barred and a decree is passed in accordance with the award, no appeal lies but an application in revision is competent. *Das* v. *Dayalal*, 142 Ind. Cas. 835=A.I.R. 1933 Rang. 38.

Courts act with material irregularity when it does not give time to adduce evidence in support of objections raised against the validity of the award. *Betana* v. *Kederanath*, 37 Ind.Cas. 400=3 O.L.J. 583. Where no notice of the filing of the award was given to one of the parties before a decree in terms of the award was passed the decree must be set aside and the case sent back for disposal in accordance with law. *Sohan Lal* v. *Munna Lal*, 24 O.C. 263=62 Ind.Cas. 849. See also, *Mani Ram* v. *Ram Asray*, 24O.C. 234=64 Ind.Cas. 90. An order awarding a sum of money a fees to an arbitrator in arbitration proceedings arising out of a reference made through court is a case decided within S. 115, Civil Procedure Code, and a revision would lie to the High Court, though the latter would not interfere unless it involves any question of any irregularity in jurisdiction *e.g.*, when the amount awarded is very execessive. *Takhitram* v. *Kishin Chand*, I.L.R. 1940 Kar. 34=190 Ind.Cas. 800=A.I.R. 1940 Sind 190. See also, *Khan Chand* v. *Mul Chand*, 160 Ind.Cas. 361=A.I.R. 1936 Sind 1.

967. Revision against order confirming award—Copy of the decree should ordinarily be affixed to application.—In case of a revision application against an order confirming an award and ordering a decree to be drawn up, ordinarily a copy of the decree should be annexed to the application, for the decree is drawn up in the terms of the award, and it is the decree which is to be set aside if the application is successful, but failure to do so is not fatal to the application and it should not be rejected on that ground alone. *Hassomal* v. *Kishin Chand*, A.I.R. 1936 Sind 172=30 S.L.R. 271=166 Ind.Cas. 365.

968. Sections 17 and 33.—An application by a person alleged to be a party to an arbitration agreement, for declaration of its non-existence

on the ground that it was fabricated and, he was not a party to it is maintainable, notwithstanding that an award, and, on the basis of the award, a judgment and decree, had been passed. A mere reading of Ss. 31 and 32 makes the position absolutely clear that the question about non-existence, or invalidity, of an arbitration agreement also has to be dealt with under the Act itself, and not by a separate suit. It is for this reason that S. 33 has been enacted providing the making of an application for such a purpose. *Basant* v. *Surendra,* I.L.R. 36 Pat. 35=1957 B.L.J.R. 94=A.I.R. 1957 Pat. 417.

969. Application for setting aside award dismissed as time barred —Judgment if must be passed.—It cannot be held that in every case, even where the time for filing of the award has long expired, the court while rejecting an application for seeting aside the award, as time barred, is bound to pass a judgment in terms of the award. S. 17 has to be read with reference to an award passed "after the time for making an applica- application under S. 33, which is placed in different chapter, is in independent proceeding and rejection of an application under it does not necessarily attract the provisions of S. 17. *Gopichand* v. *Lal Chand,* A.I.R. 1956 Pepsu. 74. The language of S. 17 makes it clear that only with reference to an award passed "after the time for making an application to set aside the award has expired, of such application having been made, after refering it" that the court can proceed to pronounce judgment according to the award. This means that the court has necessarily to deal with the objection in support of the application of any party for remitting the award or setting aside the award. *Lakshmi Kanta* v. *Venkateswarlu,* (1963)=An W.R. 271.

970. Second appeal.—Objection was unsuccessfully taken before a District Munsif to the validity of an award on the ground of the arbitrator being interested, and a decree was passed in accordance with the award. The defendant appealed and the Subordinate Judge held that the objection was well-founded and should prevail; and, setting aside the award, he remanded the case for re-trial. *Held* that the appeal to the High Court was maintainable. *Krishnan* v. *Mathu Palandi,* 22 Mad. 172. See also, *Lutawan* v. *Lachia,* 21 Ind.Cas. 898 (F.B.)=12 A.L.J. 57=36 All. 69: *Narain was* v. *Ram Prosad,* 14 Ind.Cas. 455=9 A.L.J. 258. A second appeal is maintainable where the court of first instance sets aside the award and passes a decree on the merits and the lower appellate court sets aside that decree and passes a decree in accordance with the award. *Ganesh Singh* v. *Bhikhan Singh,* A.I.R. 1928 Oudh 1=4 O.W.N. 1085= 107 Ind.Cas. 545=3 Luck. 1. See also, *Shyama Charan* v. *Prolahad,* 8 C.W.N. 390; *Chintamoni* v. *Haladhar,* 2 C.L.J. 153=10 C.W.N. 601; *Ganga Prasad* v. *Kora,* 28 All. 408=3 A.L.J. 168=(1906) A.W.N. 64; *Raghubar* v. *Maina Koer,* 12 C.L.R. 564; *Poreshnath* v. *Nobinchandra,* 12 W. R. 93=5 B.L.R. App. 77 (note); *Kalyan Das* v. *Pyare Lal,* (1907) A W.N. 110=4 A.L.J. 256; but see, *Naurang* v. *Sadapal Singh,* 10 All. 8=7 A.W.N. 240; *Nawab* v. *Ahmad Khan,* 26 P.R. 1890; *Bahar* v. *Inayat,* 89 P.R. 1904=26 P.L.R. 1908. But the case of *Naurang* v. *Sadapal, supra,* overruled by the Full Bench case of *Ganga Prasal* v. *Kuru,* 28 All. 408=3 A.L.J 168 (F.B.), where the court observed: "The preliminary objection raised to the hearing of the appeal is that no appeal lies. The answer to this is, that no appeal against the order of the Munsif setting aside the award lay to the District Judge, and that consequently the decree of the District Judge passed upon the award was without jurisdiction."

Where a court sets aside an award of arbitrators on application under section 521, Civil Procedure Code, and decides on merits, the court of appeal can on appeal from the final decree, enquire into the propriety or otherwise of the order setting aside the award. *Achuthayya* v. *Thimma,* 31 Mad. 345. See also *Naranjan* v. *Gujraj,* 15 Ind.Cas. 928.

Now an appeal lies from an order setting aside or refusing to set aside an award. So where the court sets aside an award on any of the grounds mentioned in S. 30, if any party is dissatisfied with such an order, it is his duty to file an appeal against that order. But against that order no second appeal lies. *Vide* S. 39 (2).

In *Ram Khelawan* v. *Ram Nagina,* A.I.R. 1935 Pat. 109=153 Ind. Cas. 764, it has been held that under S. 104 (*e*) of the Code a party is entitled to appeal from the order modifying the award. If the appeal has been expressly from the order modifying the award, no second appeal would be admissible; but if the appeal is regularly preferred from the decree and not from the order, the form of appeal might justify the administration of a second appeal. *Vide* S. 41, *infra.*

Where a decree is passed in accordance with an award and an appeal is wrongly entertained against it and a decree is set aside, second appeal lies against such an appellate decree. *Sagar Mull* v. *Hira Maharaj.* 91 Ind. Cas. 799=A.I.R. 1925 Pat. 324=7 A.L.T. 264=A.I.R. 1926 Pat. 164; *Lutawam* v. *Lachya,* 21 Ind.Cas. 989=12 A.L.J. 57=36 All. 69; *Shiva Prosad* v. *Lachmi Prosad,* 46 Ind.Cas. 785. But in such case it has been held by the Calcutta High Court that no appeal lies but the court can interfere in revision. *Sita Nath* v. *Baikunthanath,* 9 Ind.Cas. 296=38 Cal. 421. See also, *Cangacharan* v. *Sasti Mandal,* 6 C.W.N. 614; *Elahee* v. *Hajoo,* 14 W.R. 33. In *Hari Singh* v. *Allah Baksh,* 38 Ind.Cas. 769=115 P.R. 1916, *Jonstone, C.J.* said: "It is clear, therefore, that the lower appellate court exercised a jurisdiction not vested in it by law and we revise its proceedings, rule that its interference with the first court's judgment and decree was *ultra vires* and restore that judgment and decree." See also, *Dial Chand* v. *Khuda Baksh,* 6 Ind.Cas. 963.

971. Review.—A Judge (not being a Judge of the High Court) other than a Judge who delivered the judgment, has no jurisdiction to grant an application for review on the ground that no leave or consent of the court under section 462 of the Code of Civil Procedure had been given to the guardian *ad litem* to refer the matter in dispute between the parties to the suit to arbitration. *Ananda* v. *Jogendra,* 8 C.L.J. 294.

972. How to enforce award under the English Arbitration Act.—An award under the English Arbitration Act of 1889 duly made in accordance with English Law can be enforced by a suit in an Indian High Court but cannot be set aside by an Indian Court on the ground of misconduct or irregularity on the part of the arbitrator. *John Batt* v. *Kanoodal,* A I.R. 1926 Cal. 938=53 Cal. 65=95 Ind.Cas. 21; *Oppenheim & Co.* v. *Hajee Mahomed.* A.I.R. 1922 P.C. 120=(1922) 1 A.C. 482=91 L.J.P.C. 205=127 L.T. 196 (P.C.).

973. Executions.—Under s. 15 of the Indian Arbitration Act of 1899 an award filed in court could be enforceable as if it were decree of the court. *Jasoda* v. *Kirtibash,* 18 Cal. 639; *Gladstone Wyllie* v. *Joosub,* A.I.R. 1924 Cal. 117=77 Ind.Cas. 868=27 C.W.N. 666; *Anath Nath* v. *Monmotha Nath,* A.I.R. 1939 Cal. 482=184 Ind.Cas. 652. In the last-named case the court observed: "In 27 C.W.N. 666 (*Gladstone Wyllie* v. *Joosub*) *Greaves, J.* held that when under the provisions of the Arbitration Act, the Legislature provided that an award on being filed was enforceable

as if it were a decree of the court, it intended that all the provisions of of the Code of Civil Procedure applicable to the execution of decrees should apply to an award so filed." See also *Acharjsing* v. *Achrapram*, A.I.R. 1933 Sind 78=142 Ind.Cas. 489=27 S.L.R. *Denmal* v. *Lal Chand*, A.I.R. 1931 Sind 97=133 Ind.Cas. 65=25 S.L.R. 109; *Danmal* v. *Lal Chand*, A.I.R. 1931 Sind 97=133 Ind.Cas. 65=S.L.R. 475; *Louis Dreyfus* v. *Purusottam*, 47 Cal. 29=56 Ind.Cas. 325; *Sital Prosad* v. *Clements*, A.I.R. 1921 All. 199=61 Ind.Cas. 401=43 All. 394; *Belvedere Jute Mills* v. *Haradwari*, A.I.R. 1927 Cal. 853=104 Ind.Cas. 808; *E. D. Sasson* v. *Shivaji*, A.I.R. 1929 Lah. 228; *Sassoon* v. *Ramdul* A.I.R. 1922 P.C. 374=70 Ind.Cas. 277=49 I.A. 366=50 Cal. 1 (P.C.); *Ghulam Ahmed* v. *Abu Baker*, A.I.R. 1931 Nag. 170=27 N.L.R. 386=134 Ind.Cas. 683; *Mangaimal* v. *Akbari*, A.I.R. 1929 Sind 28=112 Ind.Cas. 126=23 S.L.R 422; *Bal Krishna* v. *Sukdei*, A.I.R. 1943 Cal. 442. In the last-named case it was held that rule 50 of Order XXI of Civil Procedure Code was applicable to an award obtained without the intervention of the court against a firm and made a rule of the court under the provisions of Arbitration Act of 1899. The proceedings for enforcement of an award under S. 15. Arbitration Act, were governed by S 47, Civil Procedure Code, and an appeal was competent from an order rejecting such application. *Kanhaiya Lal* v. *Peoples Bank*, A.I.R. 1934 Lah. 49=35 P.L.R. 535=151 Ind.Cas. 881: *E. D. Sassoon* v. *Shivaji*, A.I.R. 1929 Lah. 228 · *Donald Greham* v. *Kewal*, A.I.R. 1921 Sind 132=16 S.L.R. 245; *Pakhar Das* v. *Radha Kissen*, A.I.R. 1924 Lah. 544. But under the present section the court must pronounce a judgment according to the award and upon the judgment so pronounced a decree shall follow. This decree is to be executed like any other decree passed by a Civil Court. Where an award grants six months time for payment of a certain amount and decree was passed in term of the award, the starting point of the period for payment is date of the award and not the decree in terms of such award. *Janeshwar Das* v. *Tilok Chand*, 1951 A W.R .(H.C.) 615.

974. Executing court, if can go behind the decree.—The executing court cannot refuse to execute a decree because it is against law or contravenes the provisions of any law. Where the court making the award a rule of the court had jurisdiction over the subject matter of the suit, but it failed to wait till the time of making an application to set aside the award had expired, as required by S. 17 of the Arbitration Act, the omission of the court was at the most a contravention of the prescribed procedure and the executing court could not ignore the decree. *Madhav Reddy* v. *Raja Ram*, A.I.R. 1958 Andh.Pra. 417.

975. Ss. 17, 14, 2(a)—Agreement Signed on behalf of minor by person having adverse interest.—An award is not valid where agreement signed on behalf of minor by persons having adverse interest. *Satyanarain* v. *Jugal Kishore*, A.I.R. 1958 All. 512=1956 All. L.J. 622=1958 All· W.R. (H.C.) 721.

976. Ss. 17, 39.—Section 17 bars an appeal from a decree (except on the ground of its being in excess of the award) only if the decree is passed in a proceeding governed by Ss. 14, 15, 16 and 17. Where there is an appeal for an order refusing to set aside an award, when disposing of the appeal, it is open to the appellate court to set aside any consequential or incidental order passed by the trial court. Even if the order referring to set aside the award is maintained on appeal, any consequential or incidental order passed by it without jurisdiction or wrongly can be set

aside. In any case it can be set aside by the appellate court in exercise of its revisional jurisdiction and the appellate court can exercise its revisional jurisdiction while exercising its appellate jurisdiction. It is not necessary that there should be an application under S. 115, C. P. C. *Amod Kumar* v. *Hari Prosad,* A.I.R. 1958 All. 720.

Power of court to pass interim orders.

18. (*1*) Notwithstanding anything contained in section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the court may pass such interim orders as it deems necessary.

(*2*) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just.

977. Object of the Rule.—"In following the Civil Procedure Code, section 17 seeks to amend the existing law in places where the 1899 Act is in force in another manner. At present under that Act an award is immediately enforceable as a decree, and one High Court has held that it may be executed under section 15 (1) of the Act even though the notice of filing under section 11 (2) has not been given. The position is at variance both with the Code and with the English law, and it is now proposed to make the decree only after the time for challenging the award has expired or when such a challenge if made has been rejected. [*Vide* section 17, (*supra*)]. This section, taken from the English rule of court is a corollary to section 17 in the sense that it enables the court to counter in the interval any action designed to defunct the subsequent execution of the decree."—*Notes on Clauses.* The words "or is about to take" has been added by the Select Committee. In making the addition they have observed : "The change made is in accordance with the principle followed by rule 1 of Order XXXVIII of the Civil Procedure Code."—*Report of the Select Committee.*

978. When the court can exercise powers under this section.—It has already been noted that this section has been enacted in accordance with the principles underlying rule 1 of Order XXXVIII of the Code of Civil Procedure Code. In *Seth Chand* v. *Purshottamdas,* A.I.R. 1926 Mad. 584=50 Mad. 27=94 Ind.Cas. 512=51 M.L.J. 384, *Coutts-Troter, C.J.* observed : "It appears to me that before exercising the powers conferred by order 38, a court should be satisfied on two points. The first is that the plaintiff's cause of action is *prima facie* an unimpeachable one subject to his proving his allgations made in the plaint. The second is that the court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the arbit of the court." It seems that under this section the court is competent in a suitable case to appoint a receiver. Vide *Dayaram* v. *Naraindas,* A.I.R. 1929 Sind 200.

979. After the award has been filed.—This section deals with a case where an award has been filed and a decree has been passed. But where some one of the parties had been trying to defeat or delay or obstruct the

execution of the decree passed upon the award, in such cases, the court is specifically empowered by this section to pass interim orders that may be deemed necessary. It is significant that the Act does not contain any corresponding provision for passing interim orders before the stage at which the award is filed. *Shib Krishna* v. *Sunil Kumar,* A.I.R. 1949 Cal. 189. It is to be noted in this connection that the filing of an award by the arbitrator is tantamount to institution of a suit before a court and as such the court is given jurisdiction to exercise the same powers which it possess in a pending suit by issuing orders under Orders XXVIII, XXXIX and XL of the Civil Procedure Code of 1908. Cf. *Surendra Kumar* v. *Sushil Kumar,* A.I.R. 1928 Cal. 256 ; *Pin Roncoroni,* (1892) 1 Ch. 633 ; *Willesford* v. *Watson,* (1873) 8 Ch. 473. In the last-named case *Lord Selborne* says : "It is said that the arbitrator could not grant an injunction. No doubt he could not grant an injunction ; but he might say that the thing was not to be done and there being liberty to apply to this court, this court would then grant an injunction." As regards court's power to appoint receiver *vide Nagar Chand* v. *Surendra,* 24 Pat. 416.

980. Court may.—The power is discretionary, 84 Ind.Cas. 870.

981. Appeal.—The order under this section is not appealable.

Power to supersede arbitration when award becomes void or is set aside.

19. Where an award has become void under sub-section (*3*) of section 16 or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred.

982. Court may.—The word "may' in this section is a word of permission rather than of command thus this section confers full discretion on the court to say in each particular case whether the reference should not be superseded When a court making an order under this section does not expressly supersede the reference and direct that the arbitration agreement shall cease to have effect, it must be deemed to have declined to exercise the power. In this respect it differs from paragraph 15 (3) of the Second Schedule in the Code of Civil Procedure which declared that where an award becomes void or is set aside, the court shall make an order superseding the arbitration. *Gulab Rai* v. *Bansilal,* A.I.R. 1959 Punj. 102=61 Punj.L.R. 153.

983. Ss. 23(1), 30—Issues framed by court or arbitrator.—Where the issues are framed by the arbitrator in proceedings before himself, the law does not require the arbitrator to answer each one of the issues, and the failure to answer the issues does not amount to misconduct. *Padmabati* v. *Pannalal,* A.I.R. 1959 Cal. 156.

In a suit for dissolution of partnership and accounts the court referred the dispute to arbitration. The arbitrator made an award by which the plaintiffs were given a certain sum as their share of the business. The defendants jointly were allowed all the assets and all the liabilities including the goodwill, so that if they so desired, they could carry on a new partnership business. If the plaintiffs were held liable for any debt due by the partnership, the defendants were to indemnify them. *Held* that the arbitrator had not created a new partnership in his award and as such he could not be said to have exceeded his power under the order of reference. *Padmabati* v. *Pannalal,* A.I.R. 1959 Cal. 156.

984. Scope of the section.—"Section 19 provides that where an award

comes void or is set aside, the court may supersede the reference and order that the agreement shall cease to have effect with respect to the particular difference referred. The section generalises the provisions of paragraph 15 (2) of the Second Schedule to the Code."—*Notes on Clauses*. Where arbitrators refuse to act, the court has no power to supersede arbitration and to determine matters referred to arbitration. *Sadiq Hussain* v. *Nazir,* 33 All. 743 (P.C.). The court has inherent jurisdiction and it can in the exercise of its inherent jurisdiction revoke a reference when it would be futile to proceed with an arbitration which is grossly irregular and defective. *Parvathamma* v. *Subramma,* A.I.R. 1935 Mad. 349=68 M.L.J. 417 ; See also, *Lathman* v. *Moghal,* 86 Ind.Cas. 540 ; *Anand* v. *Rambhusan,* A.I.R. 1933 Pat. 566 ; *Bholanath* v. *Raghunath,* A.I.R. 1929 All. 743= 51 All. 1010. If the award is wholly set aside, the arbitrator is *functus officio. Russell,* 15th Edn., p. 298. Under S. 19 the setting aside of an award does not, by itself terminate the reference except where the award is set aside on a finding that the reference itself was invalid. In other cases that is where the reference is valid and only the award is bad, after the award is set aside, the reference has to be superseded by a further order, if desired to terminate it. *Union of India* v. *S. S. Sasmal,* A.I.R. 1961 Orissa 81. The Scheme of the Arbitration as disclosed from sections 8, 10, 12, 19, 20(5) and 25 is whether the arbitration is under Chapter II, Chapted III or Chapter IV, to give direction to the Court to decide whether to supersede the reference or not when it sets aside an award. Where it decides to supersede the agreement it has to order that the arbitration agreement shall cease to have effect with respect to the difference referred ; but where it does not supersede the reference and the reference and arbitration agreement subsist and if there is machinery provided in the arbitration agreement for making a further reference or for continuing the same reference further arbitration can take place. The contention therefore that once the award is set aside the arbitrator becomes *functus* and consequently there can be no further reference with respect to the dispute decided by the award which is set aside, must fail in view of the specific provisions of s. 19 of the Act. *Juggilal* v. *General Fibre,* A.I.R. 1962 S.C. 1123=(1962) 2 S.C.J. 314 see *Rallis India L.W.* v. *B. V. Maickam Chetti & Co.* 75 Mad. L.W. 216=A.I.R. 1962 Mad. 351 (where it is found there is no valid award in the form of a special case, the court is not justified in superseding the arbitration agreement). Under s. 19 unless the reference was superseded the original agreement of arbitration would remain intact and the arbitrator would be properly seized of the arbitration proceedings before him. *Union of India* v. *Lakshmi Ice Factory,* A.I.R. 1964 J. & K. 10.

985. Arbitration Clause in the contract.—In the contract itself there was reference of the dispute to arbitration of Bengal Chamber of Commerce. The award was set aside by the High Court for misconduct of arbitrator. The question arose whether the chamber has power to appoint fresh tribunal for continuance of arbitration. Held that the appointment of a fresh arbitral tribunal by the chamber could be sustained in the present case only under Rule X and not under Rule V of Rule VII of the Arbitration Rules of the chamber. Rule X was applicable in the case because the words "becomes incapable of acting" in Rule X are of wide amplitude and do not refer to cases only of physical incapacity. Therefore, it was open to the Registrar under this rule to appoint a fresh tribunal because the earlier tribunal had become incapble of acting in view of the fact that its award had been

set aside on the ground of misconduct. That there was a machinery by which fresh arbitrator could be appointed according to the terms of the arbitration agreement read with the rules of the chamber and the appointment of a fresh tribunal and the carrying on of the arbitration. *Juggilal Kamlapat* v. *General Fibre Dealers, Ltd.* (1962) 2 S.C.J. 314 = A.I.R. 1962 S.C. 1123.

986. Reference.—Section 19 clearly contemplates that "reference" and "agreement" are not identical but are distinct things. Reference in the present Act means the actual submission of a particular dispute under the provisions of an arbitration agreement. *Baranagore Jute* v. *Hulas Chand,* 162 C.W.N. 734 = A.I.R. 1958 Cal. 490.

987. Appeal.—Superseding an arbitration is appealable under s. 39 (1) (c).

988. Revision.—A court cannot be considered to have decided a case within the meaning of S. 115 Civil Procedure Code, where it has set aside the award and superseded the arbitration pending a suit which is consequently to be tried by the court. *Gobind Das* v. *Indrawati,* (1938) A.L.J. 813 = I.L.R. 1938 All. 805 = 177 Ind.Cas. 981 = A.I.R. 1938 All. 557 (F.B.). See also, *Gulab Singh* v. *Dharam Pat,* 160 Ind.Cas. 1052 = 38 P.L.R. 121 = A.I.R. 1936 Lah. 538.

989. Sections 19 and 20.—By the operation of s. 20 (5) the provisions of s. 19 of the Act are applicable to a case falling under S. 20, where there is a pending suit, but the agreement to refer has been filed in the Court. Under S. 19 the court has power, when it sets aside an award made upon reference under S. 20 (4) to supresede the reference and thus avoid arbitration agreement. It follows that where a court, while making order under S. 19 does not expressly supresede the reference and direct that the arbitration agreement shall cease to have effect, it must be deemed to have declined to exercise the power, and consequently that the arbitration agreement notwithstanding it is filed in court, still remains in full force according to its tenor, not only with respect to the difference which was referred to arbitration but with respect to all disputes between the parties which properly fall within the agreement. *Abdul* v. *Chairman,* Pak.L.R. (1949) Lah. 789 = A.I.R. 1950 Lah. 32 = P.L.D. 1949 Lah. 278.

990. Ss. 19, 30.—Where only the award is set aside, the arbitration agreement subsists except perhaps in the unusual but possible case where the award itself provides that there shall be only adjudication. In fact S. 19 provides for supersession of the reference and carries the clear implication that unless the reference is superseded when the award is set aside, it continues to subsist. Therefore, the view that after an award is set aside, not only are the parties entitled to make fresh reference, but a fresh reference is the only means by which they can have further arbitration and that they can make a fresh reference as many times as the award is set aside is not correct. *Kathihar Jute* v. *Lachminarayan,* A.I.R. 1958 Cal. 501 ; but see *Barangar Jute* v. *Hulaschand,* 62 C.W.N. 734 = A.I.R. 1958 Cal. 496.

CHAPTER III.

ARBITRATION WITH INTERVENTION OF A COURT WHERE THERE IS NO SUIT PENDING

Application to file in Court arbitration agreement.

20. (*1*) Where any persons *have entered into a arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II,* may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be field in Court.

(*2*) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plantiffs *and the remainder* as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(*3*) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(*4*) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed *by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.*

(*5*) *Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.*

991. N.B.—"Section 20 is based upon paragraph 17 of the Second Schedule to the Code. It allows the parties to an arbitration agreement or any of them to initiate the reference proceedings with the assistance of the court."—*Notes on Clauses.* "The change made in sub-section (5) applies such of the other provisions of the Act as may be applicable to the arbitration proceedings under this chapter and not merely the provisions of Chapter II"—*Report of the Select Committee.*

992. Changes.—Sub-section (1) has been redrafted, while very little change has been made in sub-section (2) to (4). Sub-section (5) is new.

993. Scope of the section.—Before a person applies under this section that agreement be filed in court four conditions must be satisfied, namely (1) that he has entered into an arbitration agreement with some person or persons, (2) that the agreement has been entered into before the institution of any suit with respect to the subject-matter of the agreement or any part of it, (3) that a difference has arisen between the parties to which the agreement applies, and (4) that the court to which the application

is made has jurisdiction in the matter to which the agreement relates. If any of these conditions is absent, the filing of an matter to which the agreement relates. If any of these conditions is absent, the filing of an application under that section and the passing of orders by court that the agreement be filed in court and a reference to arbitration be made would be barred. All these questions must be decided by the court to which an application under the section is made before it proceeds to make an order that the agreement be filed and reference to arbitration be made. The jurisdiction of the arbitrator being a creation of contract; the determination of the question of whether any particular dispute or difference that has arisen between the parties is referable to arbitration must depend on whether the dispute or difference in question is one to which, in the language of S. 20 of the Act, "the agreement applies" provided of course, there is still in existence an agreement legally binding on the parties. *Godhu Mal* v. *Gangu Hasso,* 1958 All.W.R. (H.C.) 23 = A.I.R. 1958 All. 26. A civil Judge is competent to formulate the points of difference between the parties and to refer those points for decision to the arbitrator. In order to give jurisdiction to the court to take the agreement it must be shown that the subject-matter of the agreement or any part of it lies within the court's jurisdiction and the provisions of S. 31 (1) must be complied with. The word "court" means the civil court having jurisdiction formulating the subject-matter of the reference, if the same had been the subject-matter of a suit for this purpose the pleadings of the parties are to be considered. An award which does not dispose of all the matter referred to arbitration is incomplete and invalid in law. The court may in such a case either remit the award under S. 16 (a) or set it aside under S 30. *Indian Minerals* v. *Northern India Lime* A.I.R. 1958 All. 692. As regards what matters are in dispute vide *Dennal* v. *Caledonian,* 1958 B.L.J.R. 305 = 1958 Pat.L.R. 162. The section relates to a stage prior to the award and an application to file in court the arbitration agreement, and proceed to arbitration with the intervention of the court. It has nothing to do with an application to file award obtained without intervention of court. *Gauri* v. *Ramlochan,* A.I.R. 1948 Pat. 430 = 29 P.L.T. 105. The scope of the section is no more than this that when an agreement of reference to arbitration has been entered into by the parties but the arbitrators have not so far functioned, the court has power to enforce an agreement against the parties when the arbitrators are ready and willing to act in terms of the reference. This section far from implying an ouster of jurisdiction, predicates that the arbitrators have the jurisdiction to act on the reference and the courts should step in and ask them to exercise the powers as arbitrators if they are agreeable to do so. *Sheo Narain* v. *Bala Ram,* (1932) A.L.J. 331 = 137 Ind.Cas. 198 = A.I.R. 1932 All. 348; *Ramugah* v. *Acharnath,* 31 Ind.Cas. 899 = 38 All. 895 = 13 A.L.J. 115; *Allahdin* v. *Badshaw Begum,* 45 Ind.Cas. 647 = 90 P.W.R. 1918; *Louis Dreyfus v. Basappa,* 38 Bom.L.R. 607 = A.I.R. 1936 Bom. 401; *Makhan Lal* v. *Abhoy Ram,* A.I.R. 1935 All. 886 = 156 Ind.Cas. 904 = (1935) A.L.J. 998; *Tincori* v. *Fakir,* 30 Cal. 218. Although an agreement to refer to arbitration cannot be specifically enforced under the Specific Relief Act but an arbitration can be enforced by the provisions of this section. *Venkatachallam* v. *Suryanarayan,* A.I.R. 1941 Mad, 129 = (1940) 3 M.L.J. 520 = 52 M.L.W. 556 = (1940) M.W.N. 1083. A contract in writing to refer disputes in a pending suit is an arbitration agreement to which the provisions of the Arbitration Act of 1940 apply and therefore is not specifically enforceable save as provided by the Arbitration Act in view of

S. 21, Specific Relief Act. Such a contract cannot be enforced and filed in court under S. 20. *Jugaldas* v. *Pursottam,* A.I.R. 1953 Cal. 690, where the court observed : "Formerly there was conflict of opinion on the point whether such contract and refusal to arbitrate under it barred the pending suit by virtue of S. 21, *Specific Relief Act.* The Allahabad High Court held that the suit was barred ; *Saligram* v. *Jhumna Koer,* 4 All. 546=1882 A.W.N. 135 ; *Sheoambar* v. *Deodut,* 9 All. 163= 1887 A.W.N. 13 ; *Sheo Dat* v. *Sheo Shankar,* 27 All. 53. The better view was that the suit was not barred ; *Raza Ali* v. *Fida Ali,* 4 Oudh Cas. 17 and *Fakir* v. *Jaimal,* 50 Punj. Rec. 1891, *Budha* v. *Hakri,* 130 Punj. Rec. (1882). This section cannot apply as refusal to arbitrate before institution of the suit is necessary to attract the bar under section. *Crisp* v. *Adlard,* 23 Cal. 956. The section has been successively amended. Now it does not apply to contract to refer, to which the provisions of the Arbitration Act of 1940 apply.....The Court of Chancery never decreed specific performance of a contract to refer to arbitration. *Doleman* v. *Orsett Cor.,* 81 L.J.K.B. 1092=(1912) 3 K.B. 257 (270) ; *Koeglar* v. *Coringa Oil,* I.L.R. 1 Cal. 42 (49). Because of S. 21, Specific Relief Act such contract is not specifically enforceable save as provided by the Arbitration Act, 1940." Where arbitrator had not entered upon arbitration at the time when application to file agreement was made, but before disposal of application had actually delivered his award, and filed it in court, it was held that the application had become infructuous and another reference cannot be made to the arbitrator as the object of having the agreement filed in court which is to direct the arbitrator to enter upon his duties and to deliver his award, is achieved, though not through the agency of the court. Proper course for parties is to take steps under section 14 to have the award a rule of court either by amendment of the previous application or by withdrawing it and filing a fresh application. *Parbati* v. *Durga Debi,* 108 Ind.Cas. 186=A.I.R. 1928 Lah. 170. This section does not apply to agreements to refer by parties to a litigation. It only covers the case where the parties without having recourse to litigation agree to refer their differences to arbitration. *Venkatachallam* v. *Rungiah Reddi,* 12 Ind.Cas. 372=10 M.L.T. 248=2 M.W.N. 249 ; *Haji Umar* v. *Shivlal Das,* 81 Ind.Cas. 653 ; *State* v *Bhagat,* 39 P.L.R. & K. 83. Party going to arbitration in case in which on its refusal to go to arbitration an order of reference would have been made under this section, cannot dispute opponent's right to obtain order of reference when a difficulty arises at a later stage of proceedings, which has not been provided for unless an order of reference has been made. *Fazal Ilahi* v. *Prag Narain,* 44 All. 523=20 A.L.J. 327=L.R. 3 All 434=67 Ind.Cas. 739 ; *Bhagwan Das* v. *Gurdyal,* 64 Ind.Cas. 459=A.I.R. 1921 All. 188=19 A.L.J. 823. Parties agreeing to refer to arbitration out of court may make an agreement an order of court. *Manilal* v. *Gokul Das,* 45 Bom. 245=22 Bom.L.R. 1048=59 Ind.Cas. 53. Parties accepting court's decision to refer and appearing and prosecuting case before arbitrators cannot afterwards challenge award on ground of want of jurisdiction in tribunal chosen by themselves. *Sukh Nath* v. *Nehal Chand,* 59 Ind.Cas. 801=42 All. 661=18 A.L.J. 644. A court has no power to superimpose its will on the parties to a reference. It has no discretion whatever to refuse to make the reference to the arbitrator or arbitrators nominated by the parties. It is only when the parties cannot agree that it can exercise its discretion in the matter. *Satis Chandra* v. *Paliram,* 61 Ind.Cas. 390= A.I.R. 1921 Pat. 161=2 Pat.L.T. 277=6 Pat.L.J. 287. In cases when the

existence of the agreement is denied, it is for the court to enter into that question and give a definite finding whether the agreement does or does not exist. *Anwarlul* v. *Ali Mohammed,* 1961 All. L.J. 73=A.I.R. 1961 All. 588.

There is nothing in the language or S. 20 which can lead to the inference that a suit has to precede an application under the section. On the other hand the indication are that section 20 does not contemplate the institution of a suit. *Ramanath Rao* v. *Venkata,* (1962) 1 Andh. W.R. 137=A.I.R. 1962 Andh. Pra. 387.

In order to attract s. 20 of the Act three conditions are necessary (1) that the arbitration agreement must have been entered into before the institution of any suit with respect to the subject matter of an agreement or any part of it; (ii) there must have arisen a difference to which the agreement applies; and (iii) the proceedings under Chapter II must not have been started. The condition prescribed are cumulative and not mutually exclusive unless their conditions are satisfied there can be no occasion for making an application under s. 20 with the request that the agreement be filed in court nor the court could entertain and proceed with the case as prescribed in that provision. *Venkata Surya Rao* v. *Venkata Rao,* (1962) Andh. W.R. 326.

994. Question of liability—Power of court to decide.—On an application under s. 20, ordinarily the only point for decision for the court would be if there was an arbitration agreement and the question of liability is one for the arbitrator and not for the court to decide. Where, however, a person is sought to be dragged into an arbitration proceeding on the strength of an arbitration agreement to which he was not a party unless by operation of law he is deemed to be a party to the agreement, the question of liability must be decided by the court. *Union of India* v. *Chamanlal,* 1957 S.C.J. 719=1957 S.C.A. 825=A.I.R. 1957 S.C. 652.

995. S. 20—Whether notice is necessary.—Section 20 gives an option to a party to apply under that section instead of Chapter II and when once a party proceeds under that section, no notice need be given. *C. Rai* v. *Union of India,* A.I.R. 1957 J. & K. 27.

996. S. 20—Nature of the proceeding.—Application filed in court to enforce arbitration agreement is a legal proceeding. *Great American Ins.* v. *Dinanath,* 27 Com. Cas. (Ins.) 4=A.I.R. 1957 Punj. 152.

997. An award whether a plaint.—Where an award is sufficiently stamped filed in court it is not a plaint but it is an adjudication of a tribunal selected by the parties. *Thartal* v. *Arjun Singh,* A.I.R. 1957 Madh.B. 49=Madh. B.L.R. 1956 (Civil) 565.

998. Sub-section (1).—This sub-section refers to cases where the parties have entered into an agreement to refer to arbitration any difference between them independently of the court. A proceeding under this section does not commence with a plaint. *Per Shadi Lal, C.J.* in *Secretary of State* v. *Kundan Singh,* A.I.R. 1932 Lah. 374=13 Lah. 672=137 Ind.Cas. 266=33 P.L.R. 508. It is not necessary that an agreement to submit a dispute to arbitration should set forth in full detail every matter which is in dispute. *Pormaya* v. *Supammal,* A.I.R. 1946 Mad. 391=(1946) 1 M.L.J. 308; see also *Durga Prosad* v. *Anardeyi,* A.I.R. 1947 Cal. 75. Parties cannot by an agreement to refer to arbitration dispute in a pending suit under this section. Such disputes cannot be referred under this section in conjunction with other disputes. *Deomal* v. *Thanoomal,* A.I.R. 1926 Sind. 5=89 Ind.Cas. 335; *Haji Umar* v. *Shivaldas,* 16 S.L.R. 174=81 Ind.Cas. 653 (F.B.); see also *Dinkarrai* v.

Yeshanwtrai, A.I.R. 1930 Bom. 98=31 Bom.L.R. 1403=124 Ind.Cas. 119=54 Bom. 197 ; *Venkatachala* v. *Rangiah,* 36 Mad. 353=21 M.L.J. 990=12 Ind.Cas. 372 ; but see *Bhimaram* v. *Bhagat,* A.I.R. 1953 Pesh. 18 ; *Kokil Singh* v. *Ramasray,* A.I.R. 1924 Pat. 488=81 Ind.Cas. 994=3 Pat. 443 ; *Lalchand* v. *Sri Ram,* A.I.R. 1930 Lah. 1066=122 Ind.Cas. 237 ; *Palaniyandi* v. *Kandappa,* A.I.R. 1951 Mad. 281. Court cannot refuse to make reference to arbitrator or arbitrators nominated by the parties. It can exercise discretion only when parties cannot agree. A.I.R. 1921 Pat. 161=2 Pat. L.T. 277=6 Pat. L.J. 287=61 Ind.Cas. 390. Sub-section (1) contemplates agreement to which the provisions of chapter II would also apply. *India Hosiery* v. *Bharat,* 92 C.L.J. 7=A.I.R. 1953 Cal. 488. Where in a pending suit a private reference to arbitration is made without the knowledge of the court and without its discretion and award is made, a decree in terms of the award can be passed under O. 23, R. 3 even though all the parties interested in the suit do not consent to it being filed as a compromise or adjustment. *Palaniyandi* v. *Kandappa,* A.I.R. 1951 Mad. 281 ; *Arumuga* v. *Balasubramania,* I.L.R. (1946) Mad. 39=A.I.R. 1945 Mad. 294 doubted but followed. See notes under s. 47, and notes under s. 21 under the hearing of chapter IV. Section 20(1) presupposes that the agreement is with one party or the other who can be ordered by the court to file it. This would be the position when the arbitrator has not entered upon the reference. When he has entered upon the reference there is no scope for making such an order as the agreement is with him and he is not under the court's jurisdiction. Section 20(1) contemplates a case in which the parties entered into an arbitration agreement providing for, a reference or a difference and then a difference arises between them. A party or the parties would itself or themselves, without the intervention of the court, call upon the arbitrator by notice in writing to make an award vide clause 3 of the First Schedule. But the remedy given by S. 20(1) is an alternative to that provided by Chapter II, which means that chapter II, also applies to a case in which a difference arises after the agreement has been entered into. *Mangal Prosad* v. *Lachman Prosad* 1963 All. L.W. 693=A.I.R. 1964 All. 108 (F.B.).

999. Arbitration agreement.—An arbitration agreement, neither specifying the number of arbitrator nor specifying the mode of appointment, is perfectly effective and valid and the incidents of such an agreement are that it is to take effect as an agreement to reference to a sole arbitrator, to be appointed by the consent of the parties, or where the parties do not concur in making an appointment, to be appointed by the court, except where the operation of Rule 1 of the First Schedule is excluded. *India Hosiery* v. *Bharat,* 92 C.L.J. 7=A.I.R. 1953 Cal. 488. The essential ingredients for constituting an arbitration agreement, within the meaning of s. 2. (a) Arbitration Act, 1940, are (1) that there must be an agreement, i.e., the parties must be *ad idem* and (2) that such an agreement must be in writing. In order to constitute a written agreement it is not necessary that the agreement should be a formal document of submission to arbitration or should be contained in one document. Such agreement may ever be contained in correspondence. The only thing that is necessary in law is that the agreement which is held by the court to have been arrived at between the parties should be in writing. Where, therefore, two persons apply, though at different times, to be enrolled as members of an Association agreeing by the very terms of the application which they sign, to be bound by all its rules and regulations including

one enjoining the members to refer their dispute to arbitration, there is an agreement between those persons and all other members and, therefore, between themselves, at least on the date of the later application, to refer their dispute to an arbitration and it is also written agreement by reason of this having appended their signatures to the application form within s. 2 (*a*) ; *Mohanlal* v. *Bissesarlal,* A.I.R. 1947 Bom. 268=48 Bom.L.R. 686 ; see also *Radhakisan* v. *Balmukund,* A.I.R. 1931 Bom. 41=55 Bom. 382= 128 Ind.Cas. 614 ; *Hickman* v. *Kent,* (1915) 1 Ch. 881=113 L.T. 159=84 L.J.Ch. 688 ; *Kotumal* v. *Adam Haji,* A.I.R. 1939 Sind. 358=I.L.R. (1939) Kar. 769=186 Ind.Cas. 272. See also *Great American* v. *Bodh Raj,* 54 P.L.R. 497=1953 Punj 50 ; *Municipal Committee* v. *Electric Supply,* A.I.R. 1947 Lah. 2309. It is not necessary in an arbitration agreement, that it should contain the words "arbitration" "arbitrator" on "arbitration agreement" so long the parties were found to have agreed to allow the matter to be decided by a person of their own choice whose decision was to be final, conclusive and binding on them. *Governor General* v. *Simla Banking,* A.I.R. 1947 Lah. 215 ; see also *Great American Ins.* v. *Bodhraj,* 54 P.L.A. 497. All that is necessary that such an agreement must be a binding agreement on both sides. *Mohsinuddin* v. *Khabimuddin,* 26 C.W.N. 246 ; *Shankar* v. *Ramchandra,* 25 Bom.L.R. 437. As regards construction of arbitration agreement, *vide Great American Insurance Co.* v. *Dinanath,* 27 Com. Cas. (Ins.) 4=A.I.R. 1957 Punj. 152. *Union of India* v. *Himco* (India) A.I.R. 1962 Cal. 254 (contract concluded by tender and acceptance) ; *Ganon Dankerley* v. *Union Carbide (India) Ltd.* A.I.R. 1962 Cal. 360.

1000. Persons have entered into arbitration agreement.—An arbitration agreement means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. *Vide* section 2(*a*). This section contemplates that the agreement should be in writing and should be before the court, so that it may be ordered to be filed in order that an arbitrator may be appointed in accordance with the provisions and he may be called upon to act upon the agreement. It is not necessary that the document should be in the form of a written contract signed by the parties so as to be an instrument or document, but it is certainly necessary that there should be some writing which should embody the whole of the agreement. The terms of the agreement should not be a matter of controversy between the parties in the court which has to decide whether the agreement should or should not be filed. Once the court is satisfied that an agreement which is in writing, and is before it, was entered into by the parties, it can proceed under this section, but where no writing is produced and the terms of it are not admitted, the court cannot order it to be filed without first ascertaining the terms, as to which it would have to hold an enquiry, which does not appear to be contemplated in the provisions of this section. *Makhan Lal* v. *Abhoy Ram,* A.I.R. 1935 All. 886=156 Ind.Cas. 904=(1935) A.L.J. 998 ; *Tincori* v. *Fakir,* 30 Cal. 281 ; *Mohsiruddin* v. *Khabiruddin,* 26 C.W.N. 246 ; *Sankar* v. *Ram Chandra,* 25 Bom.L.R. 437. But an order for reference to arbitration cannot be made on an agreement to refer made between some only of the parties interested in a suit. *Venkatachellam* v. *Rungiah,* 12 Ind.Cas. 372=10 M.L.T. 248=2 M.W.N. 249 ; *Ghulam Khan* v. *Muhammad,* 29 Cal. 167= 29 I.A. 51=25 P.R. 1902=4 Bom.L.R. 161=12 M.L.J. 77=6 C.W.N. 226 (P.C.) ; *Tincory* v. *Fakir,* 30 Cal. 218.

In *Sheo Narain* v. *Bala Rao,* A.I.R. 1932 All. 348=(1932) A.L.J. 331=

137 Ind.Cas. 198, *Sen J.* observed. "It is a settled rule of law that it is not open to a party to an agreement of reference to revoke the submission to arbitration except for good cause and that a mere arbitrary revocation of the authority is not permitted." See also, *Pestonji* v. *Manokjee,* 12 M.I.A. 112=10 W.R. 51=2 Sar. 390 (P.C.); *Bansidhar* v. *Sital Prosad,* 28 All. 13=3 A.L.J. M.I.A. 112=10 W.R. 51=2 Sar. 390 (P.C.); *Bansidhar* v. *Sital Prosad,* 28 All. 13=3 A.L.J. 613=(1906) A.W.N. 253; *Ram Chandra* v. *Krishna Lal,* 17 Ind.Cas. 600. Where parties have chosen under an agreement to refer their disputes to arbitration, court will insist that they should have recourse to arbitration before pursuing any other remedy. *Brij Lal* v. *State,* A.I.R. 1954 All. 393. An arbitration to which a minor is a party is not itself void, it is only voidable at the instance of the minor. *Rama* v. *Surya,* (1940) 2 M.L.J. 356=A.I.R. 1940 Mad. 905=(1940) M.W.N. 808=52 L.W. 373. The guardian mother of a minor has authority to agree to refer the disputes that have arisen inside the family to the decision of arbitrators under sub-section (1) if she finds that it is for the benefit of the minor. *Raghupati* v. *Ramgopal,* A.I.R. 1939 Cal. 557; *Tulsi* v. *Jhanaklal,* I.L.R. 1936 Nag. 44=A.I.R. 1936 Nag. 197; but see, *Haranarain* v. *Sajjan,* A.I.R. 1940 P.C. 181=190 Ind. Cas. 184=(1940) A.L.J. 774=45 C.W.N. 40=52 L.W. 409; *per Lord Russell of Kelowen.* Where one of the parties to a contract is a firm, a clause for the submission of disputes to the arbitration of its directors is perfectly legal. *Jubilee Chamber* v. *Lala Amrit,* 42 P.L.R. 48=A.I.R. 1940 Lah. 180. The assignee of a party to a contract is bound by an arbitration clause in the contract where the subject-matter of reference is capable of assignment. *McKenzies Ltd.* v. *Sulleman,* 27 S.L.R. 159=140 Ind.Cas. 626=A.I.R. 1933 Sind 75. See also *Mehtab Singh* v. *National Fire and General Insurance* 64 Punj. L.R. 649=A.I.R. 1963 Punj. 103 (a transferee of a motor vehicle who is a party to the contract of motor insurance containing the arbitration clause cannot deemed to be a party to the arbitration agreement). The agreement could not be accepted in part. *Fazaldin* v. *Shah Newaz,* 22 Ind.Cas. 381=46 P.L.R. 1914=55 P.W.R. 1914; *Partab Singh* v. *Debi Singh,* 5 P.R. 1883; but see *Rahatulla* v. *Ibad Ullah,* 40 Ind.Cas. 38=4 O.L.J. 131; *Asa Nand* v. *Gameshram,* 11 Lah. 470=31 P.L.R. 789=122 Ind.Cas. 724=12 Lah.L.J. 297=A.I.R. 1930 Lah. 836.

No action can be taken on an agreement which has come to an end by either revocation or lapse of time. *Colley* v. *Da Costa,* 17 Cal. 230; *Vishwas* v. *Bhalchaondra,* 23 Bom.L.R. 1022. Where parties enter into an arbitration agreement knowing full well that there is another person who is interested but leave such person out the court may send the parties to the forum of arbitrators chosen by them, even if that other person is not made a party before the arbitrator. *Abdul Kadir* v. *Madhab,* A.I.R. 1962 S.C. 406=(1962) 1 S.C.J. 620.

1001. "Where a difference has arisen to which the agreement applies," meaning of.—On disputes,A the financier of a partnership of business with B, the contractor, asks for rendering of accounts from B and on B's failure to render them filed a suit for appointment of arbitrator and for recovery of certain amount. Held, that in the circumstances of the case it could not be said that the dispute between the parties was something outside the agreement. The suit fell within the ambit of S. 20 and was maintainable. *Indramani* v. *Bijoy Chandra,* (1961) 3 Orissa J.D. 190.

Whenever there is a dispute as to the existence of a contract of arbi-

tration, the parties may choose to adopt one or the other the following courses :—(1) The party affirming the existence of the contract of arbitration may approach the court to have it determined either under Ss. 31 and 32 read together, or approach the court under S. 20 and request that the agreement be filed and that the matter be referred to arbitration. (2). He may follow the procedure of Chapter II and refer the matter to arbitration according to the contract calling upon the party denying the existence of the contract of arbitration to appoint his own arbitrator who may if he so chooses deny the jurisdiction of the arbitrator and appear under protest or he may, if he chooses refuse to appear before the arbitrator at his own risk. (3) He may if he chooses approach the court under s. 33. (4) He may not even adopt that procedure but may wait and take a chance of a decision in his favour and when the application is made to make a decree in terms of the award, challenge the validity of the award on the ground that there was in fact no valid and existing contract of arbitration. *Sri Vallabh Pitte* v. *Narsinghdas* 65 Bom.L.R. 29=I.L.R. (1962) Bom. 743=A.I.R. 1963 Bom. 157.

1002. Award set aside—Arbitration agreement not superseded—Presentation.—So long as the Judge did not supersede the arbitration agreement, it must be presumed that the arbitration agreement is subsisting. Therefore the contention that once the award is set aside the parties could no longer resort to arbitration clause cannot be accepted. *Rallies* v. *M Chetti,* A.I.R. 1956 Mad. 369.

1003. Refuse to enforce agreement—Sufficient cause for—Possibility of setting aside award.—A court cannot start with the assumption that every award must necessarily be followed by proceedings to have it set aside. It will not therefore be justified in refusing to enforce an arbitration agreement, simply because of the possibility of an application to set aside an award. *Rallies* v. *M. Chetti,* A.I.R. 1956 Mad. 369.

1004. Arbitration agreement should be construed strictly.—A clause relating to the submission of a dispute to arbitration must be construed strictly and the provision in a partnership agreement that at the termination of the partnership arbitrators should be appointed to settle all disputes does not include the question whether the partnership has been terminated or ousts the court's jurisdiction to take accounts. *Tara Chand* v. *Parsram,* A.I.R. 1930 Sind 202=123 Ind.Cas. 696 ; 14 Ch.D. 200. If one party clearly bases his claim under the contract itself and the other party denies his liability under the contract, the terms of the contract have to be looked into in order to decide the disputes between the parties. In the circumstances, the dispute is a dispute arising under the terms of the contract, whatever may be the merits of the same. *Adjai Collieries* v. *Union of India,* 6 D.L.R. (Cal.) 52.

1005. Effect of arbitration clause.—The effect of a clause in the contract providing for reference to arbitration does not oust the jurisdiction of the court or make it obligatory for the plaintiff to submit to arbitration before going to court. *Ghisa Ram* v. *Bhiwani Grisa,* 142 Ind.Cas. 351= 33 P.L.R. 1020=A.I.R. 1933 Lah. 79 ; but see, *Sheo Datt* v. *Sheo Shankar,* 27 All. 53.

1006. Agreement for reference in pending suit.—If the parties to a pending suit agree to refer the matter to arbitration and to withdraw the suit there pending, and the suit is subsequently withdrawn in pursuance of such agreement, the agreement can be filed under this section. *Hari Ram* v. *Ramditta,* 152 Ind.Cas. 614=A.I.R. 1935 Lah. 59 ; *Kokil Singh* v. *Ramasray,* A.I.R. 1924 Pat. 488=81 Ind.Cas. 994=3 Pat. 443 ; *Lalchand* v.

Sri Ram, A.I.R. 1930 Lah. 1066=122 Ind.Cas. 237 ; *Sarbati* v. *Zaninpal,* A.I.R. 1933 All. 291=141 Ind.Cas. 87 ; *Bhima Rama* v. *Bhagat Thakardas,* A.I.R. 1933 Pesh, 18=141 Ind.Cas. 83 ; but see, A.I.R. 1930 Bom. 98= 124 Ind.Cas. 119=54 Bom. 197. But this section is not applicable where the reference to arbitration is made during the pendency of the suit. *Dhan Singh* v. *Kalu Singh,* 115 P.R. 1912=15 Ind.Cas. 140. An agreement to refer to arbitration matters in difference between the parties in pending suit without the order of the court cannot be filed. *Dinkarraj* v. *Yeshwantrai,* 54 Bom. 197=124 Ind.Cas. 119=31 Bom.L.R. 1403=A.I.R. 1930 Bom. 98. A reference to arbitrators and an award thereon which is not accepted by both the parties is not an adjustment of the suit under Order XXIII, rule 3, Civil Procedure Code, and the same cannot be recorded as a compromise. *Rohini* v. *Rajani,* 151 Ind.Cas. 661=38 C.W.N. 648=A.I.R. 1934 Cal. 643. For further discussion on this topic *vide* notes under s. 47, *infra.*

1007. May.—The use of the word "may" in this section shows that the provisions of this section are permissive and not mandatory. *Basaoo* v. *Jagannath,* 131 Ind.Cas 443=14 C.L.J. 184=8 O.W.N. 71=A.I.R. 1931 Oudh 127. See also, *Ma Kyaw* v. *Ma Theva,* (1897-1901) 2 U.B.R. 286. Under s. 20 the court has the discretion in the matter of filing the agreement and directing a reference under s. 20 even in cases where there is an effective arbitration agreement and the dispute stated in the petition covered by the arbitration agreement. *Gannon Dunkerby & Co.* v. *Union Carbide Ltd.* A.I.R. 1962 Cal. 360. The court is required under S. 20 not only to order the filing of the agreement but also to make a reference. Ibid.

1008. Appointment of receiver.—The court has jurisdiction to appoint a receiver in arbitration proceedings as soon as an application under s. 20 is made, even though notice of the application has not been given to the parties concerned. There is no warrant for the contention that a proceeding becomes an arbitration proceeding only after notice of the application is given to all the parties concerned. *Nagar Chand* v. *Sundernath,* 24 Pat. 616=223 Ind.Cas. 571=A.I.R. 1946 Pat. 70.

1009. Apply to court having jurisdiction in the matter.—An arbitrator is a tribunal of the parties' own choice and before the court gives effect to his award the court must be satisfied that the disputes referred to arbitration were such as could be made subject of a suit. *Naraindas* v. *Valabdas,* 111 Ind.Cas 425=A.I.R. 1929 Sind. 1. An agreement for reference to arbitration cannot be filed in a Civil Court under this section, if some of the matters included therein are within the jurisdiction of the Revenue Court only and there are actually suits pending in such court with respect to some of them. *Lachman Das* v. *Chanan Mal,* 4 P.L.R. 966. See also, *Jawala Shah* v. *Nihal,* 42 Ind.Cas. 261=91 P.L.R. 1917=166 P.W.R. 1917 ; *Fazaldin* v. *Shah Nawaz,* 22 Ind.Cas. 381=46 P.L.R. 1914=55 P.W.R. 1914 ; *Portab Singh* v. *Devi Singh,* 5 P.R. 1833 ; but see, *Asa Nand* v. *Ganesh Ram,* A.I.R. 1930 Lah. 836=122 Ind.Cas. 724=11 Lah. 470=31 P.L.R. 78=12 L.L.J. 297, relying on *Amir Begam* v. *Badruddin,* A.I.R. 1914 P.C. 105=23 Ind.Cas. 625=17 O.C. 120=36 All. 336 (P.C.), *Mahomed Khalil* v. *Abdul Rahim,* A.I.R. 1925 Pat. 670, and *Butta v. Municipal Committee of Lahore,* 29 Cal. 854=87 P.R. 1902 (P.C.) ; *Ram Gawaya* v. *Debi Ditta,* 34 Ind.Cas. 192= 117 P.R. 1916 ; *Govindlal* v. *Munnilal,* 45 Ind.Cas. 166. A court has jurisdiction to entertain an application to file an award or enforce it as a decree only if it has jurisdiction to entertain a suit subject of which is

the subject-matter submitted to arbitration. *In re Sri Krishna Khanna*, A.I.R. 1934 Sind 29=148 Ind.Cas. 977. See also, *Jawala Saha* v. *Nihal Chand*, 42 Ind.Cas. 261(1)=166 P.W.R. 1917 ; *Muhammad* v. *Hassanuddin*, 38 Ind.Cas. 296=A.I.R. 1917 Pat. 93 ; *Mohammad* v. *Ahmed*, 6 Ind.Cas. 219=7 A.L.J. 761=32 All. 503 ; *Attock Oil* v. *Abdul Majed*, 118 Ind.Cas. 533=A.I.R. 1929 Lah. 246. (But now see amendment of s. 152 of the Companies Act by this Act) ; *Narain Das* v. *Vallabh Das*, 111 Ind.Cas. 525=23 S.L.R. 299=A.I.R. 1929 Sind 1 ; *Lodharam* v. *Ralla Ram*, 10 Lah.L.J. 242=112 Ind.Cas. 262=A.I.R. 1928 Lah. 730. If a court has no jurisdiction to enforce an award any consent by a party not to challenge the award cannot confer jurisdiction on the court for the purpose of enforcing it. *Narain Das*, v. *Vallabh Das, supra*. In filing the agreement for arbitration the territorial jurisdiction of the courts are also to be taken into consideration. *Nihal Chand* v. *Jai Ram*, 32 P.L.R. 464=132 Ind.Cas. 218=A.I.R. 1931 Lah. 673 ; *Secretary of State* v. *Balwant Singh*, A.I.R. 1933 Lah. 18.

In *Ram Labhaya* v. *Panna Lal*, A.I.R. 1937 Lah. 843=18 Lah. 433=39 P.L.R. 852, the question arose whether an agreement for division of property of a deceased person can be filed under this section during the pendency of an application for letters of administration in a proper court as regards the will of the same deceased person. In answering the question in the affirmative the court observed: "The sole point for decision is whether the pendency of the proceedings on the application for letters of administration was a bar to the entertainment of the application under Sch. 2, para. 17 ; Civil Procedure Code referred to above. The learned Senior Subordinate Judge has relied on *Gopi Ram* v. *Palchar Das*, A.I.R. 1934 Lah. 887=154 Ind.Cas. 7=37 P.L.R. 138, and *Ghansham* v. *Tek Chand*, A.I.R. 1935 Lah. 916=157 Ind.Cas. 867=17 Lah. 291=38 P.L.R. 636, but in my opinion those authorities do not support the view taken by him. It is correct that a private tribunal such as an arbitrator cannot oust the jurisdiction of courts, but the rule applies when the matter to be decided by the arbitrator is identical with the matters to be decided by the court. *Jai Narain* v. *Narain Das*, A.I.R. 1922 Lah. 369=69 Ind.Cas. 583=3 Lah. 396. In the present instance, the court dealing with the application for letter of administration had simply to decide whether the will was duly executed by Banshi Ram while the arbitrator had to decide the property according to *Chundawand* rule as agreed to by the parties.....The proper course for the court dealing with the application for letters of administration in the circumstances would have been, I think, to stay its proceedings until the question of the validity of the agreement to refer the dispute to arbitration was decided in the proceedings under Schedule 2, Civil Procedure Code, for this way the main issue in the latter proceedings and it had to be decided before making a reference to arbitration. If the agreement is valid and supersedes the will, the proceedings regarding letters of administration would be obviously futile." See also, *Shankar Ram Chandra* v. *Ram Chandra Annaji*, A.I.R. 1923 Bom. 365=73 Ind.Cas. 415=25 Bom.L.R. 437.

The executor cannot legally make any reference to arbitration which will go against the terms of the will. *Jnanendra Nath* v. *Jitendra Nath*, A.I.R. 1928 Cal. 275=105 Ind.Cas. 751=32 C.W.N. 108, *Saudamini* v. *Gopal Chandra*, 28 Ind.Cas. 557=29 C.W.N. 948=21 C.L.J. 273. Where an application addressed to the court stating that the parties had agreed to refer their dispute to arbitration is given to the Commissioner for proper presentation to the court, the order passed by the court there in

making a reference to the arbitration is perfectly correct and valid. *Faquir Mohammad* v. *Amina*, 1963 All. L.J. 112=A.I.R. 1964 All. 246= 1963 All. W.R. (H.C.), 150.

1010. Court having territorial jurisdiction.—In *Secretary of State* v. *Balwant Singh*, A.I.R. 1933 Lah. 18, *Dalip Singh J.* observed: "There remains only the question of jurisdiction. The argument is as to local jurisdiction. To this the learned counsel for the respondent contends (1) that s. 21 applies and that therefore there is no force in the objection, and (2) that part of the cause of action arose in Lahore and therefore the Lahore Courts had jurisdiction.....Be that as it may, however, and without deciding whether s. 21, applies or does not apply it seems to me that part of the cause of action in this case, namely, refusal to refer to arbitration, did arise in Lahore. In my view of the matter this is the fundamental cause of action, and the mere fact as to whether the personnel should be M. Lawton or the Chief Engineer or someone else has little to do with the case at present and therefore I consider that the Lahore Courts had jurisdiction". Where a contract of Insurance has been accepted in a place, the court within the jurisdiction of which that place is situated has jurisdiction to file the agreement. *Guardian Assurance* v *Shiv Mangal*, 167 Ind.Cas. 897=(1937) A.L.J. 98=I.L.R. 1937 All. 234 =A.I.R. 1937 All. 208.

1011. Property in jurisdiction of two Courts.—Where an application under this section relates to property within the jurisdiction of two courts, it is open to the court within the jurisdiction of which part of the property is situated to entertain an application. It is not necessary to divide one estate among two or more courts merely because all the property is not situated within the jurisdiction of one court. *Jethanad* v. *Mirabai*, A.I.R. 1942 Sind. 79=202 Ind.Cas. 152=I.L.R.1942 Kar. 36; see also *Venkata Chelam* v. *Surya Narayan*, A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520.

1012. Waiver of objection as regards jurisdiction.—The determination of the place of suing is the same thing as the determination of the local or territorial jurisdiction of the Court. An objection having reference to the local or territorial jurisdiction of the court is capable of being waived. If either by reason of this section or by reason of the omission of the party to take the objection to the territorial jurisdiction of the Court at the proper time, the court entertains or deals with a litigation, the case is one where there was either no initial defect of jurisdiction, or if there was such a defect it must be deemed to have been waived. *Venkatachellam* v. *Suryanarayan*, A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520.

1013. Agreement be filed in Court.—The word "filed" in the section is not used by the Legislature in the sense that the written agreement must be physically produced in court before it can be accepted or ordered to be acted upon. If the parties have proved to have agreed to submit their present or future differences to arbitration by means of a written document that agreement can be as effectively ordered to be filed in court whether the particular piece of paper on which it is written is available or not. A party who wishes to enforce a written agreement of that kind should be able to prove by secondary evidence when evidence of that nature is permitted or admissible under the provisions of the Evidence Act. *Dhumi Chand* v. *Prem Chand*, A.I.R. 1945 Lah. 264=47 P.L.R. 214; *Hill* v. *Town Send*, 12 R.R. 595; but see *Makhan Lal* v. *Abhai Ram*, A.I.R. 1935 All. 886=156 Ind.Cas. 904; *Khudeja* v. *Ghulam*, 55 Ind.Cas.

845=A.I.R. 1920 Lah. 396=I Lah. 45. In *Makhan Lal* v. *Abhai Ram, supra,* the court observed : "Obviously para. 17 contemplates that the agreement should be in writing and should be before the court, so that it may be ordered to be filed in order that an arbitrator may be appointed in accordance with its provisions and he may be called upon an act upon the agreement. Now it is not necessary that the document should be in the form of a written contract signed by the parties so as to be an instrument or document ; but it is certainly necessary that there should be some writing which should embody the whole of the agreement. Obviously the intention seems to be that the terms of the agreement should not be matter of controversy between the parties in the court which has to decide whether the agreement should or should not be filed. Once the court is satisfied that the agreement which is in writing and is before it, was entered into by the parties, it can proceed under para. 17, but where no writing is produced and the terms of it are not admitted, the court cannot order it to be filed without first ascertaining the terms as to which it would have to hold an enquiry, which does not appear to be contemplated in the provisions of para. 17. It is not merely a case of proving the contents of a document which has been lost, which may be done by secondary evidence ; but the agreement itself has to be ordered to be filed and therefore it should exist in writing before the court. As it is not necessary that it should be signed by the parties, any writing, so long as it embodies the whole of the agreement, would be sufficient. Other provisions in the schedule also show that a written agreement is necessary." There is no reason why a party who writes to enforce a written agreement should not be able to prove it by secondary evidence where evidence of that nature is permitted or admissible under the Evidence Act. *Dhuni Chand* v. *Prem Chand*, 47 P.L.R. 348=A.I.R. 1945 Lah. 264.

1014. Arbitration agreement—Construction—Application under this section.—One of the clauses of the deed of partnership between the parties was as follows : All disputes and questions in connection with or touching the partnership or this deed arising between the parties, shall be referred to a single Arbitrator to be nominated by second party and all such disputes shall be decided at Calcutta only. *Held,* that though the earlier portion of the clause there was a clear reference to a single arbitrator, the last portion did not expressly say that the Arbitrator shall decide the disputes at Calcutta. The language was wide enough to include not only the decision of the Arbitrator but also the decision of the Civil Court that may arise either in consequence of the decision of the Arbitrator or as ancillary to the same. It was the intention of the parties that Arbitrator should decide such disputes at Calcutta. Hence the Berhampur Court had no jurisdiction to entertain the application under S. 20 and the Civil Court in Calcutta alone had such jurisdiction. *Nirmal* v. *Sudhendu,* I.L.R. (1958) Cut. 597=A.I.R. 1958 Orissa 77.

1015. Oral agreement.—An arbitration agreement is not by law required to be in writing. The Arbitration Act, does not, for the purposes of that Act recognise an arbitration agreement unless it is in writing. But for purposes other than the purposes of the Arbitration Act, an arbitration agreement which is not in writing is still recognised. In this view a subsequent oral agreement to rescind or abrogate a prior arbitration agreement in writing for purposes other than those of the Arbitration Act, is not barred. *Rungta* v. *Jugometal,* 63 C.W.N. 527=A.I.R. 1959 Cal. 423. Where *vakalatnama* in very general and wide terms, as

regards pleader's power to agree to abide by the statement of witness on special oath, *vide* A.I.R. 1959 All. 382.

1016. Application for reference—Limitation—Starting point.—It is questionable whether Art. 181 Limitation Act applies to application under s. 20 of this Act. A.I.R. 1957 All. 206 requires reconsideration in view of A.I.R. 1953 S.C. 98=(1953) S.C.J. 68=(1953) 1 M.L.J. 364. *Sarwat* v. *State,* A.I.R. 1959 All. 493. See also A.I.R. 1957 All. 206; A.I.R. 1933 All. 789 (not followed).

1017. Sub-section (2).—An application to file a reference under this section is not a suit. *Hot Chand* v. *Kishin Chand,* A.I.R. 1924 Sind 23=17 S.L.R. 178=83 Ind.Cas. 548. See also, *Rajmal* v. *Moruti Shivram,* 59 Ind.Cas. 755=45 Bom. 329=Bom.L.R. 1377; *Abdul Aziz* v. *Chandra Soun,* 89 Ind.Cas. 68=A.I.R. 1925 Bom. 415; *Satis Chandra* v. *Paliram,* 61 Ind.Cas. 390=A.I.R. 1921 Pat. 162=2 Pat.L.T. 227 =6 Pot. L.J. 287; *Gurbaksh Singh* v. *Sant Ram,* 117 Ind.Cas. 94=A.I.R. 1929 Lah. 533; *Ram Charan* v. *Jasoda,* A.I.R. 1930 Oudh 89=5 Luck. 678=7 O.W.N. 97=126 Ind.Cas. 508; *Secretary of State* v. *Kundan Singh,* A.I.R. 1932 Lah. 374=13 Lah. 672=137 Ind.Cas. 266=33 P.L.R. 508; *Bhima* v. *Bhagat,* A.I.R. 1933 Pesh. 18. Proceedings before an arbitrator and proceedings subsequent to the award are all proceedings in the matter of an application made by a party under this section and according to Rule 289 (*b*) of the Oudh Civil Rules only one-fourth of the fee payable to pleaders in the case of suits decided on merits on contest can be levied. *Ram Charan* v. *Jasoda,* 5 Luck, 678=126 Ind.Cas. 508=7 O.W.N. 97=A.I.R. 1930 Oudh 89. The application under this section is not in a suit and no preliminary decree can be passed upon such application. *Satis Chandra* v. *Paliram,* 2 Pat. L.T. 277=61 Ind.Cas. 390. Non-observance of procedure laid down in this sub-section is irregular but when it is acquiesced by the parties and does not affect the merit of the case, it is not material. In such a case there is no sufficient ground for revision. *Wali Muhammad* v. *Bahawal,* 21 Ind.Cas. 925=14 P.L.R. 1914=20 P.W.R. 1914.

1018. Sub-section (3).—The non-representation of a party at arbitration proceedings through want of formal notice of the proceedings is no ground for challenging an award when that party had actual knowledge of the proceedings and also an opportunity of putting its point of view before the court. *Thadomal* v. *Menghraj,* A.I.R. 1930 Sind 190=120 Ind.Cas. 694.

1019. Cause for revoking submission when to be urged.—Where the defendant is under this section called upon to show why the order of evoking the submission to arbitration should not be made, it is plainly necessary for him to show what cause he had of revoking the submission to arbitration. He need not wait till completion of the award. *Ghulam Mahomed* v. *Gopal Das,* A.I.R. 1933 Sind 68=143 Ind.Cas. 635. See also, *Lachman Machhua* v. *Moghan Mian,* A.I.R. 1925 Pat. 720.

1020. When submission can be revoked.—Where there has been a valid reference to arbitration, it is open to either of the parties to go to court and to pray it to file the agreement and take action under it, or on their own account to call upon the arbitrator to give a decision. If the arbitrator makes an award, the party in whose favour it is made can sue for a decree in terms of the award. *Nathu Mal* v. *Muhammdad Shafi,* 39 Ind.Cas. 349=12 P.R. 1917; *Subbaraya* v. *Sadasiva,* 20 Mad. 490; *Dharm Das* v. *Ajudhia,* 77 P.R. 1882; *Bhajahari* v. *Behary,* 33 Cal. 881=4 C.L.J. 162. But a party may for just cause rescind a contract to refer to arbitration, but is not entitled to do so without any cause whatever. *Nathu*

Mal v. *Muhammad Shah, supra ; Ram Kumar* v. *Jagoomohan,* 6 Ind.Cas. 420 ; *Deutsche Spingston* v. *Briscoe,* 20 Q.B.D. 177=57 L.J.Q.B. 4=36 W.R. 557 ; *Pestonji* v. *Mankajee,* 12 M.I.A. 112=10 W.R. 51 ; *Kellie* v. *Fraser,* 2 Cal. 445 ; *In re M. A. Vappa Rawthar,* 22 Ind.Cas. 548=(1914) M.W.N. 52 ; *Bansidhar* v. *Sital Prosad,* 29 All. 13=3 A.L.J. 613=(1906) A.W.N. 253 ; *Perumalla* v. *Perumalla,* 27 Mad. 112=13 M.L.J. 311 ; *Sheonarain* v. *Bala Rao,* A.I.R. 1932 All. 348=(1932) A.L.J. 331=137 Ind.Cas. 198 ; *Naraswami* v. *Rangaswami,* 8 M.H.C.R. 46 ; *Sultan Muhammad* v. *Sheo Prosad,* 20 All. 145 ; *Raja Ali* v. *Fida Ali,* 4 Oudh Cas. 17 ; *Abalakshar* v. *Oodun,* 15 W.R. 331=7 B.L.R. 14. But an agreement to refer to arbitration does not become void by reason of the resignation of one of the arbitrators, and this is not a sufficient reason for refusing to file an agreement in court. *Sri Ram* v. *Sorabji* 3 Lah. 276. Party entering into an agreement to refer under misconception as to authority of mother of minors who are among the other party is entitled to withdraw from agreement if it is found that mother had no authority to enter into such, agreement. *Moshenuddin* v. *Khabiruddin,* 47 Cal. 715=57 Ind.Cas. 945= 26 C.W.N. 246=A.I.R. 1921 Cal. 818.

1021. Sub-section (4)—sufficient cause.—It is not open to a party to an agreement of reference to revoke the submission to arbitration except for good cause. But on the other hand, when good cause has been shown there is no doubt that such revocation can be and are allowed. The fact that the arbitrator is related to one of the parties as the brother of his son-in-law does afford a real likelihood of an operative prejudice on his part, and the existence of such a relationship with one of the parties unknown to the other disqualifies him from acting as an arbitrator. *Motharam* v. *Maya Das,* A.I.R. 1925 Sind 150=78 Ind.Cas. 521=19 S.L.R. 251 ; *Ghulam Mahomed* v. *Gopal Das,* 143 Ind.Cas. 635=A.I.R. 1933 Sind 68 ; *Kaliprosanno* v. *Rajani,* 25 Cal. 141 ; *Ram* v. *Panna,* A.I.R. 1937 Lah. 843=I.L.R. 1937 Lah. 438. In *Makhan Lal* v. *Abhai Ram,* A.I.R. 1935 All. 886=156 Ind.Cas. 904=(1935) A.L.J. 998, it has been held that the court can order an agreement to refer any matter to be filed under para. 4, only when no sufficient cause is shown to the contrary. In *Sheonarain* v. *Bala Rao,* A.I.R. 1932 All. 348=137 Ind.Cas. 198, the court observed : "Where the parties have once agreed to submission to arbitration, the agreement is binding and enforceable and cannot be annulled except for some reason as that the agreement had been obtained by fraud, coercion or undue influence." See also, *Dosaba* v. *Bari Bohu,* 3 C.P.L.R. 89. In *Ghulam Mahomed* v. *Gopal Das, supra,* the court observed : "We do not think it necessary to lay down that the wide words 'sufficient cause' should be confined within the narrow compass of fraud, coercion and undue influence. In our opinion, there are other causes besides these which may be sufficient for the reversal of an order under Schedule 2, para. 17." See also, *Dasoba* v. *Bari,* 3 C.P.L.R. 89 ; *Nga Tha* v. *Nga Kayan.* 38 Ind.Cas. 577=9 Bur.L.T. 253 ; *Ganesh* v. *Kishan Das.* 50 Ind.Cas. 637 ; *Ram Rattan* v. *Basakha,* 49 P.R. 1893 ; *Ali Baksh* v. *Kadir,* 28 P.R. 1868 ; *Nathumal* v. *Shafi,* 39 Ind.Cas. 349. Mahomedan mother is not competent to agree to arbitration regarding minor's property though a *de facto* guardian. *Moshinuddin* v. *Khabiruddin,* 57 Ind.Cas. 945=47 Cal. 713=26 C.W.N. 246=A.I.R. 1921 Cal. 818. But the guardian mother of a Hindu minor has authority to agree to refer the disputes that have arisen inside the family to the decision of arbitrators under this section if she finds that it is for the benefit of the minor. *Raghupati Dutt* v. *Ram Gopal Dutt,* A.I.R. 1939 Cal. 557.

The words "sufficient cause" occurring in sub-section (4) are not restricted to grounds such as are mentioned in section 30; they cover all the grounds of justice, equity and good conscience on which a court thinks an agreement should not be ordered to be filed. *Girdhari* v. *Gobardhan,* 170 Ind.Cas. 490=(1937) O.L.R. 436=(1937) O.W.N. 792= A.I.R. 1937 Oudh 437; *Makhan Lal* v. *Abhai Ram,* A.I.R. 1935 All. 886=156 Ind.Cas. 904=(1935) A.L.J. 998. Where the arbitrators though not partial to one party, cannot yet command the confidence of the other (opposite) party, it is wholly inequitable to compel the other parties to submit themselves to their arbitration. *Girdhari* v. *Gobardhan,* A.I.R. 1937 Oudh 436.

Where there is contract for sale of goods and subsequent cross-contract containing similar provisions as to quantity, kind and delivery, earlier contract is extinguished by latter which has the effect of fixing the difference to be paid by one party to the other. Parties to earlier contract cannot claim arbitration as there is no difference which is referable to arbitration, mere non-payment not being such difference. *Pokerdas* v. *Kishenji,* 56 Ind.Cas. 514=14 S.L.R. 18. See also *Union of India* v. *S. N. Das,* A.I.R. 1962 Cal. 82 (for what is sufficient cause for not filing the arbitration agreement). Where serious allegation of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. *Abdul Kadir* v. *Madhav Prabhakar,* A.I.R. 1962 S.C. 406=64 Bom.L.R. 267=(1962) 1 S.C.J. 620=(1962) 1 M.L.J. (S.C.) 276. The words of sub-section (4) of s. 20 leave a wide direction in the court to consider whether an order for filing the agreement should be made a reference made accordingly.

1022. S. 20(4)—Incapacity of named arbitrator to act.—sub-section (4) uses the words "shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court." From this it is clear that on the failure of the parties to agree to the appointment of the arbitrator the court can appoint one. Thus the court is competent to keep the agreement alive inspite of the incapacity of the named arbitrator to act. It follows therefore that the court has jurisdiction to order the filing of the agreement. *Karam Chand* v. *Sant Ram,* A.I.R. 1958 Punj. 418.

1023. S. 20(4)—Statutory Arbitration.—When the parties by their agreement have placed the power of selecting the arbitrator or arbitrators in the hands of the Chairman of the Board of Directors of the East Indian Cotton Association Ltd., the Court can certainly perform the ministerial act of sending the agreement to him to be dealt with by him. Once the agreement filed in court is sent to the Chairman, the Bye-laws laid down the procedure for the Chairman and the appointed arbitrator or arbitrators to follow, and the procedure, if inconsistent with the Arbitration Act, prevails. In such a case there is no impediment to action being taken under s. 20(4) of the Arbitration Act. *Dhanrajmal* v. *Shamji,* A.I.R. 1961 S.C. 1285.

1024. Death or refusal of arbitrator.—Where an agreement is entered into to refer a dispute to some arbitrators and one of them subsequently refuses to act as such or dies, the court cannot pass an order of reference under para. 17, nor has the court power to appoint another arbitrator as the power can be exercised only where there is already an

order of reference. *Abdul* v. *Abdul,* 9 Luck. 321=147 Ind.Cas. 1073=11 O.W.N. 12=A.I.R. 1934 Oudh 67; *Narayanappa* v. *Ramachandra,* A.I.R. 1931 Mad. 28=60 M.L.J. 676=(1930) M.W.N. 1028=32 L.W. 905=129 Ind.Cas. 638; *Bala* v. *Sethramma,* 17 Mad. 498; *Ramayya* v. *Berpayya,* A.I.R. 1926 Mad. 1183=97 Ind.Cas. 824; *Tara Prasad* v. *Baijnath,* 19 Pat. 927=193 Ind.Cas. 756=(1941) P.W.N. 49=A.I.R. 1941 Pat. 155; *Laxman* v. *Manjunath,* A.I.R. 1921 Bom. 458=64 Ind.Cas. 289=45 Bom. 1181; *Mohan Lal* v. *Damodar,* 71 P.R. 1918=44 Ind.Cas. 886; *Ma Bu* v. *Maung Pe,* 42 Ind.Cas. 911; *Brooke* v. *Gurdyal* 12 B.I.R. App. 13; *Narendra* v. *Horan,* A.I.R. 1926 Cal. 730=43 C.L.J. 292=94 Ind.Cas. 177; *Gaitun* v. *Nabi,* 17 Ind.Cas. 289=24 M.L.J. 15=(1912) M.W.N. 957=12 M.L.T. 346; *Sri Ram* v. *Sorabji,* 51 Ind.Cas. 636=155 P.R. 1919=55 P.W.R. 1919; *Amaresh* v. *Bhagwati,* A.I.R. 1935 Oudh 179; *Rajani* v. *Panchanan,* A.I.R. 1937 Cal. 388=172 Ind.Cas. 243=I.L.R. 1937 Cal. 434=41 C.W.N. 981; *Sheopal* v. *Bhaya,* 2 O.C. 355; *Ahmad Noor* v. *Abdur Rahaman,* 42 All. 191=54 Ind.Cas. 366=18 A.I.J. 76; but see, *Bhagwan Das* v. *Gurdyal,* A.I.R. 1921 All. 188=64 Ind.Cas. 459; *Fazal Ilahi* v. *Prag Narain,* A.I.R. 1922 All. 133=67 Ind.Cas. 739=44 All. 523; *Sri Ram* v. *Sorabji,* 51 Ind.Cas. 636=155 P.W.R. 1919 (where there was distinct provision authorising a party to appoint); *Datta Mal* v. *Lala Amarnath,* A.I.R. 1938 All. 414=(1938) A.L.J. 544=176 Ind. Cas. 404=(1938) A.W.N. 431; *Rahatulla* v. *Ibadullah,* 40 Ind.Cas. 38=4 O.L.J. 131; *Tara Prosad* v. *Baijnath,* 19 Pat. 927=193 Ind.Cas. 756=A.I.R. 1941 Pat. 155; *Salig Ram* v. *Kishen Singh,* A.I.R. 1938 Lah. 859. But under the new Act no such difficulty arises, because by S. 47 of the Act "the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder." So in a case like this by the application of section 8 is competent. *Vide Yar Mahomed* v. *Ghulam,* Pak.L.R. (1950) Lah. 285=A.I.R. 1950 Lah. 145. Where under para. 17 of the Second Schedule, order was made filing an agreement but on finding that the arbitrators were not willing to act the court revoked the order of reference and dismissed the suit, *held* that the order was appealable. *Zahur* v. *Taslimmenissa,* A.I.R. 1926 All. 55=23 A.L.J. 891=89 Ind.Cas. 404=48 All. 27. Where an agreement to refer has been duly revoked, the court is competent to order it to be filed. *Coley* v. *Da Costa,* 17 Cal. 200 (208).

1025. Refusal of arbitrator to act.—Under sub-section (4), the authority of the court has been considerably widened. Previously the court was not entitled to fill up the place of an arbitrator who has refused to act, but now if the arbitrator named in the agreement declined to act, the court could ask the parties to agree to another person as arbitrator, and if the parties still could not come to an agreement, the court could appoint another arbitrator. In other words, the omission or failure on the arbitrator first appointed by the parties would not make the agreement wholly ineffectual, but the agreement could still be kept alive by the parties by agreement, and failing that by the court itself. *Yar Mahomed* v. *Ghulam Sarwar,* Pak.L.R. (1950) Lah. 285=A.I.R. 1950 Lah. 145.

1026. Onus.—The onus lay upon the party desiring to proceed with the suit to satisfy the the court that there were sufficient reasons why the matter should not be referred in accordance with the agreement and the case was one in which the court by reason of the fact that an order under sub-section (4) could not be made, should be satisfied that there was sufficient reason why the matter should not be referred in accordance with agreement and should therefore refuse to exercise its discretion to stay the suit. *Daw Shwe Thit* v. *Ma Thain,* A.I.R. 1933 Rang. 331.

1027. Delay in filing, effect of.—Unless there has been such a delay as to lead to the inference that the parties had abandoned the reference to arbitration, anything short of that inference cannot cut down the statutory period of limitation and right to have the agreement of reference filed in court. *Secretary of State* v. *Balwant,* A.I.R. 1933 Lah. 18 See also, *Vishwas* v. *Bhal Chandra,* 134 Ind.Cas. 733=33 Bom.L.R. 1022= A.I.R. 1931 Bom. 529, where the court observed : "If one party to a submission has been guilty of such laches as to entitle the other party to repudiate the submission, the latter will not be deprived of his right to repudiate merely owing to the absence of formal legal notice of revocation. *Bhogilal Porshottam* v. *Chimanlal,* A.I.R. 1928 Bom. 49=107 Ind.Cas. 707=52 Bom. 116." See also, *Coley* v. *De Costa,* 17 Cal. 200 ; *Kunjlal* v. *Banwari Lal,* 48 Ind.Cas. 711=4 Pat.L.J. 394 ; *Madho Kashinath* v. *Sambashiva,* 54 Ind.Cas. 126.

1028. Order of reference not communicated to arbitrator.—Where the reference is through a court the arbitrator will, of necessity, be informed of the agreement of the parties, and the order of reference, so that he might make his award within a time to be fixed by the court, but where the arbitrator is fully aware of the terms of the order of reference, accepts the office of the arbitrator and actually decides the controversy between the parties by giving an award, the mere fact that the order of reference was not formally communicated to him would not vitiate the arbitration *Manni Lal* v *Prahlad,* A.I.R. 1937 All. 141=167 Ind.Cas. 171=(1937) A.L.J. 29=(1937) A.I.R. 157.

1029. Order of reference by court not fixing time tor filing award.—The arbitrator derives his authority from the agreement of the parties and the order of reference given effect to that agreement. In an ordinary case a date has to be fixed before which the arbitrator should file the award, but where the order of reference itself does not fix a date and the court subsequently intimates to the arbitrator the time within which the award should be filed, the irregularity, if any, would not affect the validity of the award. *Manni Lal* v. *Prahlad,* A.I.R. 1937 All. 141=167 Ind.Cas. 171=(1937) A.L.J. 29. But now see clause (3) of the First Schedule of this Act. Where on an application made under this section tor filing the agreement to refer and making a reference in accordance therewith, the court acting under subsection (4) of this section, refers the dispute to the arbitrator named in the agreement to refer, but fails to fix the time for making the award then the arbitrator is to make the award under para. 3 of Schedule I, within four months after entering on the reference, unless time is extended by the court. And as the provision of this paragraph is expressed in mandatory terms, its contravention involves avoidance of the award under clause (*c*) of section 30. *Abdul Hakim* v. *Chairman,* A.I.R. 1950 Lah. 32=Pak.L.R. (1949) Lah. 789. In the above case court observed : "Reading this sub-section [S. 20 (5)] with S. 19, it seems to me that the latter section provides the court with power, in proper case, to make an order whereby the agreement filed before it would be deprived of its forces, *i.e.,* the court has power under S. 19 when it has set aside an award made upon reference under sub-section (4) of section 20, to supersede the reference and thus avoid the arbitration agreement. It would seem to follow that where a court, while making an order under S. 19 does not expressly supersede the reference and direct that the arbitration agreement shall cease to have effect it must be deemed to have declined to exercise the power, and consequently that the arbitration agreement has been filed in court, still remains of

full force according to its tenor, not only with respect to difference which was referred to arbitration, but also with reference to all disputes between the parties which properly fall with the agreement."

1030. Reference by a pleader appearing for another pleader.—Pleader appearing for another pleader cannot make a valid reference to arbitration on behalf of the latter's client, without a *vakalatnama* authorising him to do so. *Azib Din* v. *Moti Ram,* A.I.R. 1926 Lah. 563=96 Ind.Cas. 277.

1031. Arbitrators appointed by parties.—The court's jurisdiction to order a reference to arbitration is derived from the agreement of the parties, and an order of reference has to be made by the court in accordance with the provisions of the agreement (subject to any powers conferred on it by the statute), and at any rate, it should not be inconsistent with the intention of the parties disclosed by the agreement, on a proper construction of its terms. *Narayanappa* v. *Ramchandra,* A.I.R. 1930 Mad. 28=(1930) M.W.N. 1028=32 M.L.W. 905=129 Ind.Cas. 638=60 M.L.J. 676=54 Mad. 489. An order directing a party to nominate an arbitrator within seven days failing which the court itself would appoint one can only be passed as ancillary to an order directing the agreement to be referred. *Shib Dayal* v. *Ali Baksh,* 94 Ind.Cas. 483=A.I.R. 1926 Lah. 503. Court cannot change original agreement between parties to refer dispute to certain number of arbitrators and order that in case of disagreement opinion of the majority of arbitrators should prevail. *Ramayya* v. *Bappaya,* A.I.R. 1926 Mad. 1183=51 M.L.J. 440=24 L.W. 384 See also, *Barro Co.* v. *D'Souza,* 7 M.H.C.R. 72. [But now see section 10 (3)] where one of the terms of the agreement is that "in case of any dispute whatsoever arising under this contract the same is to be referred to two European merchants residing in Karachi, each party having the right to nominate one arbitrator" the court has no power to appoint as an arbitrator a person who is not a European merchant residing in Karachi. *Dreyfus* v. *Gurditta Mal,* 9 Ind.Cas. 655=35 P.R. 1911=85 P.L.R. 1911.

1032. Frustration of contract.—Only when, on the admitted facts on the pleading of the parties the court could come to the conclusion that the performance of the contract had become impossible or unlawful and that therefore the contract had become void under S. 56, Contract Act, would the arbitration clause also become void along with the contract and not otherwise. *Lachmi Narain* v. *Raja Ram,* 4 D.L.R. (Al). 203=1949 A.W.R. 509.

1033. Sub-section(5).—It is also sufficiently clear that by the operation of this sub-section the provisions of section 19 are applicable to a case falling under section 20. *Abdul Halim* v. *Chairman,* P.L.D. 1949 Lah. 278. After the court has ordered the filing of the agreement sub-section (5) of S. 20 at once comes into operation. Similar are the terms of S. 47. Thus the Act makes a provision for the application of the other provisions of the Act. *Karam Chand* v. *Sant Ram,* A.I.R. 1958 Punj. 418.

1034. S. 20(5) and s. 47—Applicability of s. 8(1)(b).—After the court has ordered the filing of the agreement S. 20 (5) comes into operation. Similar are the terms of S. 47. Thus the Act makes provisions for the application of the other provisions of the Act. Hence provision of S. 8 are also attracted. Under S. 8 (1) (b) of this Act it can be presumed that it intended to supply the vacancy and the burden to show otherwise must rest on the party objecting to it. It is therefore for the objector to show that the inention of the party was not to refer the dispute to any other

arbitrator than that of the named arbitrator. *Karam Chand* v. *Sant Ram*, A.I.R. 1958 Punj. 418.

1035. Appeal.—An appeal will lie from an order filing or refusing to file an arbitration agreement, under S. 39 (1) (iv). *Venkatachalam* v. *Rungiah*, 12 Ind.Cas. 372=36 Mad. 353=10 M.L.T. 248=2 M.W.N. 249; *Sadik Ali* v. *Imdad Ali*, 3 All. 286; *Janki* v. *Gayan Tewari*, 3 All. 427=(1881) A.W.N. 4; *Ghulam Khan* v. *Muhammad Hassan*, 29 Cal. 167 (P.C.); *Norpat Rai* v. *Devi Das*, 126 P.R. 126=107 P.W.R. 88=50 P.L.R. 1908. The court is competent to arrive at a decision that there was no agreement to refer to arbitration and as such an appeal lies thereform. *Sheo Pershad* v. *Indore Malwa*, 39 Ind.Cas. 508=65 P.W.R. 1917=62 P.W.R. 1917. The provisions of S. 39 (1) (iv) are general and not restricted to refusal to file an agreement on any particular grounds. An order refusing to filing an agreement to refer certain disputes between parties to arbitration on the preliminary ground that the court has no jurisdiction is appealable. *Nihal Chand* v. *Jairam*, A.I.R. 1931 Lah. 673=132 Ind.Cas. 218=32 P.L.R. 464. See also, *Khoka Baksh* v. *Suamboo Singh*, 11 Oudh. Cas. 116. No appeal lies from a decree passed on an award arrived at under this section, except so far as it is at variance with the award. *Lal Chand* v. *Megh Ram*, 160 Ind.Cas. 1075=A.I.R. 1936 Lah. 617. See also, *Tallapragada* v. *Tallapragada*, 9 Ind.Cas. 173=21 M.L.J. 263=(1911) 1 M.W.N. 151=9 M.L.T. 251; *Jagan Nath* v. *Nanak Chand*, 16 Ind.Cas. 996=9 P.R. 1913; *Tehla Mal* v. *Dhana Mal*, 60 Ind.Cas. 590; *Wali* v. *Bahawal*, 21 Ind.Cas. 925. An agreement referring disputes to arbitration was filed under para. 17 of Schedule II but after a number of futile attempts making the arbitrators act and appointing new arbitrators to act, the court revoked the order of reference and dismissed the suit. *Held*, that the order of revocation was not appealable. *Zahur Ahmad* v. *Taslimun*, 89 Ind.Cas. 404=23 A.L.J. 891. See also, *Ram* v. *Devi*, Ind. Cas. 192=107 P.W.R. 1916. In delivering the judgment in the above first-named case the court observed: "The ultimate order passed by and revoking the reference and dismissing the suit would not be appealable unless it came under S. 104 of the C.P.C. (=S. 39). Section 104 (1) (*a*) cannot apply because the order was not one superseding the arbitration where the order had not been completed within the period allowed by the court. The fact was that the court found that as the arbitrators named were not willing to act it was futile to appoint new arbitrators. Nor did it come under sub. clause (*d*) because the order was not an order refusing to file an agreement to refer to arbitration." Where there was substantially a reference to arbitration by court with the consent of the parties, appeal does not lie from a decree passed in terms of the award. *Venkatachalam* v. *Ramanatham*, 70 Ind.Cas. 410=A.I.R. 1922 Mad. 429=15 L.W. 111=31 M.L.T. 52=(1922) M.W.N. 423.

1036. Revision.—An order under the last portion of sub-section (4) directing a party to nominate an arbitrator or to appoint one itself, is one ancillary to an order under the earlier portion of the sub-rule ordering an agreement to be filed and can be passed only when an order under the earlier portions is in existence and where such order is passed without an order under earlier portion, it is liable to be reversed. *Shib Dial* v. *Ali Baksh*, A.I.R. 1926 Lah. 505=94 Ind.Cas. 483. No revision lies on the ground of irregularity of procedure when it was acquiesced in by the parties. *Wali Mohammad* v. *Bahawal Baksh*, 21 Ind.Cas. 925=14 C.P.L.R. 1914=20 P.W.R. 1914.

1037. Court-fee.—It seems that an application under this section is

to be stamped with court-fees as provided by Article 1 of Schedule II of the Court Fees Act. In case of appeal Article II of the same Schedule is applicable.

CHAPTER IV.

Arbitration in suits.

Parties to suit may apply for order of reference.

21. Where in any suit all the parties interested agree that any matter in difference between them *in the suit* shall be referred to arbitration, they may at any time before judgment is pronounced apply *in writing* to the Court for an order of reference.

1038. N.B.—This section reproduces substantially paragraph 1 of the Second Schedule of the Civil Procedure Code. It sets out the initial steps to be taken for arbitration in a suit.—*Notes on Clauses.* "This clause as drafted contemplates an agreement in writing to be followed by a subsequent application which must also be in writing. We have provided that there had not necessarily been a preliminary agreement in writing so long as the intention of the parties is exhibited in writing in court."—*Report of the Select Committee.*

1039. Para. 1 of the Second Schedule of the C. P. Code.—*Para. 1 of the Second Schedule of the C. P. Code was as follows :—*

Para. 1. (*1*) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be interfered.

This para. is again based on section 506 of Act XIV of 1882.

1040. Arbitration in suits.—Chapter IV deals with arbitration in suits. There was no provision in the Indian Arbitration Act of 1899 for arbitration in pending suits.

1041. Scope of Chapter IV.—Chapter IV is comprehensive and covers all references to arbitration in pending suits and chapter II does not apply to such references by its own force. *Palaniyandi* v. *Kandappa,* A.I.R. 1951 Mad. 281, where *Viswananth Sastry, J.* observed : "Before the enactment of Arbitration Act of 1940, it was held by a Full Bench of this court in *Subbaraju* v. *Venkataramaraju,* 51 Mad. 800=A.I.R. 1928 Mad. 1015 (F.B.) that where the parties to a pending suit has referred this difference to arbitration without an order of the court and award is made, a decree in terms of the award could be passed by the court under order 23, Rule 3, C. P. Code even though the parties do not accept the award as binding upon them. This decision has been followed and applied to a similar case even after the enactment of the arbitration Act of 1940 by a Division Bench of this court in *Arumuga* v. *Balasubramania,* I.L.R. (1946) Mad. 39=A.I.R. 1945 Mad. 294. The learned Judges construed the language of S. 47, proviso, a mere agreement to be found by a future award and an award is given on such a reference. They held that O. 23 Rule 3 was not confined to a case where after the award is made,

the parties consent to its being filed as a compromise or adjustment ot the pending suit and that S. 47, proviso also did not bar that interpretation. Sitting singly I am bound by this decision though I consider that it is probable that the Legislature intended that a private reference to arbitration in a pending suit without the knowledge of the court and without its direction which results in an award should not be made a rule of court unless all the parties interested in the suit consent to the award being filed into court as a compromise or adjustment of the suit. Indeed the Calcutta High Court had consistently taken that view before the Arbitration Act of 1940 and S. 47, proviso appears to confirm the view."

1042. Scope of section 21.—For a valid reference to be made to arbitration of dispute which form the subject-matter of a suit it is necessary that all the interested parties should join in it. A.I.R. 1920 Cal. 113; *Narsing* v. *Gagan Ram,* 56 Punj.L.R. 304 = A.I.R. 1955 Punj. 31. This section does not apply to reference out of court. *Dulari* v. *Rajendra Prosad,* A.I.R. 1959 All. 711. Before any matter involved in a suit pending in a court can be referred to arbitration under section 21, (*a*) there must be an agreement amongst all the parties interested that any matter in dispute between them in the suit shall be referred to arbitration; (b) if they come to such an agreement then they have made an application in writing to the court concerned; and (c) thereafter the court has to pass an order referring the dispute to the arbitrator agreed upon between the parties. *Khetu Ram* v. *Kashmir Lal,* A.I.R. 1959 Punj. 617 (F.B.). Thus the foundation of the jurisdiction of the court to make such an order is an agreement between and an application made, by the parties interested. If in fact there is no agreement between "all the parties interested" on the date when the court pass an order, or there is no application made in writing by such parties, the order of the court is wthout jurisdiction and consequently null and void. A reference to the arbitrator and the award given by him in pursuance of such a reference is altogether invalid. No subsequent act of the parties or ratification can clothe court with the jurisdiction retrospectively, and validate the order of reference passed by a court at a time when there was, in fact no agreement between all the parties interested. In such a case the courts are concerned with the general principles of ratification but are concerned only with the interpretation of S. 21 of the Act. *Khetu Ram* v. *Kashmri Lal,* A.I.R. 1959 Punj. 617 (F.B.); [50 Punj.L.R. 182 = A.I.R.1949 P. 48 and A.I.R. 1952 Punj. 373 overruled and A.I.R. 1932 Lah. 358 Rel. on]. A reference to arbitration through court under S. 21, by one partner may be legalised by subsequent acquiescence and ratification by other parties. *Ibid.* However, if there is a reference to arbitration without the intervention of the court when no suit is pending the matter is entirely different. *Ibid.* This section as well as sections 22 and 23 set out the initial steps which are necessary for arbitration in a suit. *Bhimraj* v. *Muniah,* A.I.R. 1935 Pat. 243. This section is an enabling section and is not intended to be restrictive or exclusive. Parties *suit juris* are competent before the decree to make any agreement as to the settlement of the suit. *Jogesur Banerjee* v. *Kulyanee,* 24 W.R. 41. Capacity to make a submission to arbitration is co-extensive with capacity to contract; every person capable of entering into a contract may be a party to a submission; and as a necessary corollary, in the case of persons whose capacity to contract is restricted, the power of making a submission is, in the same manner and to the same extent, limited. Consequently, if parties enter into a sub-

mission covering a subject-matter over which one of them, has no authority or only a restricted power of disposition, an award ordering such party to do that which he cannot lawfully do, will be of no legal effect whatever. *Soudamini* v. *Gopal Chandra,* 28 Ind.Cas. 557=21 C.L.J. 27=19 C.W.N. 948, citing *Wyatt* v. *Benson,* 23 Barb. (N.Y.) 327; *Wood* v. *Griffith,* 1 Swan. 43. Unless a strong irresistible case is made out, the court should be reluctant to supresede an arbitration. *Ahmed* v. *Cassum,* 36 Bom.L.R. 827=A.I.R. 1934 Bom. 388; *Sheo Narain* v. *Bala Rai,* 137 Ind.Cas. 198 =(1932) A.L.J. 331=A.I.R. 1932 All. 348.

Any agreement as contemplated by Schedule II, para. I, between the parties should clearly set forth what are the matters in difference between the parties on which the arbitrators are required to arbitrate. Such points should set forth clearly in the form of issues. *Kunwar Puran Singh* v. *Bhal Kunwar,* 125 Ind.Cas. 583=A.I.R. 1930 All. 319. A court has no power to refer to arbitration any question other than those in issue in any suit. So in an appeal against a decree on an award which included matters not covered by the suit, the appellate court has no power to make a new reference including matters not in issue and pass a decree in terms of any award that may be passed on such a reference. *Bhagirath* v. *Shankar Mal,* A.I.R. 1951 M.B. 111. There is no provision in this Chapter providing for reference regarding future dispute. *Kunwar Puran Singh* v. *Bahal Kunwar, supra.* The provision in Schedule II, para. 1, Civil Procedure Code, that an application for reference to arbitration should be in writing was directory and not mandatory. *G. Subbaraya* v. *K. Seshayya,* 105 Ind.Cas. 105. Unless all the parties to the suit join in asking for the reference there cannot be any valid reference to arbitration. *Abdul Halim* v.*Abdul Gafur,* A.I.R. 1928 Cal. 249. The forms and steps for a reference to arbitration and for the award made by the arbitrator to be embodied in the decree of the court, must be complied with where the petition of compromise does not contemplate any award to be made by the arbitrator and to be embodied in the judgment of the court, provisions of Schedule II do not apply. *Dwarikananth* v. *Atul Chandra,* A.I.R. 1928 Cal. 108=46 C.L.J. 353=106 Ind.Cas. 509. The foundation of the jurisdiction of the court to make a reference to arbitration is an agreement between all parties interested. Where the compromise petition did not contain a prayer for the order of reference in a pending suit and there was nothing to show that there should be a judgment in accordance with the award of the arbitrator, *held* that the reference was under the circumstances invalid. *Dwarka Nath* v. *Atul Chandra,* 46 C.L.J. 353.

Suit cognizable by a Civil Court to which the provisions of the Civil Procedure Code apply may be referred to arbitration. *Under* v. *Dali,* A.I.R. 1926 Sind. 128=20 S.L.R. 116. A suit is not pending between the dates of its dismissal for default and its restoration. *Visabhadra* v. *Kalyani,* 97 Ind.Cas. 465=A.I.R. 1926 Mad. 1211.

For the applicability of s. 21, two conditions must be satisfied before an application in writing for reference is made. All the interested parties to the suit must agree to obtain a reference and the subject-matter of the reference must be any matter in difference between the parties in suit. When the two conditions are satisfied the application for reference must be made at any time before the judgment is pronounced. *Nachippa* v. *Subramaniam,* A.I.R. 1960 S.C. 307=1960 S.C.J. 416=(1960) 1 S. C. A. 655=(1960) 2 S.C.R. 209.

1043. Section 28 of the Contract and Section 21 of the Arbitration Act.—Like other arbitration agreement a contract in writing to refer to

arbitration matters in dispute in a suit which is pending is legal. Such contract does not oust the jurisdiction of the court and is not in restraint of legal proceedings. Section 21 of the Indian Arbitration Act, 1940 presupposes that such contract is legal and that its subject-matter is lawful. *Jugal Das* v. *Purshottam,* 92 C.L.J. 181=A.I.R. 1953 Cal. 690.

1044. "At any stage before the judgment is pronounced" meaning of.—The scheme of S. 21 does not permit the addition of any words qualifying the word 'judgment' used in it. The expression 'at any time before judgment is pronounced' is only intended to show the limit is reached when a final judgment is pronounced. The provision that 'any matter in difference between the parties in the suit can be referred to arbitration' can not be subjected to the further limitation that the said matter can be referred to arbitration if it is not covered by the judgment of the court. The effect of the section appears to be so long as the final judgment is not pronounced by the court any matter, i.e., some or all the matter—indifference between the parties can be referred to arbitration provided they are agreed about it. It is open to the trial court to refer to arbitration any matter of difference between the parties to the suit provided they agree and apply at any time before the court pronounces its final judgment in the suit. *Nachiappa Chettiar* v. *Subramaniam Chettiar,* A.I.R. 1960 S.C. 307=1960 S.C.J. 416=(1960) 1 S.C.A. 655=(1960) 2 S.C.R. 209 (power of trial court to refer dispute to arbitration after prelimanary decree when appeal is pending).

1045. Suit for mandatory injunction—Reference of.—A suit for mandatory injunction can be referred to arbitration. *Lakshmi* v. *Raghubir,* A.I.R. 1956 Punj. 249; see also A.I.R. 1940 Lah. 123; A.I.R. 1944 Lah. 280.

1046. In any suit.—In *Watkins* v. *Fox,* 22 Cal. 943 (948), *Hill J.* observed: "Numerous examples of litigious business might be metioned, to which it would, without an obvious misapplication of language, be improper to apply the word 'suit' and I think that the term ought to be confined to such proceedings as under that description are directly dealt with by the Code of Civil Procedure, or such as by the operation of the particular Act which regulate them are treated as suits." The word "suit" does not include an appeal. *Bharasi* v. *Sarat,* 22 Cal. 415; *Baness* v. *Turtur,* 23 P.R. 1883; *Jinahuddin* v. *Sarfaraz,* A.I.R. 1938 Pesh. 80; but see the next topic. A suit can ordinarily be said to terminate where there is nothing more to be done in it except execution. *Administrator General* v. *Chandracant,* 22 Cal. 952 (Note). A proceedings for revocation of a probate is not a suit within the meaning of Order XXIII, rules of the Civil Procedure Code and, therefore, it is not competent to the parties to adjust the matter in difference by a compromise. *Sarada* v. *Gobinda,* 6 Ind.Cas. 912. See also, *Campbell* v. *Simpson,* 72 P.R. 1894; *Mayo* v. *Williams,* 2 N.W.P. H.C.R. 268. Where in execution proceedings arising out of a money decree, the judgment debtor pleaded satisfaction out of court and thereupon both parties referred the matter to arbitration and the award was filed in court, the procedure is wholly irregular and the award is unenforceable. *Wang* v. *Sona Wangdi,* 52 Cal. 559=87 Ind. Cas 633=29 C.W.N. 886=42 C.L.J. 26=A.I.R. 1925 Cal. 812. An execution proceeding is not a suit and therefore this section does not entitle parties to an execution proceeding to file an application for a reference to arbitration. *Bachan Lal* v. *Amar Singh,* A.I.R. 1935 All. 125; *Jhinno Singh* v. *Brahmadat,* 152 Ind.Cas. 937=(1934) A.L.J. 1181. See also, *Hari Charan* v. *Manmotha,* 19 Ind.Cas. 683=41 Cal. 1=18 C.W.N. 343;

Bipinbehari v. *Abdul,* 35 Ind.Cas. 613=44 Cal. 950=21 C.W.N. 30=24 C.L.J. 446 ; *Tirthsami* v. *Annappayya,* 18 Mad. 131 ; *Sarju* v. *Sukhdeo,* A.I.R. 1936 All. 378=(1936) A.L.J. 142=161 Ind.Cas. 107 (proceedings under Order XXI, rule 58) ; *T. Wang* v. *Sona Wangdi,* A.I.R. 1925 Cal. 812=87 Ind.Cas. 633=52 Cal. 559=42 C.L.J. 26=29 C.W.N. 886 ; *Sattar-un-nissa* v. *Muhammad,* (1905) 8 O.C. 263 ; *Basdeo* v. *Saraswati,* 54 Ind. Cas. 469 ; *Narayan* v. *Dhoniba,* A.I.R. 1937 Bom. 111=38 Bom.L.R. 1303=I.L.R. 1937 Bom. 144=167 Ind.Cas. 750 ; *Fakirulla* v. *Thakur Prosad,* 12 All. 129=(1890) A.W.N. 53 (P.C.) ; *Jainahuddin* v. *Sarfaraz,* A.I.R. 1938 Pesh. 80 ; but see, *Jhino Singh* v. *Brahmdat,* 152 Ind.Cas. 397=(1934) A.L.J. 1181 ; *Raj Kumar* v. *Bulaki Myan,* 42 Ind.Cas. 467=3 P.L.W. 146 ; *Negendra* v. *Harendra,* 11 Ind.Cas. 457=16 C.W.N. 34 ; but see A.I.R. 1948 All. 443 ; A.I.R. 1941 Bom. 20.

1047. "Suit" and "Court" meaning of.—Court include appellate court and suit include appeal. *Bundi Municipal Board* v. *Bundi Electrical Supply,* A.I.R. 1957 Raj. 728. Under this Act the court has no jurisdiction to make an order of reference in execution proceedings. *Jagjivan* v. *Dosho,* 8 Sau.L.R. 102=A.I.R. 1955 Sau. 88 ; see also A.I.R. 1935 All. A I.R. 1937 Bom. 111 ; A.I.R. 1941 Bom. 20. The word "suit" appearing in S. 21 cannot be construed in its broad general sense and does not include execution proceedings. *Premnath* v. *Premnath,* 64 Punj. L.R. 975=A.I.R. 1963 Punj. 62.

1048. Reference by Appellate Court.—"This section speaks of parties to a suit and in difference between them in the suit. It enables such parties to apply in writing to the court, before judgment is pronounced for an order of reference. Examining the definition of the term 'court' as given in section 2(c) ; there seems no valid ground for holding that it excludes appellate court. Just as a court of first instance 'jurisdiction to decide the questions forming the subjec-matter of the reference, if the same had been the subject-matter of a suit', so also an appellate court has the same 'jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit.' This is the function of an appellate court as well. I see, therefore, no reason why a restricted meaning should be given to the word 'suit' as used in S. 21, Arbitration Act. In my opinion, the term 'suit' in that section ought not to be taken to exclude an appeal. I, for myself, find no good ground for legislation, while giving power to the court of original jurisdiction to make an order of reference under S. 21, Arbitration Act, to exclude the appellate court from making such an order." *Per Jamuna, J.* in *Thakur Prosad* v. *Baleshwar,* A.I.R. 1954 Pat. 106 ; see also *Lakshmi Narain* v. *Ram Babu,* A.I.R. 1953 All. 9 ; *Munnilal* v. *Kishen Prosad,* A.I.R. 1948 All. 443=I.L.R. 1948 All. 629 ; but see *Abani Bhusan* v. *Hem Chandra,* A.I.R. 1947 Cal. 93=I.L.R. (1946) 2 Cal. 492 ; *Shu Kurulla* v. *Rahamat,* A.I.R. 1947 All. 304=I.L.R. (1947) All. 227 ; *Chidambaran* v. *Subramanian,* A.I.R. 1953 Mad. 492, where A.I.R. 1947 Cal 93 was quoted with approval. An appellate court has no power under Arbitration Act to make a reference. *Durga* v. *Patlu,* A.I.R. 1952 H.P. and B. 24.

1049. Matters which cannot be referred to arbitrators.—A court cannot refer to arbitrators a proceedings in insolvency. *Ladha Singh* v. *Bhag Singh,* 34 Ind.Cas. 549=50 P.R. 1916=151 P.L.R. 1916=135 P.W.R. 1916. See also, *Simla Bank* v. *Narpatrai,* 88 P.R. 1887 ; *Mangilal* v. *Duicharan,* I.L.R. (1948) Nag. 535. The question of restitution of conjugal rights cannot be referred to arbitration as that matter must be decided by the court itself. *Malka* v. *Sardar,* A.I.R. 1929 Lah. 394=30

P.L.R. 122=11 L.L.J. 89=116 Ind.Cas. 215 ; *Hira* v. *Dina,* 37 P.R. 1895 ; *Kalabatu* v. *Prabh Dial,* 45 Ind.Cas. 165=78 P.L.R. 1918=80 P.W.R. 1918=A.I.R. 1918 Lah. 357 ; *Nathu* v. *Sarnum,* A.I.R. 1933 Lah. 532= 144 Ind.Cas. 179=34 P.L.R. 283 ; *Kalu* v. *Aisha,* 128 P.R. 1892 ; *Dinu* v. *Abdulla,* 35 P.R. 1894. But in a suit for restitution of conjugal rights the question as to the validity of a marriage can be referred to arbitration. *Faiz Ali* v. *Ashraf Khatun,* A.I.R. 1920 Lah. 177=30 P.L.R. 600=118 Ind.Cas. 464. In *Ishar Das* v. *Visan Bai,* A.I.R. 1930 Lah. 707=31 P.L.R. 380=12 L.L.J. 105=125 Ind.Cas. 610, *Jai Lal, J.* observed : "But in A.I.R. 1929 Lah. 177, I have distinguished these two cases [*Kalabatu* v. *Probdial* and *Hira* v. *Dina* (*supra*)] and have held that these cases decide that the court competent to refer the question of the exercise of its discretion in suits for restitution of conjugal rights to arbitration but other matters in dispute between the parties as distinct from the whole suit can be so referred and the court can, on the award of the arbitrators or on the facts determined by the arbitrators, decide whether or not it should exercise its discretion in favour of the plaintiff." In *Umer* v. *Dadli,* 98 Ind.Cas. 550=A.I.R. 1926 Sind 128=S.L.R. 116, the court observed as follows : "The applicant in this case filed a suit in the court of the Sub-Judge at Naushahro for a declaration that opponent No. 1 had been given to him in marriage and for an injunction restraining opponents Nos. 2 and 3 from giving opponent No. 1 in marriage to any one else. During the progress of the suit matters in difference between the parties were referred to arbitration under para. 1, Schedule 2, C.P. Code. The main point argued before us in this application is that the learned Sub-Judge had no jurisdiction to refer the matters in dispute in the suit in question to arbitration ; that such a reference amounted to contract which was opposed to public policy and that it is against public policy that suits which relate to the personal relations between the parties should be referred to arbitration. He has referred us, however, to certain passages, in *arbitration by Gopaldas* to the effect that the matters covered by the Divorce Act or the Insolvency Act cannot be referred to arbitration. We do not consider that there is any analogy whatever between proceedings covered by the aforesaid Acts and suits cognizable by a Civil Court to which the provisions of the Civil Procedure Code apply. Para. 1 of the Second Schedule of the Civil Procedure Code states in perfectly wide terms that any suit may be referred to arbitration." See also, *Kunti Debi* v. *Bholanath,* 194 Ind.Cas. 466=A.I.R. 1941 Pesh. 43 ; *Rupnarain* v. *Nandarani* A.I.R. 1934 Oudh 494.

In *Isribai* v. *Peribai,* A.I.R. 1930 Sind 195=121 Ind.Cas. 164, the court observed : "It has been held by a Bench of this court that there is no bar to refer to arbitration under the provisions of Sch. 2, Civil Procedure Code, a suit which relates to a personal rights between the parties, e.g., a question of marriage which is cognizable by a Civil Court. *Umer* v. *Dalli,* A.I.R. 1926 Sind 128=20 S.L.R. 116." In *Rup Narain* v. *Nandrani,* A.I.R. 1934 Oudh 494=11 O.W.N. 1203=152 Ind.Cas. 90= (1934) O.L.R. 817, the court observed : "It is true that the rule of law is firmly established that it is entirely within the discretion of the Civil Court to grant or refuse to grant a decree for restitution of conjugal rights ; but it has, nowhere been held that a suit for restitution of conjugal rights is not such a suit as comes within the purview of para. 1, Schedule 2, Civil Procedure Code, and cannot be referred to arbitration, even where all the parties interested therein agree to have the dispute settled by arbitration. We are not aware of any provision of law, which excludes

suits for restitution of conjugal rights from the purview of Schedule 2, C. P. Code. Probate proceedings and proceedings in execution of a decree certainly cannot be referred to arbitration and Schedule 2, Civil Procedure Code, cannot apply to such proceedings." But an agreement between a Parsi husband and wife to live separately is a lawful and binding agreement, and a reference to arbitration of the question as to the amount of the wife's maintenance, in the event of their separation, is quite legal. *Toddiwala* v. *Bai Dinbai,* 59 Ind.Cas. 189=45 Bom. 318= 45 Bom. 318=A.I.R. 1921 Bom. 399. Sse also, *Kaswasji* v. *Sasini Bai,* 23 Bom. 270. "The terms of deeds if separation between a husband and wife are frequently referred to arbitration [*De Dicci* v. *De Recci,* (1891) p. 378]. It is now settled that there is nothing illegal or contrary to public policy or morale in agreements of this nature, whether they arise out of compromise of suits for dissolution of marriage or otherwise. The right to compromise such suits is a natural corollary to the right to institute them [see *per Jessel, M.R.* in *Beasant* v. *Wood,* (1879) 12 Ch.D. at p. 622] and such agreements have frequently been specifically enforced [*Hart* v. *Hart,* (1881) 18 Ch.D. 670]. See also, *Soilenux* v. *Herbert,* (1810), 2 Bos. Pal. 444; *Batinan* v. *Oliva, Countess of Ross,* (1813) 1 Dow. 235 H.L.: *Hooper* v. *Hooper,* (1860) 1 Sw. & Tr. 602."—*Russell* on *Arbitration,* 13th Edn., p. 5. But see *Nathu* v. *Sarnua,* 144 Ind.Cas. 179=34 P.L.R. 282 =A.I.R. 1933 Lah. 532.

In a suit for a declaration that the plaintiff is the *mutwali* of a mosque, reference to arbitration is not illegal and the decree passed in accordance with the award is not invalid. *Fazal Rahman* v. *Zainab Bibi,* 189 Ind.Cas. 812=A.I.R. 1940 Lah. 123. See also, *Mahomed Abdul* v. *Ahmad Saeed,* 35 All. 459=20 Ind.Cas. 37=11 A.L.J. 673; but see *Mahomed Ibrahim* v. *Ahmad Said,* 32 All. 503=6 Ind.Cas. 219=7 A.L.J. 761; *Muhammad Kabirul* v. *Hassamuddin,* 38 Ind.Cas. 296.

1050. Immovable properties in foreign court.—The court have no jurisdiction to determine questions of title to immovable properties in foreign countries or to effect a decision thereof. A court which has no jurisdiction to determine any matter in controversy in a suit has no jurisdiction to refer it for determination by the arbitrators. It will be illogical to hold that what a court cannot do directly can do indirectly through the machinery of arbitration. *Chidambaran* v. *Subramanian,* (1952) 2 Mad.L.J. 524=A.I.R. 1953 Mad. 492; *Nachiappa* v. *Muthu Karuppan,* A.I.R. 1946 Mad. 398=I.L.R. (1949) Mad. 858; *Dicey's Conflict of Laws,* 6th Edn., page 141.

1051. Matters outside suit.—"We may add that it was also suggested that the reference comprised not merely matters in difference in the suit but also 'all matters and proceedings connected therewith' and that that went beyond the scope of the suit. This is clearly untenable as the other 'matters and proceedings' are merely in relation to the matter in dispute in the suit, and is in the nature of the final prayer for general relief in the plaint." *Chidambaran* v. *Subramanian,* (1952) 2 M.L.J. 524= A.I.R. 1953 Mad. 492.

1052. S. 21 and 23—Petition for reference to arbitrators—matter in suit and outside suit.—Where parties wanted the arbitrators to decide and settle amicably not only matters involved in the suit but also matters involved in a criminal case pending between them, but the order passed by the court on the petition referred only to matters in dispute in the suit to the arbitrators and directed them to decide the matter on the pleading of the parties; *Held* that the court had jurisdiction to refer

to arbitration matters which were in dispute in the suit itself, and the mere fact that initially in the petition for reference the parties also wanted some other dispute to be settled, did not affect the validity of the reference. *Dasuram* v. *Balchand,* A.I.R. 1957 Assam 165 ; see also A.I.R. 1925 P.C. 293 : 49 Mad. L.J. 812.

1053. Application of this chapter to probate proceedings.— Judge has no jurisdiction to allow the dispute relating to the genuineness of a will in a probate proceeding pending before him to be referred to the arbitration or an arbitrator. He has got to be satisfied that the will is a genuine document before the order of granting probate is passed. He cannot delegate these functions to a private individual and decide the point through him. *Gopi Rai* v. *Baij Nath,* A.I.R. 1930 All. 840=128 Ind.Cas. 817=(1930) A.L.J. 1584. See also. *Ghella Bhai* v. *Nanda Bai,* 21 Bom. 335 ; *Monmohini* v. *Ganga Chandra,* 31 Cal. 357=8 C.W.N. 197 ; *Saroda* v. *Gobinda,* 6 Ind.Cas. 912 ; *Sarda* v. *Triguna,* 46 Ind.Cas. 117=3 Pat.L.J. 415 ; *Mayo* v. *Williams,* 2 N.W.P. H.C.R. 268 ; *Campbell* v. *Simpson* 72 P.R. 1894 ; *Janakbati* v. *Gajanand,* 37 Ind.Cas. 12=20 C.W.N. 986=1 P.L.J. 377=1 P.L.W. 41 ; *Khela* v. *Chet Ram,* A.I.R. 1952 Punj. 67.

1054. Construction of will whether can be referred to arbitration. —An executor cannot legally make any reference to arbitration which will go against the terms of the will. *Jnanendra* v. *Jitendra,* A.I.R. 1928 Cal. 275=32 C.W.N. 108=107 Ind.Cas. 70. In *Soudamini* v. *Gopal,* 28 Ind.Cas. 557=19 C.W.N. 948=21 C.L.J. 273 ; *Mookerjee, J.* observed : "We must not be taken, however, to countenance the proposition that an executor or administrator is not competent under any circumstances to make a reference to arbitration ; such right cannot be disputed when exercised within the limits of his authority [*Bean* v. *Farman,* 6 Pickering Mars. 269, *Halsbury's Laws of England, Vol.* 1, Article 943]. But it is equally plain that an executor cannot make a reference to arbitration with the avowed purpose that the terms of the will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator. The case before us is plainly not one of submission to arbitration by an executor for the settlement of any debt, account or claim in relation to the estate in his hands. The arbitrators are, no doubt, asked to construe the will ; and it need not be disputed that pure questions of law may be referred to the decision of an arbitrator. *Stiff* v. *Andrews,* 2 Mad. 6 ; *Ching* v. *Ching,* 6 Ves. Ves. 281 ; *Young* v. *Walter,* 9 Ves. 364 ; *Mathew* v. *Davis,* 1 Dowl. (N.S.) 679 ; *Ghhlam Khan* v. *Muhammad Hassan,* 29 Cal. 167=29 I.A. 51=6 C.W.N. 226=4 Bom.L.R. 161. But the arbitrators are here authorised to do something more than a construction of the will which, as their Lordships of the Judicial Committee said in *Venkata Narasinha Appa Row* v. *Partha Sarathy Appa Row,* 23 Ind.Cas. 166=19 C.L.J. 369=37 Mad. 199 (P.C.), does not mean an addition to the terms of the will. They are empowered to alter the terms of the will. This plainly was not within the competence of the executors." But see, *Janendra* v. *Suresh Chandra,* A.I.R. 1928 Pat. 7=109 Ind.Cas. 821=6 Pat. 556, where it has been held that though a will directs that a legatee should get his share on attaining a particular age, the decision of the arbitrators appointed by other legatees and executors empowering the legatee to take his share before the particular age is valid.

1055. Execution proceedinrs.—The Act is not inapplicable to proceedings in execution and a civil court executing a decree has therefore

jurisdiction to refer a dispute arising in execution to arbitration. *Munni Lal* v. *Kishen,* 3 D.L.R. (All.) 46=A.I.R. 1948 All. 443=I.L.R. 1948 A. 629=1948 A.L.J. 556 ; see also *Zunaklal* v. *Fulchand,* A.I.R. 1941 Bom. 20=42 Bom.L.R. 867=192 Ind.Cas. 583.

1056. Matters in guardianship proceedings.—The appointment of a guardian to a minor not being a matter of private right as between parties, is not a question which can be settled by reference to arbitration. *Mahadeo* v. *Bindeshri,* 30 All. 137=5 A.L.J. 101. In the above case *Aikman, J.* observed : "If rival claimants to a certificate of guardianship are allowed to refer their dispute to arbitration, a door would be opened to collusion and the interests of the minor would suffer." So also, *Muhammad Ibrahim* v. *Ahmad Said,* 32 All. 503=7 A.L.J. 761=6 Ind. Cas. 219 ; *Soma Chetty* v. *Adaikalam Chetty,* A.I.R. 1924 Mad. 484=84 Ind.Cas. 613=47 Mad. 459=46 M.L.J. 179 ; *Fazlan* v. *Murad,* 42 P.R. 1882.

1057. Suit under s. 92, C. P. Code.—Where a suit could not be brought under s. 92, C. P. Code, except upon the conditions therein specified ; the section cannot be evaded merely by a reference to arbitration upon contention raised in the written statement, and the arbitrators cannot decide upon matters of public right which the law provides shall be brought into issue only in a particular manner. *Ganga Ram* v. *Keshav Das,* 30 S.L.R. 478=170 Ind.Cas. 102=A.I.R. 1937 Sind 174. See also, *Ganoba* v. *Narayan,* A.I.R. 1923 Nag. 112=6 N.L.J. 7=72 Ind.Cas. 1016 ; *Nambi* v. *Narayan,* 11M.L.J. 337. 337. But disputes regarding private trust may be referred to arbitrators. *Narain Sri* v. *Ram Lakhan,* 151 Ind.Cas. 148=(1934) A.L.J. 711=A.I.R. 1934 All. 368. See also, *Kardha* v. *Vemavarapu,* 26 Mad. 361=14 M.L.J. 14 ; *Gurumukh* v. *Lalu,* A.I.R. 1947 Sind 74. A suit in which the plaintiff prays for a declaration that he is a trustee of a property which is neither alleged nor found to be a true property created or existing for a public purpose of a charitable or religious nature is not a falling within S. 92, C. P. Code, because neither the subject-matter nor the reliefs claimed are such as are contemplated by S. 92, C. P. Code. Hence a reference to arbitration in such suit is not invalid or prohibited. *Gurumukh Singh* v. *Lalu Singh,* I.L.R. (1946) Kas. 558=277 Ind.Cas. 61=A I R. 1947 Sind 74.

1058. Matrimonial dispute.—The terms of this section are exceptionally wide and the court has jurisdiction to refer for the decision of arbitration any matter in dispute in a martimonial suit and arbitrators are competent to pass an award in respect of such disputes. The Court can pass a decree in terms of such an award. *Ramuddamma* v. *Kashi Naidu,* A.I.R. 1945 Mad. 269.=(1945) 1 M.L.J. 396 ; but see *Kalabatu* v. *Probh Dayal,* 45 Ind.Cas. 163 ; *Malku* v. *Sardar,* A.I.R. 1925 Lah. 394 ; *Hira* v. *Dina,* 37 P.R. 1895.

Under S. 21 parties to any suit may apply for an order of reference to arbitration. A suit under Dissolution of Muslim Marriage Act is a suit which the meaning of s. 21. Therefore the provisions of the Arbitration Act can be legitimately invoked by the parties to a suit under the Act. *Faquir Mohammad* v. *Amina,* 1936 All. L.J. 112=1963 All. W.R. (H.C.) 150=A.I.R. 1964 All. 246.

1059. Declaratory suit.—A suit praying for an arbitration by a widow to be declared invalid and not binding on the plaintiff, can be referred to arbitration. *Hare Shankar* v. *Amraoti,* A.I.R. 1944 Lah. 280.

1060. Management of a mosque.—Where an award does not deal with the question of management of a moseque but only determines which

party could use the moseque and decides one of them to be so entitled, such award is not open to objection. *Hashmat* v. *Siddiq*, A.I.R. 1927 All. 128=98 Ind.Cas. 998 ; *Muhammad* v. *Ahmad*, 32 All. 503 ; *Moazam Ali* v. *Raja Ali*, 46 All. 856.

1061. Question regarding charities.—Under the laws of England questions affecting charities may be referred to arbitration. *Prior* v. *Hombrow*, (1841) 10 L.J. Ex. 371 ; *Att.-Gen* v. *Hewit*, 9 Ves. 232.

1062. Criminal complaint.—A criminal complaint cannot be referred to arbitration and therefore, the award following it cannot be made a rule of a civil court. *Malka* v. *Sardar* A.I.R. 1929 Lah. 394=30 P.L.R. 122=11 L.L.J. 89=116 Ind.Cas. 215. See also, *Kamini* v. *Birendra*, A.I.R. 1930 P.C. 100=32 Bom.L.R. 639=34 C.W.N. 489=51 C.L.J. 400 =123 Ind.Cas. 187=57 I.A. 117=59 M.L.J. 82=57 Cal. 1302 ; *Jones* v. *Merionethsire*, (1892) 1 Ch. 173=61 L.J.Ch. 138 ; but see *Haras Rai* v. *Tek Chand*, A.I.R. 1927 Lah. 465=101 Ind.Cas. 786 ; *Ramgopal* v. *Ganeshi Lall*, A.I.R. 1925 Lah. 364 ; *Sukdeo* v. *Mangal Chand*, 2 P.L.J. 630=41 Ind.Cas. 812=2 P.L.W. 140 ; *Jai Kumar* v. *Gauri Nath*, 28 All. 768. An agreement to refer to arbitration in respect of non-compoundable effence is opposed to public policy. *Gopal* v. *Lakshmi*, A.I.R. 1933 Cal. 817 ; *Bakhtawar* v. *Issardas*, A.I.R. 1934 Sind 71 ; *Thandamoyi* v. *Gunamoyi*, 47 Ind.Cas. 506. But a compoundable case can be referred. *Nihal Singh* v. *Ashtawakar*, A.I.R. 1930 Lah. 860=127 Ind.Cas. 705. In the above case *Dalip Singh, J.* said : "The learned counsel next contends that if the award is looked upon as a compromise it is illegal because among its terms was a withdrawal of certain prosecutions under Ss. 325, 447 and 323, I.P.C. As the last two sections are compoundable by the parties and S. 325 is compoundable with the leave of the court I do not see that there was any illegality in the compromise." See also, S. 345 of the Cr. Pro. Code. But where the arbitrators do arrogate to themselves the powers of a Magistrate, the award is invalid. *Fazall Ilahie* v. *Nazir Ahmad*, A.I.R. 1938 Sind 130=176 Ind.Cas. 490. A criminal complaint cannot be referred to arbitration and therefore the award following it cannot be made a rule of a civil court. *Malka* v. *Sardar*, A.I.R. 1929 Lah. 394=30 P.L.R. 122=11 L.L.J. 89=116 Ind. Cas. 215. In *Nand Kishore* v. *I. M. Commissioner*, A.I.R. 1953 Call. 415 (421), *Bachawat, J.* said : "There is no doubt that the agreement of reference to arbitration is void if either the consideration or object thereof is the dropping of prosecution for a non-compoundable offence. The relevant principles admit of no doubt and are now settled by the highest judicial authority. *Sir Benod Mitter* in *Kamini* v. *Birendra Nath*, A.I.R. 1930 P.C. 100 at p. 102 states the law *succinctly* as follows : 'If it was an implied term of the reference or the *ekrarnama* that the complaint would not be further proceeded with. then in their Lordships' opinion the consideration of reference or the *ekrarnama*, as the case may be, is unlawful.'" See also the case of *Bhowanipur Banking Corporation* v. *Durgesh Nandini Dassi*, A.I.R. 1941 P.C. 95 (96)=68 I.A. 144 (P.C.), for the observation of Lord Atkin ; the observation of *B. K. Mookerjee, J.* in *Sudhindra* v. *Ganesh*, A.I.R. 1933 Cal. 840 (851)=43 C.W.N. 147.

In *Hussain Mahomed* v. *Ismail*, A.I.R. 1935 Sind 10=156 Ind.Cas. 383, the court observed : "The proposition that a reference and award are vitiated if the consideration therefore or even a part thereof is the stiffling of a criminal prosecution is not and cannot be disputed. Nor can it be contended that it is necessarily that a prosecution should actually be pending in order that this principle should apply. But then in the

present case there was neither a criminal prosecution for a non-compoundable offence pending or within the power of the respondent No. 1 to threaten. All that there was, was an application to the court under S. 476 Cr. Pro. Code. I am not prepared to hold that the withdrawal of an application under section 476, Cr. Pro. Code, and the fact that it forms part of the consideration for the reference executed by the parties in this case is sufficient vitiate the reference and award on the ground put forward by respondent No. 2" *Warisala* v. *Mohamad,* A.I.R. 1918 Nag. 181=46 Ind.Cas. 424, distinguished.

1063. Quasi-criminal matters.—It is not permissible to refer to arbitration the subject-matter of a proceeding under Chapter X of the Criminal Procedure Code in respect of a public nuisance in which public interests are involved. *Ajit Shaikh* v. *Jamatulla,* 62 Ind.Cas. 335=22 C.L.J. 511; *Rajbalam* v. *Nawlaksh,* 61 Ind.Cas. 55=2 P.L.T. 66=Cr.L.J. 327. Proceedings under s. 145 cannot be compromised nor can they be submitted to arbitration; all that can be done is that there may be an agreement as to the mode of taking evidence as regards actual possession on the date of the preliminary order either by a commissioner or by arbitrators. Such a commissioner or arbitrators have no power to decide the case, but can only submit a report, and the Magistrate would then be bound to take the report into consideration before passing an order. *Gangadhar* v. *Balkrishna,* A.I.R. 1929 Nag. 285=121 Ind.Cas. 47. See also, *Uttim Singh* v. *Jodhan Bai,* A.I.R. 1924 Pat. 589=3 Pat. 288; *Hamidul* v. *Atait,* (1917) 2 Pat.L.J. 86=37 Ind.Cas. 513=1 Pat.L.W. 81; *Hari Prosad* v. *Sewak,* 40 Ind.Cas. 333; *Banwari* v. *Hriday,* 32 Cal. 552=1 C.L.J. 482; *Sadhu* v. *Mahommed,* 15 C.W.N. 568=9 Ind.Cas. 167=12 Cr.L.J. 32; *Kalananda* v. *Rameshwar,* 15 C.W.N. 271=8 Ind.Cas. 892=11 C L.J. 729; but see, *Taramoni* v. *Gynandra,* 7 C.W.N. 461; *Jamuna* v. *Hanuman,* A.I.R. 1921 Cal. 637; *Haldhar* v. *Bulaki,* 44 Ind.Cas 122=19 C.L.J. 266=3 P.L.J. 249.

1064. Proceedings under U. P. Agriculturists Relief Act.—Proceedings under S. 12, U. P. Agriculturists' Relief Act are proceedings in a civil court to which the Arbitration Act aplies, and hence a reference to arbitration of the dispute between the parties to such proceedings is competent and lawful. *Balaram* v. *Dudh Nath,* 3 D.L.R. (All.) 12=1948 A.L.J. 296=I.L.R. 1948 All. 363=A.I.R. 1949 All. 100.

1065. Application of Arbitration Act in other Proceedings.—Section 52 of the Bengal Estate Partition Act enacts as follows: "Where a Partition has been refused to arbitration, the proceedings shall, except as hereinafter otherwise expressly provided, be conducted in accordance with the provisions of sections 506 to 522 (both inclusive of the Code of Civil Procedure of 1882), so far as they are applicable.

Section 43 of the Bengal Survey Act of 1875 enacts as follows: "Whenever the Collector thinks it necessary to decide a dispute as to any boundary under last proceeding section he may, the consent of the parties concerned, refer the same to arbitration. The procedure laid down in Chapter VI of Act VIII of 1859 (the Code of Civil Procedure) shall, so far as may be practicalbe be applicable to disputes referred to arbitration." Section 265 (3) of the Chota Nagpur Tenancy Act of 1908 enacts as follows: "Until rules are made under sub-section (1), and, subject to those rules when made, and to the other provisions of the Act, the provisions of the Code of Civil Procedure, relating to.....(*k*)arbitration.....shall so far as may be and in so far as they are not inconsistent with this Act, apply to all suits, appeals, and proceedings before the Deputy Commissioner under

this Act, and to all appeals from decisions passed in such suits or proceeding." For further notes *vide* s. 46, *post*.

1066. All parties interested agree.—Where special jurisdiction is given by an Act of the Legislature, in order to give the jurisdiction, every one of those terms must be complied with. *Nusserwanjee* v. *Meer Mynoodeen,* 6 M.I.A. 155. The court has no power of its own motion to order a reference, and it can only do so under the provisions of this section. *Luxmibai* v. *Hajee,* 23 Bom. 629. For a binding award, the parties must voluntarily refer to arbitration; coercion of any sort by the court will vitiate the reference. *Ali Buksh* v. *Kadri Buksh,* 28 P.R. 1868; *Kakee* v. *Hajoodeen,* 52 P.R. 1869; *Sheonath* v. *Ramanath,* 1 Ind.Jur. N.S. 161=10 M.I.A. 413. The agreement to refer and the application to the court founded on it must have the concurrence of all parties concerned. *Ghulam Khan* v. *Muhammad Hussain,* 29 Cal. 167 (P.C.)=6 C.W.N. 226=29 I.A. 51=12 M.L.J. 77=4 Bom. L.R. 161; *Basdeo* v. *Saraswati,* 64 Ind.Cas. 469: *Intiaz* v. *Dost Mohammad,* A.I.R. 1933 Oudh. 384 =147 Ind.Cas. 189=9 Luck. 73=10 O.W.N. 790; *Haswa* v. *Mahbub,* 8 A.L.J. 645=10 Ind.Cas. 559; *Patita* v. *Narasinga,* A.I.R. 1920 Mad. 852=51 Ind.Cas. 155=42 Mad. 632=31 M.L.J. 538; *Ghafooran* v. *Abdul,* A.I.R. 1938 Oudh. 154=(1938) O.W.N. 475=174 Ind.Cas. 766; *Mian Rahmatulla* v. *Sayed Alam,* A.I.R. 1938 Pesh. 47; *Daryao* v. *Ratan Lal,* 1944 A.W.R. (Rev.) 164=1944 R.D. 325. In the corresponding s. 506 of the C. P. Code the words used "all the parties to a suit" it was held that all the parties to the suit who were interested must concur in making the reference. *Bykuntnath* v. *Nazarooddeen,* 10 W.R. 171; *Sheonath* v. *Ramnath,* 10 M.I.A. 413 (427)=5 W.R.P.C. 21; *Indur Subbarami* v. *Kandada,* 26 Mad. 47. In *Dwarkanath* v. *Atulchandra,* A.I.R. 1928 Cal. 108=46 C.L.J. 535=106 Ind.Cas. 509; *Mukherjee J.* said: "As pointed out by the Judicial Committee in *Ghulam Khan* v. *Muhammad Hossein,* 29 Cal. 167=29 I.A. 51=6 C.W.N. 226; in dealing with Chapter XXXVII of the Code of 1882 in which the words were 'where in any suit all the parties agree,' the agreement to refer and the application to the court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the court, and that large powers are given to the court, with the view of making the award in such case complete, operative and final. The word 'interested' was added by the Code of 1908 to give effect to the decision of *Pitam Mal* v. *Sadiq Ali,* 24 All. 229= (1902) A.W.N. 19, which laid down that the words 'all the parties to a suit' would not necessarily include parties who never put in any appearance in the court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit." See also, *Ishardas* v. *Keshabdeo,* 7 Ind.Cas. 68=32 All. 657=7 A.L.J. 807; *Choil Ram* v. *Lal Chand,* 61 Ind.Cas. 451=14 S.L.R. 156; *Subba Rao* v. *Appadurai,* A.I.R. 1925 Mad. 621=48 M.L.J. 142=21 M.L.W. 498=86 Ind.Cas. 839; *Miran Baksh* v. *Sher Muhammed* 9 Ind.Cas. 195=50 P.L.R. 1911=17 P.R. 1911; *Haraprosanna* v. *Arab,* A.I.R. 1924 Cal. 353=71 Ind.Cas. 860; *Ladhu Ram* v. *Nanda Lal,* 47 Cal. 555=31 C.L.J. 150; *Possumarti* v. *Bollan,* A.I.R. 1923 Mad. 502=44 M.L.J. 359=17 L.W. 424=(1923) M.W.N. 296=73 Ind.Cas. 202; *Mahadeo* v. *Narayan,* 52 Bom. 408=30 Bom.L.R. 530=100 Ind.Cas. 343=A.I.R. 1928 Bom. 248; *Hassomal* v. *Kondanmal,* 104 Ind.Cas. 342=A.I.R. 1927 Sind 239; *Subba* v. *Venkata Subba,* 51 755=28 L.W. 558=110 Ind.Cas. 539=A.I.R. 1928 Mad. 519=55 M.L.J. 72 *Jagrup* v. *Kashi Prasad,* A.I.R. 1934 All. 658= 148 Ind.Cas. 1168=(1934) A.L.J. 694; *Dwarka* v. *Fanindra,* 49 Ind.Cas.

262 ; *Bankey Lal* v. *Chotey Mian,* A.I.R. 1931 All. 453=133 Ind.Cas. 31= 53 All. 669 ; but see, *Abudar Beg* v. *Nathumal,* A.I.R. 1933 All. 739=147 Ind.Cas. 869. But the rule is otherwise in partition cases inasmuch as in such cases all the parties to the suit are vitally interested in questions in relation to the partition. *Jagrup* v. *Kashi Prosad, supra ; Gopal Das* v. *Baijnath,* A.I.R. 1926 All. 238=91 Ind.Cas. 930=48 All. 239 ; *Tej Singh* v. *Ghasi Ram,* A.I.R. 1927 All. 563=102 Ind.Cas. 236=49 All. 812. In order to find out whether the parties have interest in the subject-matter in difference it is necessary to see the nature of the suit in which that question is raised and not the possibility of their having any interest in a future litigation which may arise as the result of the decree in the suit. *Sheodahin* v. *Dasrath,* A.I.R. 1934 Pat. 19=148 Ind.Cas. 512 ; *Possumarti* v. *Bolan, supra ; Haswa* v. *Mahbuh,* 10 Ind.Cas. 559=8 A.L.J. 786. In *Dwarka* v. *Kedar,* A.I.R. 1951 Pat. 445=6 D.L.R. (Pat) 56, the court observed : "In *Raghunath* v. *Ramrup,* 2 Pat. 777=A.I.R. 1924 Pat. 33, it was pointed out that it was not necessary that all the parties to a suit should concur in an application for an order of reference in order to make the submission valid and that it was only necessary that all the parties who were *interested in the subject-matter of the reference* should have joined in the submission." See also *Muhammad Khalil* v. *Abdul Rahim,* 7 P.L.T. 644=A.I.R. 1925 Pat. 810 ; *Muhammad* v. *Abdul,* 7 P.L.T. 644=A.I.R. 1925 Pat. 810. It is not an invariable rule that every necessary party is necessarily an interested party in all matters of difference between those actively litigating. There may be cases where a person may be a necessary party and yet not an interested party in regard to any matter in difference between them. A man may be *ex parte* and yet interested within the meaning of the section. *Madan* v. *Nabi Baksh,* 226 Ind.Cas. 241=48 P.L.R. 377=A.I.R. 1947 Lah. 177. The words "parties interested" in this section are not confined to parties who are claiming something in their favour and do not cover a case where a party is pleading against his own interest. Although the action of a party to a suit should be detrimental to his own interest, he is nonetheless "interested" in the decision of the matter in difference arising between the parties to the suit. *Ram Harak* v. *Mumtaz,* 4 D.L.R. (All.) 70= A.I.R. 1949 A. 679.

Court has no jurisdiction to refer the matter to arbitrators where the plaintiff and some of the defendants agree. *Imtaz* v. *Dost Mahomed,* 10 O.W.N. 790=A.I.R. 1933 Oudh 384 ; *Abdur Beg* v. *Nathumal,* 1933 A.L.J. 602 ; *Tej Singh* v. *Ghasi Ram,* A.I.R. 1927 All. 563=49 All. 812=25 A.L.J. 606=102 Ind.Cas. 236 ; *Ranga Reddi* v. *Chinna Sidda,* A.I.R. 1927 Mad. 1154 ; *Wahed* v. *Ram.* (1938) A.L.J. 1044. In this section the words 'all the parties interested" mean parties interested in the specific dispute referred to arbitration and not in the subject-matter of the whole suit where the two are not indentical. *Lakshman* v. *Raghubir,* A.I.R. 1956 Punj. 249. There is nothing in the Arbitration Act which compels the parties to a pending suit to subscribe to one and the same application for referring the dispute to arbitration and there is no objection to more than one application being made provided they all agree on the object and method of the arbitration proceedings. *Mahadeo* v. *Kamala,* A.I.R. 1956 All. 51. The word "they" occuring in s. 21 of the Arbitration Act refers to the words "all parties interested" occuring at the beginning of section and does mean "they or any of them" as used in s. 20 of the Act. *Kissen Gopal* v. *Murlidhar,* A.I.R. 1962 Cal. 581. In a dispute as regards title between the true owner and from whom the tenant claims possession, the

tenant is not a party interested in dispute. *Seth Fida Hussain* v. *Fazal Hussain* 1963 M.P.L.J. 248 = A.I.R. 1963 Madh. Pr. 232.

1067. Order of reference, necessity of.—In order to vest jurisdiction in the arbitrator to deal with a pending suit it is necessary that the court should make an order, referring the suit to him and shall specify the order such time as it thinks reasonable for the making of the award. *Kunheen* v. *Kunhipathumma*., A.I.R. 1959 Ker. 414 = 1958 Ker L.T. 207 = 1958 Ker L.J. 207 = 1958 Ker L.J. 269.

1068. Reference through Court—Application by only some of the interested parties.—Before any matter involved in a suit pending in a court can be referred to arbitration under this section, (*a*) there must be an agreement amongst all the parties interested that any matter in dispute between them in the suit shall be referred to arbitration; (*b*) if any come to such an agreement then they have to make an application in writing to the court concerned; and (*c*) thereafter, the court has to pass an order referring the dispute to the arbitrator agreed upon between the parties. Thus the foundation of the jurisdiction of the court to make such an order is an agreement between and an application made by, the parties interested. *Kheturam* v. *Kashmiri*, 61 Punj. L.R. 767 = A.I.R. 1959 Punj. 617 (F.B.).

Where a judge refers a case to arbitrators, without the consent of parties interested, he exercises a jurisdiction not vested in him by law. *Prasanna* v. *Muthswami*, A.I.R. 1925 Mad. 1209 = 50 M.L.J. 100 = 22 L.W. 395 = (1925) M.W.N. 744. Every party *ex parte* must be consulted if interested. *Ibid*. See also, *Venkataramia* v. *Vasudeva*, 96 Ind.Cas. 273. A person who has chosen to remain absent and allow *ex parte* proceedings to be taken against him is not necessarily a person not interested in the subject-matter of the suit. An important test is to consider whether he is a necessary party or such that if not originally impleaded the court would direct him to be joined under Order I, rule 10. *Sharafat Ali* v. *Bhagwati*, A.I.R. 1929 All. 763 = (1930) A.L.J. 239. It is a question of fact in each particular case whether any particular person is interested in the specific dispute which is referred to arbitration or not and that question is to be decided from the whole circumstances of the case including his conduct up to the end of the proceedings, and the court is not merely to be guided by the written statements. *Sugnomal* v. *Perumal*, A.I.R. 1930 Sind 256 = 24 S.L.R. 470 = 124 Ind.Cas. 374: *Hassomal* v. *Kondanmal*, A.I.R. 1927 Sind 239 = 104 Ind.Cas. 342 = 22 S.L.R. 135. See also, *Wisan Wali* v. *Hiranand*, A.I.R. 1931 Lah. 126 = 32 P.L.R. 44 = 12 Lah. 408 = 131 Ind.Cas. 348: *Mahadav* v. *Duttatraya*, A.I.R. 1928 Bom. 248 = 110 Ind.Cas. 343 = 52 Bom. 408: *Jot Singh* v. *Hot Chand*, A.I.R. 1935 Sind 212. If a person is *ex parte* in a suit, he does not thereby cease to be a party interested in the reference. Hence if such person has not joined the reference to arbitration made by the remaining parties, the reference to arbitration is invalid and the award is wholly void. *Ghafoor* v. *Abdul*, (1938) O.W.N. 475 = (1938) O.L.R. 215 = 174 Ind.Cas. 766 = A.I.R. 1938 Oudh. 154. See also, *Imtaz Khan* v. *Dost Mohammed*, A.I.R. 1933 Oudh. 384 = 147 Ind.Cas. 89 = 9 Luck. 73 = 10 O.W.N. 790: *Gulnur Bibi* v. *Abdus Samad*, A.I.R. 1931 Cal. 211 = 130 Ind.Cas. 209 = 58 Cal. 628 = 52 C.L.J. 208: *Karam Bibi* v. *Muhammad Alam*, A.I.R. 1929 Lah. 477 = 119 Ind.Cas. 235: *Patia Pavana* v. *Narasinga Panda*, A.I.R. 1920 Mad. 852 = 51 Ind.Cas. 155 = 42 Mad. 632 = 31 M.L.J. 538: *Pasumarti* v. *Bollan*, 73 Ind.Cas. 203: *Ladhuram Nathu Mal* v. *Nanda Lal*, 55 Ind.Cas. 747 = M.L.J. 142 = 21 L.W. 498 =

A.I.R. 1925 Mad. 621 ; *Dooly Chand* v. *Mamuji,* 41 Ind.Cas. 295 = *Lachman* v. *Naman,* A.I.R. 1929 Lah. 174 = 118 Ind.Cas. 393 ; *Hoswa* v. *Mahbub,* 10 Ind.Cas. 559 = 8 A.L.J. 645 ; *Subba Rao* v. *Appadurai Iyer,* 86 Ind.Cas. 839 = (1925) M.W.N. 97 = 48 21 C.W.N. 387 = 25 C.L.J. 339 ; *Deonarain* v. *Sugan Chand,* (1935) A.M.L.J. 89 *Jot Singh* 47 Cal. 55 = 31 C.L.J. 150 ; *Sarafat Ali* v. *Bhagwati,* A.I.R. 1929 All. 763 = (1930) A.L.J. 239 ; v. *Hot Chand,* 159 Ind.Cas. 188 = A.I.R. 1935 Sind 212. The consent of all the parties is the foundation of the courts' jurisdiction to make an order of reference. *Ram Harakh* v. *Mumtaz,* A.I.R. 1949 All. 679 = 4 D.L.R. (All.) 70. The expression "parties interested in the suit" in this section should not be restricted only to those persons against whom relief is claimed. A person against whom no relief is claimed may be interested in the result of the suit, inasmuch as his liability to the plaintiff may ultimately arise by reason of any decision that may be given in the suit. *Subba Rao* v. *Appadurai, supra.* Where one of the parties does not join the court is not competent to make a valid reference. *Mahomed* v. *Muhammad,* 31 P.L.R. 55 ; *Venkata Subbaraya* v. *Venkataramayya,* 126 Ind.Cas. 735 = A.I.R. 1930 Mad. 646. Where parties have a common interest it is not sufficient that certain persons should go and seek to refer the dispute pending between them and the other party to arbitration, without taking steps to consult the other persons who had such common interest and to get their authority to represent them on their behalf. *Hashmat* v. *Siddiq,* A.I.R. 1927 All. 128 = 98 Ind.Cas. 998. A party who is entitled to maintenance in a suit need not be joined. *Sabta* v. *Dharam,* 35 All. 107. Where two out of three defendants have confessed judgment. the third is competent to refer it to arbitration. *Faiz Ali* v. *Ashraf,* A.I.R. 1929 Lah. 177 ; *Brij Raj* v. *Ramnath,* A.I.R. 1925 Oudh 201. A *proforma* party need not join. *Raminder* v. *Mohinder,* 190 Ind.Cas. 399 = A.I.R. 1940 Lah. 186. 186 ; *Fauzdar* v. *Emperor,* A.I.R. 1926 All. 261 = 91 Ind.Cas. 815 = 27 Cr.L.J. 143 = 48 All. 236 = 24 A.L.J. 239. Where an award is declared invalid because one of the parties to the proceeding did not join in the reference the award cannot be upheld in part if the decree is joint one. *Mahomed* v. *Nanhe,* 130 Ind.Cas. 291 = (1931) A.L.J. 100 = A.I.R. 1931 All. 242. But now some change has been made by s. 24. *Vide* notes under that section.

A reference to arbitration through court under s. 21 by one partner alone cannot, therefore be legalised by subsequent acquiescence and ratification by other partner. *Firm Khetu Ram* v. *Kashmiri Lal,* 61 Punj. L.R. 767 = A.I.R. 1959 Punj. 617 = I.L.R. (1960) Punj. 10 (F.B.). The jurisdiction of the court to make an order for reference in a pending suit is founded upon the agreement amongst all the interested parties that the dispute between them shall be referred to arbitration and also they must apply to court for making an order for reference. Even after agreeing to refer, either party has *locus penitential* to withdraw before the order of reference is made. *Kissengopal* v. *Murlidhar* A.I.R. 1962 Cal. 581.

1069. Validity of award where some of the parties join.—This section does not mean that all parties who are combating the suit must necessarily join in arbitration, but where interest of defendants may be secured there is no bar to some of the contesting defendants joining with the plaintiff in referring the matter between them to arbitration. *Bankey Lal* v. *Chotey Lal,* A.I.R. 1931 All. 453 = 133 Ind.Cas. 31 = (1931) A.L.J. 442 ; *Raghunath* v. *Ramrup,* A.I.R. 1924 Pat. 33 = 76 Ind.Cas. 2 = 2 Pat. 777 ; *Suguo Mal* v. *Paru Mal,* A.I.R. 1930 Sind 256 = 124 Ind.Cas. 374 ;

Ayodhya v. *Badar Husain*, 39 All. 489=41 Ind.Cas. 357. The award binds the parties to the reference even if some of the parties interested were not parties thereto. 10 Pat.L.T. 53=115 Ind.Cas. 680; *Ram Lachmi* v. *Narsing*, A.I.R. 1953 Punj. 216. See now new section 24 inserted in this Act. Where in a suit for dissolution of partnership and accounts, a reference to arbitration is made and one of the partner does not join in it, the reference is invalid. *Rangareddi* v. *Chinsadda Reddi*, 102 Ind.Cas. 2=A.I.R. 1927 Mad. 1154. See also, *Patita Pavana* v. *Narasinga*, 42 Mad. 632=51 Ind.Cas. 155=31 M.L.J. 538; *Subbarao* v. *Appadurai*, A.I.R. 1925 Mad. 621; *Baijnath* v. *Narain Prasad*, A.I.R. 1927 All. 614=25 A.L.J. 787=102 Ind.Cas. 608.

1070. Reference to arbitration by one of the trustees.—Reference to arbitration by one of the trustees without concurrence of co-trustees is not competent. *Lakha Singh* v. *Hasbhajan*, A.I.R. 1958 Punj. 102=59 Punj. L.R. 615.

1071. Parties in partnership suit.—The principle that in a pending suit all parties must join in a reference also applies to arbitration out of court. Disputes relating to accounts of partnership cannot be settled unless all the partners are joined, because the dispute involves the interest of all the parties which cannot be settled piecemeal by some of the partners without the consent of the others. *Abdul Ghani* v. *Sirajuddin*, 41 P.L.R. 580=A.I.R. 1939 Lah. 154; *Jaskaran* v. *Ram Chand*, 148 Ind. Cas. 1080=35 P.L.R. 417=A.I.R. 1934 Lah. 483.

In a suit for dissolution of partnership and accounts, the parties having no dispute with the signatory partners, are "parties interested" which the meaning of S. 21. *Hans Raj* v. *Surjit Singh*, A.I.R. 1963 Punj. 252.

1072. Reference by Companies.—Under section 152, Companies Act, 1913, before the Arbitration Act, 1940, came into force a company could only enter into an arbitration under the provisions of the Arbitration Act of 1899, and consequently companies were outside the scope of Sch. 2, C. P. Code and were precluded from making a reference under that provision. *Catholic Bank* v. *Albaquerque*, A.I.R. Mad. 308 (F.B.).

1073. Reference by a partner.—Although a reference by a partner without authority is not valid still where on a reference by a managing partner, substantial justice has been done, the award cannot be interfered with. *Harprasad* v. *Bhagwati*, A.I.R. 1933 All. 924: *Bhagwan* v. *Hiraji*, 140 Ind.Cas. 519=34 Bom.L.R. 1112=A.I.R. 1932 Bom. 516. In other cases, it is not a part of authority of one partner of a firm to refer a suit to arbitration to which the firm is a party. *Rajendra* v. *Panna*, 138 Ind. Cas. 386=36 C.W.N. 8=A.I.R. 1932 Cal. 343; *Diwan* v. *Punjab National Bank*, 133 Ind.Cas. 558: *Jiwan Mall* v. *Paras Ram*, 188 Ind.Cas. 906; *Radha* v. *Asha*, A.I.R. 1926 Lah. 91=7 Lah.L.J. 603; *Mohammad* v. *Dwarka*, 6 Ind.Cas. 63=11 C.L.J. 658=14 C.W.N. 1106; *Gopal* v. *Baijnath*, A.IR. 1926 All. 238; *Ram Bharosa* v. *Kathu*, 22 All. 135; *Govinda* v. *Nihal*, A.I.R. 1925 Lah. 61=84 Ind.Cas. 726; *Chandu* v. *Venugopal*, 43 Ind.Cas. 508; *Bhagwan* v. *Hiraji*, A.I.R. 1932 Bom. 516=34 Bom.L.R. 1112. But the award may be binding between the parties to the agreement. *Jagannath* v. *Dinanath*, 134 Ind.Cas. 99=I.R. 1931 Cal. 867. The manager of a joint Hindu family is entitled to refer to arbitration disputes on behalf of the coparcenary business or firm. *Sheo Dayal* v. *Mohan Lal*, 122 Ind.Cas. 231=A.I.R. 1930 Lah. 388. See also,

Tejbhan v. *Somnath*, A.I.R. 1930 Sind 40=117 Ind.Cas. 783 ; *Bishambar* v. *Ganga*, A.I.R. 1923 Lah. 212=5 Lah.L.J. 5=71 Ind.Cas. 734.

1074. Reference by agent.—An authorised agent is competent to refer matter to arbitration. *Bhagwan* v. *Nand*, 12 Cal. 173 ; *Hurdeo* v. *Thana*, 48 P.R. 1882. *Ahmed* v. *Bhagabati*, 170 P.R. 1883 ; *Ramdas* v. *Abbas*, 51 P.R. 1893 (F.B.) ; *Choohur* v. *Jeet*, 64 P.R. 1870 ; *Hari Singh* v. *Lachmi*, I.P.R. 188 ; *Thomas* v. *Bani*, 3 S.L.R. 5=1 Ind.Cas. 937 ; *Unniram* v. *Chatham*, 9 Mad. 451. Unauthorised act of an agent can be subsequently ratified by the principal. *Saturjit* v. *Duhir*, 24 Cal. 469. Where a reference to arbitration was made by certain persons of a community describing themselves as representatives of a community and an award was given by the arbitrators the award is not binding upon the community unless the authority of the signatories to bind the community is proved. *Hasmat* v. *Siddiq*, 98 Ind.Cas. 998=A.I.R. 1927 All. 128. Were the power of attorney did not authorise the agent to refer to arbitration but nevertheless the agent referred a pending suit to arbitration and an award was passed and the principal who was not aware of the reference and came to know of it only after the proceedings were over, is entitled to institute a suit challenging the validity of the award. *Sonamian* v. *Karuppiah*, (1933) M.W.N. 1475.

1075. Reference by attorney, pleader or counsel—An attorney acting for a firm and having the power to conduct a suit has no power to refer a matter to arbitration unless he is authorised specifically for that purpose. *Rajendra* v. *Panna Lal*, 138 Ind.Cas. 381=36 C.W.N. 8=A.I.R. 1932 Cal. 343. A pleader has no authority to apply for making a reference to arbitration unless his *vakalatnama* is so worded as to give him that authority specifically. *Hussainbhai* v. *Bansilal*, 79 Ind.Cas. 48=A.I.R. 1924 Nag 338 ; *Sheo Das* v. *Brijnandan*, 7 C.W.N. 343. *Ramjiwan* v. *Kalicharan*, 29 All. 429=4 A.L.J. 342=(1907) A.W.N. 139 ; *Jailal* v. *Tapeswari*, 45 Ind.Cas. 321 ; *Dwarka Nath* v. *Fanindra*, 49 Ind. Cas. 262 ; *Lauxmibai* v. *Wedina*, 23 Bom. 629=1 Bom.L.R. 617 *Goor Ghunder* v. *Joogol*, 1 W.R. 80: *Wazeera* v. *Mookim*, 11 P.R. 1869 ; but see. *Sri Krishna* v. *Relu Mal*, 34 Ind.Cas. 845 ; *Thadomal* v. *Meghraj*, A.I.R. 1930 Sind 190. But where he is specially authorised, he can put his signature to the application for arbitration. *Guranditta* v. *Pokhar Ram*, 104 Ind.Cas. 202=A.I.R. 1927 Lah. 362 ; *Dab Singh* v. *Man Chand*, 46 P.L.R. 348. A pleader appearing for another pleader, cannot make a valid reference to arbitration on behalf of the latter's client, without a *vakalatnama* authorising him to do so. *Aziz Din* v. *Moti Ram*, 96 Ind. Cas. 277=A.I.R. 1926 Lah. 563 ; *Amir Shah* v. *Abdul*, A.I.R. 1932 Lah. 373. But a counsel who has limited authority cannot refer the matter to arbitration. *Chunilal* v. *Hiralal*, A.I.R. 1928 Cal. 373=32 C.W.N. 44= 106 Ind.Cas. 309 ; *Madho* v. *Kanhaiya*, A.I.R. 1946 All. 1 ; but see, *Amir Sha* v. *Abdul*, *supra*. But where a counsel has been authorised to refer the matter to arbitration on behalf of his client, the validity of a reference to arbitration consented to by the counsel cannot be impugned on the ground that the party himself had not signed the application. *Sukh Lal* v. *Maru Chand*, 219 Ind.Cas. 162=46 P.L.R. 348=A.I.R. 1945 Lah. 34. See also *Bapulal* v. *Natunlal*, 1962 M.P.L.J. (Notes) 82=1961 Jab.L.T. 1437 (inherent power of advocate to make reference under order 3, r. 4 of the C.P. Code).

1076. Agree.—An application under this section should be signed by all parties interested in the settlement of the suit. *Neji Puran* v. *Hira*

Singh, 1 Ind.Cas. 147=6 A.L.J. 333. The application should be presented by all the parties so interested. *Miran Bakshi* v. *Sher Muhamad*, 9 Ind.Cas. 195=50 P.L.R. 1911=17 P.R. 1911; *Ghulam* v. *Mohammad*, 25 P.R. 1902=12 M.L.J. 77=25 Cal. 167=29 I.A. 51; *Indur Subbaramy* v. *Kandadai*, 26 Mad. 47; *Parsiah* v. *Ghansham*, 9 C.W.N. 873; see *Madan* v. *Nabi*, A.I.R. 1947 Lah. 215.

1077. Party to the reference.—Where nobody signs on behalf of a party and nobody proposes to verify the petition before the court on his behalf, he is not a party to the reftrence to arbitration. *Mahomed* v. *Nanhe*, 130 Ind.Cas. 291=1931 A.L.J. 100=A.I.R. 1931 All. 242.

1078. Where one of the parties is a minor.—"This section makes no reference to the procedure to be adopted where one of the interested parties is a minor. However Order XXXII, rule 7, Civil Procedure Code, deals with the procedure to be followed where a next friend or guardian of a minor enters into any agreement or compromise.....In my opinion this view is well-founded. The precise point arose in a case decided by a Full Bench of the Allahabad High Court in *Mariam Bibi* v. *Amina Bibi*, A.I.R. 1937 All. 65=165 Ind.Cas. 99=I.L.R. (1937) All. 317=1936 A.L.J. 1333 (F.B.). The Full Bench, of which, I was a member *held* that para. 1 of Schedule 2 of the Civil Procedure Code was subject to the provisions of Order XXXII, rule 7". *Per Harries C.J.* in *Kedar Nath* v. *Basant Lal*, A.I.R. 1939 Pat. 278=18 Pat. 271=193 Ind.Cas. 422=20 Pat.L.T. 170 =1939 P.W.N. 157; *Chabba Lal* v. *Kalu Lal*, A.I.R. 1946 P.C. 72=1946 M.W.N. 161=50 C.W.N. 465. See also, *Loung Tahir* v. *Ram Singh*, A.I.R. 1940 Sind 178=I.L.R. (1940) All. 327. Merely obtaining an order referring the matter to arbitration is not sufficient. The court must first be asked on behalf of the minor for its leave to permit the guardian to agree to a reference to arbitration and the court must expressly record its reasons for giving or referring such permission. It is only after obtaining the leave of the court that the guardian can agree to a reference to arbitration and any agreement without such leave will render all subsequent proceedings invalid at the option of the minor. *Ibid.* See also *Vijaya Ramayya* v. *Venkatasubba Rao*, A.I.R. 1917 Mad. 672=32 Ind.Cas. 881= 30 M.L.J. 465=39 Mad. 853; *Sadasivappa* v. *Sangappa*, A.I.R. 1931 Bom. 500=134 Ind.Cas. 1221=33 Bom.L.R. 1033; *Nurual Anwar* v. *Golenoor Bibi*, A.I.R. 1934 Cal. 845=153 Ind.Cas. 289=52 C.L.J. 521; *Chenna* v. *Veeraswami*, A.I.R. 1933 Mad. 862; *Hanuman Rai* v. *Jagadis Rai*, A.I.R. 1916 Pat. 223=35 Ind.Cas. 675; *Ganesh Rao* v. *Tuljaram Row*, 36 Mad. 295=19 Ind.Cas. 515=40 I.A. 132=(1913) M.W.N. 575 =25 M.L.J. 150 (P.C.). In the last named case their Lordships of the Privy Council observed: "No doubt a father or managing member of a joint Hindu family may under certain circumstances, and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is a party to a suit, and a next friend or a guardian has been appointed to look after the right and interests of the infant in and concerning the suit, the act of such next friend or guardian are subject to the control of the court." See also, *Chajju Mal* v. *Tarloki Nath*, A.I.R. 1916 Lah. 665=96 Ind. Cas. 748=17 P.L.R. 729; *Hanuman Rai* v. *Jagadis Rai*, 35 Ind.Cas. 675; *Jumnamal* v. *Gurdinomal*, 83 Ind.Cas. 913=A.I.R. 1921 Sind 61=17 S.L.R. 21; *Lakshmana* v. *Chinna Thambi*, 24 Mad. 326; *Atma Ram* v. *Bhila Ganpat*, 19 Ind.Cas. 424=15 Bom.L.R. 223; *Chiwanbhai* v. *Keshavlal*, 73 Ind.Cas. 464=A.I.R. 1923 Bom. 402=47 Bom. 721=25

Bom.L.R. 443; *Pragdas* v. *Girdhardas,* 26 Bom. 76=3 Bom.L.R. 431; *Lakshmana* v. *Chinnathambi,* 24 Mad. 326.

In *Muhammad Ibrahim* v. *Allah Baksh,* 52 Ind.Cas. 327=145 P.R. 1919 the court observed: "The first contention raised before us is that the lower court, having found that 'the plaintiff's next friend did not obtain an express sanction of the court before referring the case to the arbitration of Pandit Ram Nath' was wrong in dismissing the plaintiff's claim. In suport of this contention the Full Bench ruling of this court in *Ganesha* v. *Mulchand,* 15 Ind.Cas. 161=95 P.R. 1912=159 P.W.R. 1912, and the provisions of Order XXXII, rule 7, are relied upon. On behalf of the defendants-respondents it has been argued that the provisions of Order XXXII rule 7, are applicable to an application referring a matter to arbitration, inasmuch as it is neither an agreement nor a compromise within the meaning of this rule. The decisions of the Allahabad High Court are cited by the learned counsel in support of his contention, namely: (1) *Hardeo Sahai* v. *Gouri Shankar,* 28 All. 35 =2 A.L.J. 493=1905 A.W.N. 171 and (2) *Lutawan* v. *Lachiya,* 21 Ind. Cas. 989=36 All. 69=12 A.L.J. 57. The first was a decision under sections 462 and 506 of the old Code of 1882. The second decision is under the new Code and is certainly in point and supports the argument; but it is opposed to the Full Bench ruling of this court."

In the Full Bench case of *Mariam* v. *Amina,* A.I.R. 1937 All. 65= 167 Ind.Cas. 99=I.L.R. (1937) All. 317=1936 A.L.J. 1333 (F.B,), *Iqbal Ahmed J.* thus explained the Full Bench case of *Lutawan* v. *Lachiya,* (*supra*): "As the decision in *Lutawan's case,* (*supra*) turned on another point, the observations of two of the learned Judges quoted above, though entitled to great weight were mere *obiter dicta.* but the view taken by them is not shared by any of the High Courts in India. In *Vijaya Ramayya* v. *Venkata Subba,* (*supra*) *Chajju Mal* v. *Tarloki,* A.I.R. 1926 Lah. 665=96 Ind.Cas. 748=27 P.L.R. 729, *Sadashivappa* v. *Sangappa,* (*supra*) and *Golenur Bibi* v. *Abdul Samad,* (*supra*) the contrary view was taken and it held that leave of the court under Order XXXII, rule 7, must be obtained by a guardian *ad litem* of a minor for agreeing on his behalf to refer through court the subject-matter of a suit to arbitration. It is therefore manifest that the weight of authority is decidedly against the view expressed by the two learned Judges in *Lutawan's case,* (*supra*). Apart from this I, with all respect, am unable to agree with the learned Judges in holding that the replacement of the word 'desire' with the word 'agree' was a mere slight verbal change and the weight could not be given to this alteration in the new Code. The word 'agree' is a technical term and must be interpreted in its technical sense. Where the parties to a suit consent to refer the matter in dispute to arbitration the consent amounts to an agreement as defined by the Indian Contract Act and in the absence of anything to the contrary, it must be assumed that the word 'agree' was used by the Legislature in that sense." See also, *Nurul Anwar* v. *Golenur Bibi,* 59 C.L.J. 521; *Hanuman Singh* v. *Ram Lakhan,* 128 Ind.Cas. 437=1930 A.L.J. 923= A.I.R. 1930 All. 646; *Ponuayya* v. *Suppammal,* A.I.R. 1946 Mad. 391; *Debidas* v. *Keshab,* A.I.R. 1945 All. 423.

Where a partition suit is referred to arbitration and the arbitrators accept a compromise consented to by all the parties and by the guardian on behalf of the minors but without the sanction of the court under Order XXXII, rule 7 of the Civil Procedure Code, the absence of the court's sanction does not render a decree passed on the compromise void,

but only voidable at the option of the minor. *Chenna* v. *Veeraswami*, 38 L.W. 927=A.I.R. 1933 Mad. 862=65 M.L.J. 755; but see *Subramania* v. *Biravaperumal*, A.I.R. 1935 Mad. 1068=(1935) M.W.N. 992=69 M.L.J. 523=42 M.L.W. 612=158 Ind.Cas. 713. If minors successfully challenge an agreement to refer as not made in compliance with sub-rule (1) of rule 7, it is avoided against all parties under sub-rule (2). *Chabba Lal* v. *Kallu Lal*, A.I.R. 1946 P.C. 72.

1079. Power of a Karta of a joint family.—The sole adult member can as *Karta* maintain a suit on a mortgage executed in favour of the family and where the minor members have been added as *proforma* defendants it is open to the manager to exempt the latter from the suit and after the court does so refer the matter to arbitration. *Raja Ram* v. *Gopi Nath*, 133 Ind.Cas. 416=A.I.R. 1931 All. 721; *Ram Bilas* v. *Bircch*, 12 Pat.L.T. 733. A reference to arbitration made by the manager of a joint Hindu family consisting of himself and his sons is binding upon the sons unless the father's act was tainted with fraud or collusion or was otherwise done in bad faith. *Guran Ditta* v. *Pokhar Ram*, 104 Ind.Cas. 202=A.I.R. 1927 Lah. 362. See also, *Ranga Ram* v. *Saligram*, 11 Ind.Cas. 481=14 C.L.J. 188; *Jagannath* v. *Mannu Lal*, 16 All. 231; (1894) A.W.N. 60; *Upparachingappa* v. *Goddam*, 50 Ind. Cas. 471=9 M.L.W. 314. For further discussion *vide* p. 19 (*supra*).

1080. Effect of consent subsequently given.—What gives the court jurisdiction to refer the matter to arbitration is the consent of all parties. Consent subsequently given cannot give jurisdiction to the court which it does not possess at the time when it referred the matter to arbitration. A person, therefore, who was not a party to the reference cannot be subsequently appearing before the arbitrator and giving his consent to the arbitration proceedings render them valid. In such a case there is not morely an irregularity but the foundation of the court's jurisdiction is taken away and the award is absolutely void. *Subba Rao* v. *Appadurai*, 86 Ind.Cas. 839=A.I.R. 1925 Mad. 621=48 M.L.J. 142=21 M.L.W. 498=(1925) M.W.N. 97.

1081. Award according to agreement is valid though incomplete.—When it appeared from the evidence on the record that the parties agreed, to the settlement of the dispute in a certain manner and gave up the remaining points which they apparently considered to be trival, the incomplete character of the award cannot be considered to be fatal to its validity, when the arbitrator gives his award according to the agreement. *Bhola Ram* v. *Hukum Chand*, A.I.R. 1929 Lah. 831=117 Ind.Cas. 89. Cf. *Darbari Lal* v. *Wasu Malik*, 56 Ind.Cas. 115; *Gobardhan Das* v. *Jai Kishan Das*, 22 All. 224=(1900) A.W.N. 52.

1082. Reference in pending suit beyond scope of suit.—Where in pursuance of an agreement between the parties to get both matters in a pending suit and matters out of suit decided by an arbitrator through the court, with a view to put an end to the pending litigation, a reference is made by the court to arbitration, the reference is vitiated by illegality at its inception, and the award made on such reference cannot be enforced either as an award in the suit or as a compromise by a separate suit. *Lakshminarayan* v. *Nagamma*, 158 Ind.Cas. 1071=(1935) M.W.N. 1053=42 L.W. 608=A.I.R. 1935 Mad. 1053. In the course of the judgment the court observed: "The plaintiffs who are appellants base their arguments mainly on the decision reported in *Narayan Iyenger* v. *Tripayya*, A.I.R. 1926 Mad. 366=92 Ind.Cas. 847, where it was held that when there was a reference to arbitration through

court and a separate agreement by the parties that the arbitrators should deal with matters not within the scope of the suit, though the award is invalid under para. 15, read in the light of para. 3, Schedule 2, Civil Procedure Code, yet the agreement between the parties, that these matters outside the suit should be settled by the arbitrator, is binding upon them and it may form the subject of a separate suit. With reference to that ruling, it must be observed that in the present case there is really no agreement subsequent to the agreement to refer matters to arbitration. The agreement embodied in Ex. A. is essentially an agreement by the party to get both the matter in suit and some matters out of suit decided by the arbitrator through the court, with a view to put an end to the pending litigation. Apart from this reference through court, there was no agreement at all, and if the reference through court broke down, the prospect of putting an end to the litigation ceased, and the whole foundation of the agreement goes, and there is nothing left which can be enforced. I take it that this is the line of thought which must have formed the basis for the decision in the case of *Bodachari* v. *Muniyachari,* A.I.R. 1921 Mad. 709=65 Ind.Cas. 92, wherein a Bench of this court, in a similar case found that 'an award under an invalid reference being itself invalid gives no rights either as an award or as a compromise.'

"It has been argued that the authority of this case is taken by a Full Bench decision, *Subbaraju* v. *Venkatarama Raju,* A.I.R. 1928 Mad. 1025 =113 Ind.Cas. 632=55 M.L.J. 429=51 Mad. 800 (F.B.), wherein it is held that s. 89, Civil Procedure Code is not a bar to a decree in terms of an award based on an extra-judicial reference to arbitration being passed in a pending suit. It is true that their Lordships considered *Bodachari* v. *Muniyachari, supra,* and dissent from it so far as it relates to the applicability of a bar under s. 89 of the Civil Procedure Code, to the recording of a compromise as a result of an extra-judicial reference to arbitration, but there is no dissent from the decision in the previous paragraph of the judgment in *Bodachari* v. *Muniyachari, supra,* to the effect that the award under an invalid reference being itself invalid, gives no rights either as an award or as a compromise. It seems to me that the decision in *Bodachari v. Muniyachari, supra,* must rest on the logical conclusion that though an agreement to compromise a suit may be enforced in separate proceedings, there can be no such agreement for private compromise where the whole tenor of the agreement in question contemplates an award through the intervertion of the court". See also, *Ram Partab* v. *Durga Prosad,* 92 Ind.Cas. 633=A.I.R. 1925 P.C. 293; *Mahomed Ali* v. *Charat Singh,* 80 Ind.Cas. 596=A.I.R. 1925 Sind 51; *Taranath* v. *Manik,* 14 W.R. 469; *Merali* v. *Sheriff,* 12 Ind.Cas. 687=36 Bom. 105 13 Bom.L.R. 1017. An agreement to recognise an award beyond the scope of the disputes mentioned in the reference is void and is not binding on the parties to the reference. This principle applies with greater force to an award passed on a reference made through the court, in a pending suit, as in that case the arbitrators derive their authority from the court and their award must be confined to matters in dispute in the suit. *Parasrani* v. *Topandas,* A.I.R. 1928 Sind 81=21 S.L.R. 253=102 Ind. Cas. 183; *Naraindas* v. *Kewalram* 11 S.L.R. 43=42 Ind.Cas. 706; but see *Ramchand* v. *Gobindram,* 13 S.L.R. 75=53 Ind.Cas. 337. If the parties to a suit apply to the court for an order of reference with regard to the matter in difference in the suit and on the same day make a

reference to arbitration without the intervention of the court with regard to other matters in dispute between the parties by a separate agreement, the order of reference by the court with regard to the subject-matter of the suit cannot be questioned on the ground of illegality or invalidity. So also if the parties in their application for reference to arbitration with regard to matters in difference in a suit put in other matters of difference but the court make a reference to the arbitrators only with regard to the matters in difference in the suit without any objection of the parties, such reference is not illegal. *Jatindranath* v. *Manindranath*, A.I.R. 1927 Cal. 52=44 C.L.J. 224=98 Ind.Cas. 803. Court which has no territorial jurisdiction to decide a matter cannot refer it to arbitration. *Guardian Assurance* v. *Thakur Shiva*, A.I.R. 1937 All. 208=1937 A.L.J. 98=I.L.R. 1937 All. 234=167 Ind.Cas. 897. See also, *Lodharam* v. *Rala Ram*, 112 Ind.Cas. 262=10 L.L.J. 242=A.I.R. 1928 Lah. 730 : *Naraindas* v. *Valabhdas*, 111 Ind.Cas. 425=A.I.R. 1929 Sind 1=23 S.L.R. 299.

1083. Reference to arbitration in pending suits—Parties.—It is not necessary that all the parties in a suit should concur in an application for an order of reference to an arbitrator. It is only necessary that all parties interested in the subject-matter of the reference should join in the submission. Further, the parties to a reference cannot challenge the validity of an award on the mere ground that one of the parties to the suit was not a party to the arbitration. *Gummurty* v. *Narasinha*, A.I.R. 1954 Orissa, 334 ; see also A.I.R. 1951 Pat. 445 : A.I.R. 1951 Simla 183.

1084. Matter in difference between the parties.—Unless there is a real difference or dispute between the parties there is no scope for the operation of the clause providing for a reference to arbitration. *Dawoodbhai* v. *Abdul*, 130 Ind.Cas. 588=33 Bom.L.R. 51=A.I.R. 1931 Bom. 164 ; *Uttamchand* v. *Jewa*, 46 Cal. 534=54 Ind.Cas. 285 ; *L. & N. W. RY.* v. *Bellington*, (1899) A.C.) 79=68 L.J.Q.B. 162 ; *Velchand* v. *Lieut Liston*, 38 Bom. 638=25 Ind.Cas. 371. A dispute implies an assertion of a right by one party and repudiation thereof by another. *Dawoodbhai* v. *Abdul*, *supra*. The existence of dispute or difference contemplated by an arbitration clause is an essential condition of an pre-requisite to the exercise of the jurisdiction by the arbitrator. *Nandram* v. *Hanumat*, A.I.R. 1954 Cal. 245. There must be a point of difference or dispute between the parties for the decision of the arbitrator and it is not enough to state what the point of dispute or difference is after the suit has been filed. *Ibid.* See also, *Field* v. *Longdon*, (1902) 1 K.B. 47 : *Macnaghten* v. *Rameshwar*, 30 Cal. 831 ; *Uttamchand* v. *Mahomed*, 23 C.W.N. 704=46 Cal. 534=54 Ind. Cas. 285. Any question on which the parties join issue, whether the court can legally enquire into it, is a dispute within the meaning of this section. *T. Wang* v. *Sona Wangdi*, 87 Ind.Cas. 633=52 Cal. 559=29 C.W.N. 886=42 C.L.J. 26=A.I.R. 1925 Cal. 812. Any agreement as contemplated by this section between the parties should clearly set forth what are the matters in difference between the parties on which the arbitrators are required to arbitrate. Such points should be set forth clearly in the form of issues. *Furan Singh* v. *Bahal Kunwar*, A.I.R. 1930 All. 319=125 Ind.Cas. 583. But there is no provision in this section meeting an agreement to refer to arbitration which sets forth that any matter which might in future arise between the parties might also be referred to the decision of the arbitrators on application of the parties. *Ibid.* The expression "the matter in difference between the parties" is quite general and it fully covers the case where the parties in partition suit not having agreed among themselves as to how the properties were to be divided referred the question

to arbitrators. *Radhey Lal* v. *Kanhai Lal,* A.I.R. 1939 Pat. 526=18 Pat. 193=185 Ind.Cas. 52=1939 P.W.N. 591. An award not contemplated or authorised by the order of reference is invalid. It is not possible according to the statute law of India that one and the same arbitration should be held as to matter within the jurisdiction of the court and matters without the jurisdiction of the court, between the parties to the suit and between them and other persons and partly upon an order of reference and partly under an agreement. *Ram Pratap* v. *Durga Prasad,* 3 O.W.N. 127=A.I.R. 1925 P.C. 293=49 M.L.J. 812 (P.C.)=24 A.L.J. 13=43 C.W.N. 14=92 Ind.Cas. 633=53 Cal. 258=(P.C.)=28 Bom.L.R. 217; *Soudamini* v. *Gopal,* 28 Ind.Cas. 557=19 C.W.N. 948.

Before arbitrators get jurisdiction to decide a dispute, it must be clear that it is referred. Where the reference to arbitration is not clear as to matters referred, courts should not be unreasonable or unduly technical in construing the document when it is drawn up by persons not familiar with law and legal phraseology; but at the same time the court must be satisfied by the language used that a matter decided was in truth referred to the arbitrators for decision. It does not matter whether or not the arbitrators genuinely believed that a particular matter was referred, and the final decision as to whether the particular matter was referred or whether a particular party had consented to refer it lies not with the arbitrators but with the court. *Gopalam* v. *Mynani,* A.I.R. 1926 Mad. 752=50 M.L.J. 514=23 M.L.W 681=95 Ind.Cas. 740=(1926) M.W.N. 445. See also, *Atlas Assurance Co.* v. *Ahmedbhoy,* 11 Bom.L.R. 1=34 Bom. 1=1 Ind.Cas. 14. The question of pure law as well as facts may be referred to the arbitrators. *Soudamini* v. *Gopal,* 28 Ind.Cas. 557=21 C.L.J. 27=19 C.W.N. 948. See also, *Stiff* v. *Andrews,* 2 Mad. 6 : *Ching* v. *Ching,* 6 Ves. 281; *Young* v. *Walter,* 9 Ves. 364; *Mathew* v. *Davis,* 1 Dow. (U.S.) 679, *Ghulam Khan* v. *Muhammad,* 29 Cal. 167=29 I.A. 51=6 C.W.N. 226. Where points of law are referred to arbitrators, they have a right to decide them and their decision cannot be questioned on the ground that it is not in accordance with the received interpretation of the law. *Chhablal* v. *Parbati,* 33 Ind.Cas. 737=19 Oudh Cas. 48. The decision of arbitrators on a matter not in difference between the parties not referred to them is null and void for want of jurisdiction. *Moshalal* v. *Konomutty,* 15 W.R. 172. Where matters in dispute are referred to arbitration, and it is found that one question at issue is omitted from the reference, and that the award returned by the arbitrators contains no decision thereon, the party interested should bring omission to the notice of the court. If he fails to do so, the court is not wrong in not passing any order or coming to any decision on that point. *Raj Narain* v. *Juggeswar,* 14 W.R. 247.

1085. May.—The use of the word "may" in this section shows that the provisions of this chapter are permissible and not mandatory. *Basdeo* v. *Jagannath,* 131 Ind.Cas. 443=8 O.W.N. 71=O.L.J. 184=A.I.R. 1931 Oudh 127.

1086. At any time before judgment is pronounced.—Judgment in this section means only a judgment which finally decides all matters in controversy and not an interlocutory one which still leaves any of the matters in dispute undecided. A court has jurisdiction to refer the matters in dispute until it passes a final decree. The mere passing of a preliminary decree or the tendency of an appeal against the preliminary decree does not prevent the court from exercising the power. There is nothing in s. 21 to limit the power of court to any such manner. *Chidam-*

Saram v. *Subramanian* (1952) 2 M.L.J. 524=65 Mad.L.W. 930=A.I.R 1953 Mad. 492.

1087. "Apply in writing."—The record of an agreement to refer to arbitration in the court's proceedings which are signed by both the parties and their respective pleaders constitute sufficient compliance with the requirements of this section, even though there is no written application to the court by the parties. *Jag Mohan* v. *Suraj Narain,* 158 Ind. Cas. 300=1935 O.W.N. 1069=A.I.R. 1935 Oudh 499; *Wali Ullah* v. *Bhaggan,* A.I.R. 1925 Oudh 269=80 Ind.Cas. 7=28 O.C. 7; *Ghisalal* v. *Ram Pershand,* A.I.R. 1953 Ajmer 53. In *Goodipoodi* v. *Seshayya,* A.I.R. 1928 Mad. 48=105 Ind.Cas. 105, it has been held that the provision of this paragraph, that the application for reference shall be in writing, is directory only and not mandatory. See also, *Jayasankara* v. *Naggounda,* 1 M.H.C.R. 106; *Mirza* v. *Bundali,* 2 N.W.P. H.C.R. 419; *Joggessur* v. *Kubjani,* 24 U.R. 41; *Shamasundaram* v. *Abdul,* 27 Cal. 61=4 C.W.N. 92; *Venkatachalam* v. *Ramanathan,* A.I.R. 1922 Mad. 429=15 M.L.W. 111=31 M.L.T. 52=70 Ind.Cas. 410=(1921) M.W.N. 423; *Abdul Hamid* v. *Razuddin,* 30 All. 32=4 A.L.J. 694=(1907) A.W.N. 273; *Luxmibai* v. *Haji Widina* 23 Bom. 629=1 Bom.L.R. 617; *Mahabir* v. *Manohar Singh,* 79 Ind.Cas. 816=46 All. 208=22 A.L.J. 67 A.I.R. 1924 All. 540; *Gokaran Nath* v. *Gur Prasad,* 9 Ind.Cas. 412; *Jagannath* v. *Madho Singh,* A.I.R. 1935 Oudh 642; *Ramautar* v. *Sangat,* A.I.R. 1931 Pat. 920; *Kulsam* v. Ali *Akbar,* 39 Ind.Cas. 730=39 All. 401; *Nidamarthi* v. *Grigapatti,* 34 Ind.Cas. 741; *Muhammad* v. *Shakir Beg.* 78 Ind.Cas. 378=11 O.L.J. 142=A.I.R. Oudh 40; *Swaminathan* v. *Moona China,* A.I.R. 1933 Rang. 407=12 Rang. 1 *Umed Singh* v. *Sobhag Mal,* A.I.R. 1915 P.C. 79=32 Ind. Cas. 161=43 I.A. 1=43 Cal. 290 (P.C.); *Udit Singh* v. *Ram Lakshan,* 145 Ind.Cas. 403=1933 A.L.J. 149=A.I.R. 1933 All. 313; *Jagannath* v. *Dina Nath,* 134 Ind.Cas. 99.

Not only the writing out of an application to refer a pending suit to arbitration but the presentation of it must have the concurrence of all parties concerned. In other words, the parties interested must not only agree to refer the matter in difference between them to arbitration but they all must apply to the court for making an order of reference. After agreeing to refer, either party has a *locus penitential* to withdraw before the order of reference is made and he may take advantage of it. *Mahomed Yasin* v. *Allah Din,* 142 Ind.Cas. 678=34 P.L.R. 24.

1088. Court, meaning of, under the old Act.—Court includes appellate court. *Datta* v. *Kedar,* 11 Ind.Cas. 935=8 A.L.J. 678=33 All. 645; *Chiranji* v. *Jamma,* 7 N.W.P. 243 (F.B.); *Suresh* v. *Ambika,* 18 Cal. 507; *In re Sangaralingam,* 3 Mad. 78=5 Ind.Jur. 76; *Russol Bibi* v. *Jan Ali,* 17 W.R. 31=12 B.L.R. 267 (N.); *Bhugawan* v. *Nunda Lal,* 12 Cal. 173; *Jageswar* v. *Kritarthe,* 21 W.R. 210; *Puran Singh* v. *Bahal Singh,* A.I.R. 1930 All. 319 (2)=125 Ind.Cas. 583. In *Kahan Singh* v. *Mohan Lal,* 34 Ind.Cas. 177=44 P.W.R. 1916, the court of second appeal referred the matter to arbitration. Presentation of application to commissioner appointed by court is proper presentation of arbitration agreement. *Mohor Singh* v. *Amar Singh,* A.I.R. 1933 Oudh 521=10 O.W.N. 1102=147 Ind.Cas. 855; but see *Ashutosh Deb* v. *Apurba Kumar,* 10 C.L.J. 449=4 Ind.Cas. 570. A court of first instance to which issues have been remitted under Order XLI. rule 25 of the C. P. Code by the appellate court has only jurisdiction to try the issues remitted, and is *functus officio* in other respects, and cannot make a reference of the case to arbitration, which is only within the jurisdiction of the appellate court. *Nand Ram*

v. *Fakir Chand,* 7 All. 523=(1885) A.W.N. 139; *Gossain* v. *Biresessur,* 22 W.R. 207; *Risal Singh* v. *Bhola,* 1906 A.W.N. 221. An appellate court in referring a case under Order XLI, rule 25, has no power to order first court to call upon the parties to the suit to agree to arbitration, or on their failing to do so, to appoint arbitrators. *Puna Bibee* v. *Khoda Baksh,* 22 W.R. 396.

1089. Court, meaning of, under the Arbitration Act.—Court as defined in the Arbitration Act does not include an appellate court and consequently there is nothing in that Act which enables an appellate court to refer to arbitration the matters in dispute between the parties. *Abani Bhusan* v. *Hem Chandra,* A.I.R. 1947 Cal. 93=50 C.W.N. 838=227 Ind.Cas. 168; But see *Thakur Prosad* v. *Baleswar,* A.I.R. 1954, Pat. 106. It is wrong to say that the Arbitration Act does not apply to Revenue Court. *Raghubar* v. *Birjmohan,* 1945 R.D. 315=1945 A.W.R. (Rev.) 116.

1090. Power of court to modify order of reference.—There is no rule except s. 151, Civil Procedure Code, which can authorise a court to revise its own order supreseding a reference to arbitration. *Salle Singh* v. *Mullo Singh,* 138 Ind.Cas. 524=A.I.R. 1932 All. 656; see also, *Sital Das* v. *Nihal Chand,* A.I.R. 1942 Sind 7 where it has been held that the court cannot compel party to refer to arbitration matter not agreed to be referred.

1091. Proper reference—Power of court to withdraw.—Where certain matters before the court is properly referred to arbitration by parties, the arbitrator alone can be said to be seiezed of the matter and it is incorrect for the court to assume jurisdiction to decide the points in controversy. *Akhiman* v. *Ram,* A.I.R. 1958 All. 437.

1092. Court can cancel arbitration—when.—Where after a suit has been referred to arbitration one of the parties applies before any proceedings are taken by the arbitrator, to revoke the reference on the ground that it has subsequently come to his notice that the arbitrator is connected with the opposite party, the court should cancel the reference. *Karam Din* v. *Mohammad,* A.I.R. 1937 Lah. 71. Under the old Act it has been held that the court has inherent jurisdiction to deal with allegations of misconduct of arbitrator even though the award is not made. *Anand Das* v. *Rambhusan* Das, A.I.R 1933 Pat. 566=146 Ind.Cas. 1981; *Lachman* v. *Moghal,* A.I.R. 1925 Pat. 720=86 Ind.Cac. 540. But under the present Act of 1940, "the court may remove an arbitrator or umpire who has misconducted himself or the proceedings"; *vide* s. 11(2) and notes on subsection (2) of section 11 *supra.* See also notes under s. 23 under the heading 'Agreement to refer through court and ordinary agreement.'

1093. Judge as arbitrator.—When a judge is asked to arbitrate between the parties to a suit before him, he does not cease to be the court and become a pure arbitrator. The provisions of Chapter IV, Arbitration Act, as well as the provisions of Sch. 2, Civil P. C., before that, imply necessarily that when a dispute in a pending suit is referred to arbitration, the arbitrator must be a person other than the judge presiding in the court. Otherwise the provisions of that chapter would not be applicable at all. Hence even though the judge purports to act as an arbitrator, he is deciding the dispute not as an arbitrator under the Arbitration Act but because the parties agreed that whatever he decides will be treated as final and accepted by the parties. The provisions of the Arbitration Act would not apply to him. That being so, it is not necessary that the reference to him must be in writing and the provisions of chapter IV would not apply. *Dalal* v. *Jamadar,* 47 Bom.L.R. 388=A.I.R. 1945 Bom. 478. In the course of the judgment the court observed: "The question, therefore, is whether the

proceeding before the judge became an arbitration proceeding when he was asked to decide the dispute as an arbitrator. The word 'arbitration' is not defined in the Act, but chapter IV relating to arbitration in suits—and we are concerned only with such arbitration here—clearly provides that after a written application is made by the parties to refer the dispute to arbiraion, the court shall by order refer the matter to the arbitrator and shall specify a reasonable time for making the award, and that thereafter the court shall not deal with the matter in the suit save in the manner and to the extent provided by the Act : It is further provided that in certain circumstances the court may modify or remit the award to the arbitrator or even supersede the arbitration and proceed with the suit. In my opinion, it is clearly implied in these provisions that the arbitrator in this chapter must be a person other than the judge who forms the court, and I agree with the reasons given by *Sadasiva Aiyar J.* in *Chengalroys Chetti* v. *Raghnan Ramanuja Dass,* A.I.R. 1915 Mad. 150=52 Ind. Cas. 569=37 M.L.J. 100, for holding that such an application is not one under Sch. 2, Civil P.C. 1908, which is now replaced by the Arbitration Act of 1940. The view taken by *Sadasiva Aiyar* in 37 M.L.J. 100, which to a certain extent is shared by the learned Chief *Justice* in *Sankaranarayan* v. *Ramaswamiah,* 47 Mad. 39=72 Ind.Cas. 149=A.I.R. 1923 Mad. 444, is also the view taken by the Allahabad High Court in *Baijnath* v. *Dhani Ram,* 51 All. 903=A.I.R. 1929 All. 747=51 All. 903=117 Ind.Cas. 610...

"In my opinion when a judge is asked to arbitrate between the parties to a suit before him, he does not cease to be the court and become a pure arbitrator. As I observed before, the provisions of Chap. IV Arbitration Act, as well as the provisions of Sch. 2, Civil P. C., before that, imply necessarily that when a dispute in a pending suit is referred to arbitration, the arbitrator must be a person other than the judge presiding in the court. Otherwise the provisions of that chapter would not be applicable at all..... As observed in *Halsbury's Laws of England, Hailsham* Edn., Vol. 1, p. 624: 'When in proceeding pending before the court the parties agree to accept the judge's decision as final, it is said that they thereby constitute the judge as a *quasi-arbitrator.* The effect of such an agreement is that the decision of the judge is unappealable and cannot be questioned in anyway; but the judge is not thereby really placed in the position of an arbitrator and his decision is not, and does not in any way resemble an award.'

"*Mr. Desai* has relied on a statement of law in *Russell* on *Arbitration,* 13th Edn., p. 34, (see now 15th Edn., p. 99), where it is observed that the subject-matter of an action may be referred to a judge as arbitrator. The judge in such a case is merely an arbitrator and has no special powers by virtue of the fact that he is a judge and his award is not subject to appeal :

"I do not think that those observations necessarily mean that the judge ceases to be a judge and becomes a pure arbitrator in the sense that he can refer the dispute to himself and also remit the award to himself .....That being so, it is not necessary that the reference to him must be in writing, and the provisions of chapter IV would not apply."

So the judge has power without the consent of the parties to put himself into the position of an arbitrator so as to decide otherwise than on evidence. *Crescent Insurance* v. *Maung Po,* 125 Ind.Cas. 257=A.I.R. 1930 Rang. 8. The procedure *extra cursum curiae* cannot be applied to proceedings not pending before the particular court, the judge of which is constituted the *quasi*-arbitrator but pending before another court. *Ariff* v. *Bengal Silk,* A.I.R. 1949 Cal. 350=I.L.R. (1945) 2 Cal. 70.

1094. English cases and old cases under the C. P. Code.—Where

the parties simply agree to abide by the decision of the presiding officer, it is binding on them. *Nausad Ali* v. *Mohammad Ishaq,* A.I.R. 1937 Oudh 224=116 Ind.Cas. 853 ; *Sitaram* v. *Peare,* A.I.R. 1925 All. 558=88 Ind.Cas. 611=47 All. 921=23 A.L.J. 525 ; *Madan Mohan* v. *Munna Lal,* A.I.R. 1928 All. 497=115 Ind.Cas. 644 ; *Ganga Ram* v. *Jogu,* A.I.R. 1934 All. 176=154 Ind.Cas. 248=15 Lah. 726 ; *Nidamarthi* v. *Ramayya,* 25 Mad. 76 ; *Sitanath* v. *Baikuntha ;* 38 Cal. 421=9 Ind.Cas. 296 ; *Harrison* v. *Wright,* (1845) 13 M. & W. 816=153 E.R. 342 ; *James White* v. *Duke of Bucclench,* (1866) L.R. 1 H.I.S.C. 70 : *Bustons* v. *White,* (1876) 1 Q.B. 423 ; *Bickett* v. *Morris,* (1866) L.R.H.L.Sc. 47. In *Berges* v. *Morton,* (1896) A.C. 136=65 L.J.Q.B. 321, Lord *Halsbury* said : "My Lords, it has been held in this House that where with acquiescence of both parties a judge departs from the ordinary course of procedure and, as in this case, decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have an alternative mode of proceeding and to treat the matter as if it had been heard in due course." *Lord Watson* said : "There are several decisions of this House, in cases coming from Scotland, which appears to me to affirm that the judgment of a court below, pronounced *extra cursum curiae,* is in the nature of an arbiters' award and that as a general rule no appeal from it will lie." See also *Ditto Singh* v. *Dosad Bahadur,* 9 Cal. 575 ; *Sayal Zai* v. *Kala Bhai,* 23 Bom. 752 ; *Maung Kala* v. *Maung Miek,* 44 Ind.Cas. 622 ; *Nidar Murthi* v. *Thammana,* 26 Mad. 76.

Where the parties do not intend to constitute the trial court their sole arbitrator of the case the judgment of the court does not amount to an award and is appealable. *Raghubir* v. *Ram Das,* 85 Ind.Cas. 608=A.I.R. 1925 All. 348, but see, *Shahazadi Begam* v. *Muhammad Ibrahim,* 59 Ind.Cas. 787=19 A.L.J. 14=43 All. 266; ; *Bahirdas* v. *Nabin,* 29 Cal. 76 ; *Nidamarti* v. *Thammana,* 26 Mad. 76 ; *Chinna* v. *Venkasami,* 51 Ind.Cas. 827=42 Mad. 625 ; *Sambu* v. *Paiki,* 90 Ind.Cas. 530=A.I.R. 1925 Nag. 463 ; *Vithoba* v. *Parashram,* 113 Ind.Cas. 365. So it appears from the above cases that where the court was constituted an arbitrator by the parties by the use of such words as "his decision shall be final," "his decision is not appealable" or "he is constituted an arbitrator" no appeal lies from his decision.

1095. Separate order of refrence in separate suits.—Where there are separate suits, separate arbitration agreements and separate order of reference it is irregular for the umpire to make one single consolidated award. *Ariff* v. *Bengal Silk,* I.L.R. (1945) 2 Cal. 70=A.I.R. 1940 Cal. 350.

1096. Ss. 21 and 47—Proceedings in execution.—Proceedings in execution cannot be the subject of reference to arbitration. Broadly speaking any relief which a civil court is competent to grant and which is enforceable by a suit may be granted by the arbitrators. The proviso to S 47 makes it clear that the award may be regarded as a compromise or adjustment of a suit if all the parties interested consent to the award. The consent that is required is consent at the time when the award comes up for consideration : the fact that originally the reference to arbitration was made by consent of the parties interested would sot satisfy the requirements of the proviso. It may be acquiesced in or agreed to be treated as an adjustment. The consent of all the interested parties is a *sine qua non* to acting upon the award and recording it as a compromise or adjustment of the matter in dispute. Obviously the consent required under the proviso is the consent to take the award into consideration for

purposes of recording an adjustment. If the award is agreed to after it is given it oparates as an adjustment. *Laxminarayana* v. *Venkatasubbiah,* (1958) 2 Andh.W.R. 2542 A.I.R. 1958 Andh.Pra. 679 (1953) I M.L.J. 795 ; I.L.R. (1953) Mad. 677.

1097. Agreement to refer to arbitration—Absence of leave.—An agreement for a reference to arbitration without obtaining leave of the court, as required by O. 32, R. 7 of C. P. C., where a minor is a party to litigation will render the reference and all subsequent proceedings founded on that reference invalid only at the option of the minor, and not at the instance of an adult party. The adult members are bound by it despite that the leave of the court had not been obtained, if the award is in favour of the minor or is not challenged on his behalf. *Saraju Prosad* v. *Brij Narain,* A.I.R. 1957 Pat. 11=1956 B.L.J.R. 152 ; see also A.I.R. 1951 S.C. 280=1951 S.C.J. 413 ; A.I.R. 1946 P.C. 72=(1946) 1 M.L.J. 339 ; A.I.R. 1956 Mad. 89=(1955) 2 M.L.J. 602.

1098. Reference to arbitration in pending suit without intervention of court.—If There is a reference under the Arbitration Act, relating to the subject-matter of a pending suit, the reference and the award under the Arbitration Act are bad, for there cannot be two conflicting jurisdictions relating to one and the same matter, the jurisdiction of the court in the suit, and the jurisdiction of the arbitrators under the Arbitration Act. The rule applies even if the subject-matter of the two proceedings is, in part only, the same. Where the subject-matter of reference to arbitration outside the court and the award cannot be separated into parts, *e.g.*, where the subject-matter of the pending suit is the possession of the land, and the subject-matter of the arbitration outside the court is the possession of the land, and that part of the award outside the court relating to possession of the land cannot be separated from other parts of the award, then the whole award under the Arbitration Act must be said to be bad. *Gohram* v. *Jumo,* A.I.R. 1942 Sind 41=I.L.R. 1941 Kar. 570. See also, *Ramprotap* v. *Durgaprosad,* A.I.R. 1924 Cal. 567=83 Ind.Cas 300=28 C.W.N. 424 ; affirmed by P.C, in A.I.R. 1925 P.C. 293=92 Ind. Cas. 633=53 Cal. 258=53 I.A. 1 ; *Haji Umar* v. *Shivaldas,* A.I.R. 1921 Sind 65=81 Ind.Cas. 653=16 S.L.R. 174 (F.B.) ; *Monilal* v. *Gokaldas,* A.I.R. 1921 Bom. 310=59 Ind.Cas. 53=45 Bom. 245=22 Bom.L.R. 1048 ; *Deomal* v. *Khanoomal,* A.I.R. 1926 Sind 5=89 Ind.Cas. 335 ; *Manghammal* v. *Thawerdas,* A.I.R. 1935 Sind 184=158 Ind.Cas. 60 ; *Kishan Lal* v. *Birchand,* 1943 A.M.L.J 30. *Vide* notes under S. 47, *infra.*

A private reference to arbitration in a pending suit without the knowledge of the court and without its direction is invalid and an award remitting therefrom cannot be made a rule of court unless all the parties in the consent to the award being filed into court as compromise or adjustment to the suit under Order XXIII, Rule 3, C. P. Code. Indeed the principle has become too well settled that when once the parties have submitted to the jurisdiction of the court for an adjudication of the points in controversy between them, the exercise of such jurisdiction by court will not be suspended or hampered by any private reference to arbitration, nor is a parallel adjudication of the same subject-matter by a private tribunal permissible under law under s. 47 of the Indian Arbitration Act an award passed on a private reference in pending suit can be enforced as a compromise of the suit if both parties agree to it in so much as the consent contemplated by the proviso is not merely the antecedent agreement to refer to arbitration but the consent for the award itself. *Kumhun* v. *Kumtripathumma,* 1958 Ker.L.J. 269=1958 Ker.L.T. 207=A.I.R. 1959

Ker. 414. See also *Jugaldas* v. *Pursottam,* A.I.R. 1953 Cal. 690 ; *Zeauddin* v. *Abdur,* A.I.R. 1952 Pat. 66 ; *Chanbasaffa* v. *Basatiagayya,* 51 Bom. 908 =(F.B.) ; *Babubhai* v. *Madhabji,* 55 Bom. 503.

A private reference to arbitration in a pending suit without the knowledge of the court and without its direction is invalid and an award resulting thereform cannot be made a rule of court unless all the parties interested in the suit consent to the award being filed in the court as compromise or adjustment of the suit under order XXIII r. 3 C. P. Code. *Kunhen* v. *Kunhipathumma* A.I.R. 1959 Ker. 414=A.I.R. 1958 Ker. L.T. 207.

1099. Reference to arbitration—Power of Court to pass any order affecting subject matter of suit.—Once a suit has been referred to arbitration, so long as that reference stands, the court which has made the reference, has no power to pass any order, which in any way would affect the subject-matter of the suit. *Ram Chandra* v. *Suraj Mal,* 1943 M.L.R. 44 (Cir.) *Vide* also sub-section (2) of section 23, *infra.*

1100. Reference to even number of arbitrators.—It is clear from paragraph 2 of Sch. 1 that the case of a reference under this section where the reference is to an even number of arbitrators, they are under a statutory obligation to appoint an umpire within the time mentioned. The provisions of pargraph 2 of Sch. 1, are of a mandatory character and where they fail to appoint an umpire any award which they may pass would be invalid. This rule applies where there is no provision to the contrary in the arbitration agreement. *Jawala Prosad* v. *Amar Nath,* A.I.R. 1951 All. 474.

Appointment of arbitrator.

22. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

1101. N.B.—This section reproduces para. 2 of the Second Schedule of the C. P. Code 1908, which again corresponds to S. 508 of the Civil Procedure Code of 1882 and S. 314 of the Civil Procedure Code of 1859.

1102. Appointment of arbitrator.—In interpreting section 312 (which corresponds to s. 21 of his Act) and 314 of the Code of Civil Procedure of 1859 their Lordships of the Privy Council in *Sheonath* v. *Ramnath,* 5 W.R. (P.C.) 21=10 M.I.A. 413=1 Ind.Jur. N.S. 161, observed: "The 312th section of the Act provides that, if the parties to a suit are desirous that the matters in difference between them in the suit, or any such matters, shall be referred to the joint decision of one or more arbitrator or arbitrators, they may apply to the court at any time before final judgment for an order of reference. The 314th section provides that the arbitrator or arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the arbitrator or arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the court, the court shall appoint the arbitrator or arbitrators. These sections clearly import that the parties must either name the arbitrators or consent to the nomination of them by the court. They are the only provisions which bear upon the subject and it follows that the Code gives no authority to the court to force upon a reluctant party the decision of any question in the cause by arbitrators selected at its discretion.....Their Lordships need hardly observe that if the appointment of arbitrators in this case was irregular, the irregularity was in no degree cured by the fact that there

were four out of five persons to whom the appellant had, on a former occasion, agreed to refer the matters to them in dispute between him and as respondent." But where both parties could not agree in nominating an arbitrator, and the judge nominated one under section 314, Act VII of 1859, and one of the parties, six weeks after the nomination, objected to the Juge's nominee, but could not show on appeal that he did not request the Judge to nominate someone, the appointment was held good and binding upon both parties. *Suroop Ram* v. *Gobind Ram,* 7 W.R. 13. See also, *Deogambar* v. *Raf Prea,* Marsh. 517. Before a Judge refers a case for arbitration, he should ascertain whether the persons nominated are willing to accept the office; and till he has done so, any nomination of an arbitrator by him, without the application or consent of the parties, is illegal. *Hurronath* v. *Kasheenath,* W.R. Gap. 338. The nomination by the court is dependent on the desire of the parties. *Fayazuddin* v *Aminuddin,* 1 Ind.Cas. 354=6 A.L.J. 351. Unless the assent of an arbitrator to act has been obtained, he cannot be regarded as an arbitrator. *Ibid.* See also, *Bipinbehari* v. *Annoda,* 18 Cal. 324; *Ringland* v. *Lowndes,* 15 C.B.N.S. 173; *Pugardin* v. *Moidinsa,* 6 Mad. 414; *Shibnarain* v. *Ratiram,* 7 all 20; *Basdeo* v. *Kanhiyalal,* 59 Ind.Cas. 667; *Bala Pattabhirama* v. *Setrarama,* 17 Mad. 498; *Dhuku* v. *Bhinak,* 4 A.W.N. 209; *Ghisa* v. *Bhawani,* 1 A.L.J. 683. Subsequent acquiescence in the proceedings of the arbitrators would not validate the reference, if it was made by the court without jurisdiction. *Fayazuddin* v. *Aminuddin, (supra).* See *Kazee* v. *Hajooddeen,* 52 P.R. 1869; *Ali Baksh* v. *Kader,* 28 P.R. 1868.

1103. Ss. 22, 30—Arbitration agreement giving full powers to arbitrators.—Where the parties have given full powers to arbitrators under arbitration agreement to decide the case in any manner he deems proper, to receive evidence in the absence of one of the parties or make private enquiries or act on his own knowledge, such an agreement is effective and the award cannot be set aside on the ground of irregularities in procedure. *Sakona* v. *Damodar,* A.I.R. 1956 Punj. 243.

23. (*1*) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determining, and shall *in the order specify such time as it thinks reasonable for the making of the award.*

Order of reference.

(*2*) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this *Act,* deal with such matter in the suit.

1104. N.B.—This section reproduces substantially para. 3 of the Second Schedule of the Civil Procedure Code of 1908, which again corresponds to S. 508 of the Civil Procedure Code of 1882 and S. 315 of the Civil Procedure Code of 1859. It sets out like two previous sections the initial steps to be taken for arbitration in a suit. *Vide Notes on Clauses.*

1105. Scope of the section.—In order to vest jurisdiction in the arbitrators to deal with a pending suit, it is necessary that the court should make an order under section 23 (1) referring the suit to them and should specify in the order such time as it thinks reasonable for the making of the award. It is only when the matter is referred to arbitration by the court in that manner that under section 23 (2) the court ceases to have jurisdiction to deal with the suit or such matters

therein as are referred to arbitration. *Narayanaswami* v. *Manika,* A.I.R. 1946 Mad. 86=(1945) 2 M.L.J. 482=1945 M.W.N. 706.

1106. Agreement to refer through court an ordinary agreement.—An agreement to refer to arbitration placed under the direction of the court, cannot be treated as an ordinary contract revocable by consent at the will of the parties, or by one of them on pain of damages, for the court, must not be allowed to be trifled with nor the course of litigation to be confused by repeated changes of procedure at the behest of litigants. To this extent the statutes relating to arbitration can certainly abrogate the old common law rule that an agreement is revocable at will. Parties to reference therefore cannot merely abandon an arbitration by consent. *Prafulla* v. *Punchanan,* A.I.R. 1946 Cal. 427=I.L.R. (1946) 1 Cal. 398=50 C.W.N. 287=86 C.L.J. 1. In the same case *Akram J.* said : "Once the dispute goes to arbitration the authority of the court to proceed with the suit is suspended and it cannot deal with the subject-matter of the reference so long as the reference stands, it is only when the arbitration is superseded that the suit, as it were revived and matter in dispute can be dealt with by the court. Where a compromise is alleged by one party but disputed by the other, the court cannot embark upon an enquiry and determine whether in fact there has been a compromise. Such an enquiry will necessitate dealing with the subject-matter of the reference and that would be contrary to S. 23 (2) and S. 25 proviso to the Arbitration Act ; but see *Attar Singh* v. *Bishan Singh,* A.I.R. 1945 Pesh. 41."

1107. The court shall by order refer.—Where the parties have agreed to have their dispute settled by arbitration it is incumbent on the court to pass an order referring the matter to arbitration. The omission to pass an order of reference to arbitration will vitiate the whole arbitration proceedings and there can be no legal award without such an order. *Hurchand* v. *Chuttan Lal,* 35 P.R. 1884. See also, *Ralla Ram* v. *Badhawanmal,* 67 P.R. 1886. The parties to a case expressly informed the court that they had referred the case to a certain arbitrator and asked the court over and over again to grant time for the preparation and submission of that arbitrator's award. It was held that the orders passed by the court upon the various applications for adjournment amounted in substance to the reference of the dispute between the parties by the court to the decision of the arbitrator. *Kulsum* v. *Ali Akbar,* 39 Ind.Cas. 730=39 All. 401=15 A.L.J. 452. See also, *Nidamurthi* v. *Garigiparti,* 34 Ind.Cas. 741=3 L.W. 325. Notwithstanding that much time of the court may have been occupied in hearing a case, still the law distinctly gives the parties to a suit a right to have the matter submitted to arbitration if they come to an agreement to refer it to an arbitrator at any time before the judgment is pronounced. It is quite clear on the provisions set out in this section that the court has no discretion in the matter ; and where the parties to a suit come to an agreement in writing by which they agree to refer to the arbitration of certain arbitrators and apply to the court to refer the suit to them the court cannot reject the application because it is untimely. *Mohendra Lal* v. *Fakir Chandra,* 24 Ind.Cas. 610. See also, *Datta* v. *Khedu,* 8 A.L.J. 678=11 Ind.Cas. 935=33 All. 645. The rule of law was the same even where the court concerned was the appellate court. *Dutta* v. *Khedu (supra)* ; *Chirangi Lal* v. *Jamna Das,* 7 N.W.P. 243 (F.B.) ; *Jogeswar* v. *Kirtarthee,* 21 W.R. 210 ; *In re Sangara, Lingam,* 3 Mad. 78 (79)=5 Ind.Jur. 76 ; *Suresh* v. *Ambika,* 18 Cal. 507 ; *Bhagwan Das* v.

Nand Lal, 12 173 ; *Russol* v. *Jan Ali,* 17 W.R. 31 ; *Muhammad* v. *Mirza,* 78 Ind.Cas. 378 ; *Waliullah* v. *Bhagan,* 80 Ind.Cas. 7=A.I.R. 1925 Oudh 269. Where the parties to a previous arbitration appoint a new arbitrator, the previous arbitration proceeding comes to an end. *Khim Chand* v. *Bhogilal,* 67 Ind.Cas. 913=24 Bom.L.R. 361=46 Bom. 854. It was held by the Punjab Chief Court that where there was no express agreement to remunerate an arbitrator, he has no right of action for his remuneration. *Kirkpatrick, In re,* 22 P.R. 1897. The court also cannot, when there is no agreement by the parties to pay any sum as remuneration to arbitrators, order deposit or payment of money for such purpose. *Mulchand* v. *Niranjan Das,* 94 P.R. 1894 ; *Steel* v. *Roberts,* 6 Cal. 809 ; but see *Girdhari Lal* v. *Surendranath,* A.I.R. 1934 Nag. 199 =17 N.L.J. 153=152 Ind.Cas. 373, where the court observed : "In England it was at one time held that the appointment of an arbitrator was not of such a nature as to raise a demand for the payment in the absence of an express promise to pay him for his services. *Viramy* v. *Warne,* (1801) 4 Esp. 47 and *Burroughs* v. *Clarke,* (1801) 1 D.P.C. 48 ; but that is not the law in England as it now stands, and it is now the rule that the appointment of an arbitrator must be taken to imply a promise to remunerate him at a reasonable rate. *Wills* v. *Wakeley Brothers,* (1896) 7 T.L.R. 604. In *Llandrindod Wells Water Co.* v. *Howkisley,* (1904) 68 J.P. 242=20 T.L.R. 241, it was stated 'that where the parties have chosen their arbitrator, they must be taken to have intended to pay him at the rate ordinarily charged by persons of his experience, and they must pay his fees, unless it is proved that the charges are extortionate'.....In the absence of any express provision in Schedule 2, Civil Procedure Code, for the remuneration of arbitrators, I am of opinion that the English law should be applied unless there is an express provision to the contrary. I do not consider that any such prohibition exist." See also *Thadomal* v. *Meghraj,* A.I.R. 1930 Sind 190 ; *Bul Chand* v. *Thakurdas,* A.I.R. 1933 Sind 300. But where there was no valid reference, the court has no jurisdiction to award cost. *Arunachala* v. *Louis Dreyfus,* A.I.R. 1928 Mad. 370. When a reference to arbitration in a suit is a general one of the whole case the power of dealing with costs rests with the arbitrator. *Dharu* v. *Dildar,* 46 Ind. Cas. 182 ; *Hargolal* v. *Sodhi,* 91 P.R. 1888. But now see section 38, *infra,* and notes thereon.

1108. Power of Appellate Court to refer matter.—An appellate court has no power to refer matter to arbitration. Under section 21 only parties to the suit are competent to apply for arbitration as parties to an appeal are not authorised, the appellate Court would not be able to act under S. 23. *Shuknella* v. *Rahmat,* I.L.R. (1947) A. 227=1947 A.L.J. 445=A.I.R. 1947 All. 304. When an appellate Judge properly seized of the appeal and competent to make the reference to arbitration has made reference to arbitration the mere fact that the award directed that the sum payable by one party to the other was more than the pecuniary jurisdiction of appellate court would not, retrospectively, render all previous proceedings invalid. *Raninder* v. *Mohinder,* 190 Ind.Cas. 399=A.I.R. 1940 Lah. 186

1109. Scope of sub-section (1)—Under sub-section (1) the court has no jurisdiction to refer to arbitration matters which are not in difference in the suit. Matters in difference in a suit are ascertained from the pleadings which have been filed in the suit before an agreement and an order of the reference is made, and therefore, these differences must exist

at the time of the agreement and do not include differences which thereafter arise. *Prabodh Kumar* v. *Eichpolse Trading Co.*, I.L.R. (1947) 1 Cal. 572 where the reference is through a court the arbitrator will, of necessity, be informed of the agreement of the parties, and the order of reference, so that he might make his award within a time to be fixed by court, but where the arbitrator is fully aware of the terms of the order of reference, accepts the office of the arbitrator and actually decides the controversy between the parties by giving an award, the mere fact that the order of reference was not formally communicated to him would not vitiate the arbitration. An arbitrator derives his authority from the agreement of the parties and the order of reference gives effect to that agreement. In an ordinary case a date has to be fixed before which the arbitrator should file the award, but where the order of reference itself does not fix a date and the court subsequently intimates to the arbitrator the time within which the award should be filed, the irregularity if any, would not affect the validity of the award. *Manilal* v. *Prahlad Das*, A.I.R. 1937 All. 144 (S.B.)=167 Ind.Cas. 21=1937 A.L.J. 204,

1110. Revocation or withdrawal from arbitration.—A reference to arbitration made under an order of court cannot be revoked at the instance of a party. *Nilmonee* v. *Mohim Chandra*, 17 W.R. 516; *Pestonjee* v. *Manickjee*, 12 M.I.A. 112=10 W.R. 51 (P.C.); *Ahmad Abdulla Mussa* v. *Cassum*, A.I.R. 1934 Bom. 388=36 Bom.L.R. 827=153 Ind.Cas. 949; *Nagasamy* v. *Rungaswami*, 8 M.H.C.R. 46; *Nainsukh* v. *Umadai*, 7 All. 273=1885 A.W.N. 12; *Shoembar* v. *Deodat*, 9 All. 168; *Furna* v. *Ringa*, 46 Ind.Cas. 477; *Sheonarain* v. *Bala Rao*, 137 Ind.Cas. 198=1932 A.L.J. 331; *Sultan Mohammad* v. *Shad*, 20 All. 145; *Adhibai* v *Gursandas*, 11 Bom. 99; *Chet Kunwar* v. *Puttu Singh*, 27 Ind.Cas. 424. *Narayanswami* v. *Manika*, 1945 M.W.N. 706=58 L.W. 610=(1945) 2 M.L.J. 482. By adding para. 2 to s. 508 of the Code of 1882 [which is the same as section 23(2)] the Legislature did not deprive the court of all its powers over an arbitration proceeding under its order except in certain cases. The court has jurisdiction, in a proper case to grant leave to revoke an arbitration on good cause being shown. That jurisdiction has, however, to be exercised with great care and caution and should never be considered a venue for making applications from time to time, in pending arbitrations, with a view to obstruct the progress of the arbitration. Unless a strong and irresistible case is made out the court should be reluctant to supersede an arbitration. *Ahmed* v. *Cassum*, A.I.R. 1934 Bom. 388=36 Bom.L.R. 827=153 Ind.Cas. 949; *Pestonjee* v. *Manockjee*, 12 M.I.A. 112 (P.C.). See also, *Nilmonee* v. *Mohim Chandra*, 17 W.R. 516. *Ablakhu Koer* v. *Oudeen Singh*, 15 W.R. 331. but see *Halimbhai* v. *Shankersan*, 10 Bom. 381. *Thoongan* v. *Chinna Alagu*, A.I.R. 1927 Mad. 910=105 Ind. Cas. 92. *Rabindra* v. *Jogendra*, 80 Ind.Cas. 459=27 C.W.N. 420; *Chaturbhuj* v. *Raghubar*, 23 Ind.Cas. 758=12 A.L.J. 529=36 All. 354; *Mangar Sahu* v. *Bhato Singh*, 57 Ind. Cas. 473=5 Pat.L.J.672; *Siam* v. *Bhairam*, 3 A.L.J. 185.

In *Bholanath* v. *Raghunath*, A.I.R. 1929 All. 743=1929 A.L.J. 918 =51 All 1010, the court observed: "Schedule 2, Civil Procedure Code, provides for several contingencies in which a reference to arbitration may be superseded by the court. We may refer to rules 5, 8 and 15 of that Schedule. There is no express provision which empowers a court to supersede an arbitration on grounds other than those mentioned in it. It may, however, be said in favour of the respondent that there is an inherent jurisdiction in a court to intervene and supersede the arbi-

tration if the case fell under section 151 of the Code, *viz.*, where such an order is necessary for the ends of justice or to prevent the abuse of the process of the court." See also, *Chaturbhuj* v. *Raghubar Doyal.* 36 All. 354=23 Ind.Cas. 758=12 A.L.J. 529; *Lachman* v. *Moghal,* A.I.R. 1925 Pat. 720=6 Pat.L.T. 488=86 Ind.Cas. 540; *Khilloram* v. *Louis Drefus,* 52 Ind.Cas. 130=13 S.L.R. 80; *Anand Das* v. *Rambhusan Das,* A.I.R. 1933 Pat. 566=146 Ind.Cas. 1081; *Gangaram* v. *Sumangal,* A.I.R. 1933 Sind 347=147 Ind.Cas. 486; *Karim Din* v. *Mohammad Din,* A.I.R. 1937 Lah. 71=38 P.L.R. 480=166 Ind.Cas. 1008; *Madura Mills* v. *Krishna Ayyar,* A.I.R. 1937 Mad. 405; *Bansidhar* v. *Sital,* 29 All. 13;

1112. Award dismissing plaintiff from partnership if ultravires.— v. *Perumalla,* 27 Mad. 112=13 M.L.J. 311; *Ghulam* v. *Gopal Das,* A.I.R. 1933 Sind 68; *Smith* v. *Ludha,* 17 Bom. 129; *Adhibai* v. *Gursandas,* 11 Bom. 199; *Pawathamma* v. *Subamma,* A.I.R. 1935 Mad. 319=68 M.L.J. 537. *Vide* also notes under s. 5 at pages 57, 60-66, *ante.*

1111. Matters in difference.—*Vide* notes under section 21.

1112. Award dismissing plaintiff from partnership if ultravires.— In a suit for disolution of partnership and accounts the arbitrator made an award by which the plaintiffs were given a certain sum as their share of business and the defendants were jointly all assets and liabilities of the business and if they so desired to carry on a new partnership business. The award was held not to be *ultra vires, Sm. Padmabati* v. *Pannalal Paul,* A.I.R. 1959 Cal. 156=1958 C.L.J. 364.

1113. Shall in the order specify such time as it thinks reasonable. The fixing of the time by the court within which the arbitrators have to make their award is mandatory and not directory and where the order does not fix time limit for return of the award the reference is a nullity. It is not however necessary that the time should have specified in the order passed on the application itself. *Ramakrishnamma* v. *Lakshmi,* I.L.R. (1958) Andha Pra. 166=A.I.R. 1958 Andh. Pra. 492. In *Raja Narain Singh* v. *Bhagwat Kunwar,* 13 All. 300 (303)=18 I.A. 55=15 Ind.Jur. 283, *Lord Morirs* said: "Their Lordships are of opinion that s. 508 is not merely directory but that it is mandatory and imperative." See also, *Nusurwanji* v. *Meer Mynodeen,* 6 M.I.A. 134 (P.C.); *Ganga Gobinda* v. *Kale,* 10 W.R. 206; *Lachman* v. *Aprokash,* 30 All. 169=5 A.L.J. 144=(1908) A.W.N. 59; *Chumbal* v. *Haria Ram,* 8 All. 548; *Mohan Lal* v. *Bazkhan,* 46 Ind.Cas. 324=5 O.L.J. 205; *Robindra* v. *Jogendra,* 80 Ind.Cas. 459=A.I.R. 1923 Cal. 410=27 C.W.N. 420; *Mauni Lal* v. *Pokhardas,* A.I.R. 1927 All. 141; *Negi* v. *Hira Singh,* 1 Ind.Cas. 146=6 A.L.J. 333; *Gur Das* v. *Garul Dhul,* 9 Ind. Cal. 241. In *Robindra* v. *Jogendra (supra). Rankin J. observed*: "By the first part of third clause of the Second Schedule two matters are dealt with *uno flatu.* First that when section 1 has been complied with, the court must make the order of reference. Secondly, that the court by its order must fix such time as it thinks reasonable for the making of the award. The same clause by its second part forbids the intereference of the court save in the manner and to the extent provided in the Schedule. Here there are three things which go together; the court must part with its jurisdiction to decide; it must part with it for a specified time and no more; during that time it must stand aside. If a court should wrongly refuse an order of reference and insist upon deciding the suit, I apprehend that its decree would be bad apart from any question of the merits. If after an order of reference a court wrongly proceeded to try the suit, it could contravene an express prohibition. If by the order of

reference no time is fixed at all, the error is of the same class : *no time-limit means no control ; and the court is not authorised to abandon control save to the extent and upon the terms laid down.*" See also, *Manni Lal* v. *Pahlad Das,* A.I.R. 1937 All. 141=1937 A.L.J. 29=167 Ind.Cas. 171 ; but see *Ma Ngwa* v. *N. Mein Sein,* A.I.R. 1936 Rang. 240. Where time is fixed for hearing of a case and not filing of an award, the defect is only irregularity and can be cured. *Raja Harnarain* v. *Bhagwant Koer,* 13 All. 300 (P.C.) ; *Bhagwandin* v. *Fakir Singh,* 20 Ind.Cas. 773=16 Ind. Cas. 233.

1114. Extension of time.—Where proceedings before an arbitrator have gone on for sometime, the evidence has been closed and the case is ready for arguments and giving of decision, and the arbitrator who had only obtained two former extensions of time for filing the award applies only for one more fortnight's time, it is an arbitrary exercise of jurisdiction to refuse it and supersede the arbitration and thereby cause grave miscarriage of justice. *Chinman* v. *Brij Mohan.* A.I.R. 1943 Oudh 117=1942 O.A. 298 ; See also s. 28 *infra.*

1115. Arbitrator tendering resignation.—Where an arbitrator has tendered his resignation to act as arbitrator takes back the resignation on the application of the parties and request of court and accepts fees and continues the proceedings, he does not become *functus officio* and no fresh order of court submitting the case to him is necessary. *Kashmir* v. *Lal Khan,* A.I.R. 1934 Lah. 700=15 Lah. 820=153 Ind.Cas. 385 ; *Joymungul* v. *Mohun,* 23 W.R. 420 (P.C.).

1116. Making of the award.—The making of an award is complete when the arbitrators put their signatures on it. *Sri Lal* v. *Arjun Das,* 27 Ind.Cas. 233=18 C.W.N. 1325. Where a court allowed the arbitrators to make their award within a certain time, but instead of using the word "make" used the word "file" and the award was made in Hindi and signed within that day but was filed two days later, as the arbitrators decided to have it translated into English, and where the arbitrators also before filing it took an agreement from the parties not to raise any objection to this being done, *held* that the award was made within time and was valid and that the use of the word "file" instead of "make" was immaterial. *Ibid.* There is nothing in Chapter IV of this Act to show that an award would be invalid if not filed on or before the time fixed for the filing of it in court. All that is required by this section is that the court must fix a time for the making of the award and an award would be valid if made within the time fixed, though not filed in court on the date fixed for submitting the award to court. *Radhakanta* v. *Jaladhar,* 37 Ind.Cas. 844. See also, *Ram Avtar* v. *Deoki Tewari,* 29 Ind.Cas. 411=37 All. 456=13 A.L.J. 653 ; *Ammugam* v. *Annachalam,* 22 Mad. 22 ; *Umeresy* v. *Shamji,* 13 Bom. 119 ; *Sita Ram* v. *Bhawani Din,* 26 All. 105=(1903) A.W.N. 205 ; *Asadullah* v. *Muhammad Nur,* 27 All. 459=(1905) A.W.N. 47=2 A.L.J. 201 ; *Srilal* v. *Arjundas,* 27 Ind.Cas. 233 ; *Bhagat Ram* v. *Ganda Singh,* 89 P.R. 1907, *Debendra* v. *Sarbamangala,* 8 C.W.N. 916 ; *Roberts* v. *Harrison,* 7 Cal. 333 ; *Mohan Lal* v. *Baz Khan,* 46 Ind.Cas. 324=5 O.L.J. 205. But see *Shib Krishna* v. *Satis Chandra,* 12 Ind.Cas. 13=38 Cal. 522 ; *Bhagwan Din* v. *Fakir Singh,* 20 Ind.Cas. 773=16 O.C. 233 ; *Muhammad Yusuf* v. *Karim Baksh,* 78 P.R. 1899. The expression "making the award" including the announcement of the award and the award cannot be deemed to have "been made" till it is announced and one way of announcing it is by filing in court. *Harbhajan* v. *Mina,* A.I.R. 1928 Lah. 753=110 Ind.Cas. 738. See also, *Gokul Chand* v. *Rahman,*

59 P.R. 1907 (F.B.); but see *Bhagat Ram* v. *Ganda Singh,* 89 P.R. 1907. Where an award was declared by the arbitrators in the presence of both parties on a certain date but signed by them on a later date, the effectiveness of the award is not postponed to the date on which it was signed. The award becomes effective on the date on which the parties are made aware of it. *Sudhir* v *Bilasabati,* 45 C.W.N. 223. Sub-s. (1) of s. 23 requires that an order thereunder referring a dispute to an arbitrator must specify the time within which the award is to be made. What is imperative is the fixation of the time for making the award. But it does not follow that where the court omits to specify the time in the order of reference but does so elsewhere in the proceedings the reference is bad. The mere omission to mention the date in the order of reference itself does not vitiate the reference. *B. Subbarama Naidu* v. *B. Siddama Naidu,* A.I.R. 1962 S.C. 671 = (1962) 1 S.C.R. 784 = (1962) 1 S.C.J. 663.

1117. Arbitration Act Ss. 21, 23 and 33—Arbitration in pending suit—Order of reference—Necessity.—In order to vest jurisdiction in the arbitrator to deal with a pending suit it is necessary that a court should make an order referring the suit to him and shall specify in the order such term as it thinks fit and reasonable for making the award. *Kunhim* v. *Kunhika,* A.I.R. 1959 Kerala 414 = 1958 Ker L.J. 269 = 1958 Ker.L.T. 207. The substance of the whole matter as distinguished from the mere form of it, may be looked into to decide whether there is a reference to arbitration by the order of the court or otherwise. For after all, the question of the making the reference is one of procedure. But in any case to hold an arbitration pending the suit to be valid, the action of court and of parties must establish a substantial reference by the court. *Ibid.*

1118. Powers of court after order of reference—Sub-section (2).—The words "shall not save in the manner and to the extent provided in the Act, deal with such matter in the suit" in sub-section (2) of this section are imperative and convey a prohibition, and limit the court's jurisdiction. *Sankar* v. *Chunilal,* 89 Ind.Cas. 782 = A.I.R. 1926 Nag. 37. "Since the moment the order of reference is made the court's jurisdiction to deal with the merits of the matter in difference, referred to, arbitration is suspended and it revives only in the event of the arbitration being ordered to be superseded under paras. 5, 8 and 15 of the Schedule." See also, *Halimbhai* v. *Shankarsai,* 10 Bom. 381; *Jumna Koer* v. *Nasib Ali,* 24 All. 312 = (1902) A.W.N. 72; *Saligram* v. *Jhumna Kuar,* 4 All. 546 = (1882) A.W.N. 135; *Sheo Dutta* v. *Shto Shankar,* 27 All. 53 = 1 A.L.J. 399; *Kaikabad* v. *Khambatta,* A.I.R. 1930 Lah. 26 = 124 Ind.Cas. 339 = 11 Lah. 342 = 31 P.L.R. 668; *Ganesh Prosad* v. *Damodar,* 16 Ind.Cas. 117 = 10 A.L.J. 23; *Radhanath* v. *Haradhan,* 10 W.R. 398; *Aftab Begam* v. *Abdul Majid,* 81 Ind.Cas. 525 = 22 A.L.J. 816; *Ramprotap* v. *Durga Prosad,* 3 O.W.N. 127 = A.I.R. 1925 P.C. 293 = 49 M.L.J. 812; *Nursing* v. *Nafar,* 17 Cal. 832; *Joymungol* v. *Mohan Ram,* 12 W.R. 397; Jogat-*sundari* v. *Sonatan,* 5 B.L.R. 357; *Bengal Silk* v. *Aisha Ariff,* A.I.R. 1947 Cal. 106; *Ganesh* v. *Damodar,* 10 A.L.J. 23 = 16 Ind.Cas. 177; *Doolychand* v. *Mohanlal,* A.I.R. 1924 Cal. 722 = 51 Cal. 432 83 Ind.Cas. 606; *Prafulla* v. *Panchanan,* 50 C.W.N. 287 = A.I.R. 1946 Cal. 427 = 222 Ind.Cas. 597. In *Kaikobad* v. *Khambata* (*supra*), the court observed: "So long as the arbitration is proceeding, the power of the court extends to, to the causing the attendance of witnesses before the arbitrator (para. 7 = s. 43); enlarging the time fixed for filing the award, if this is considered necessary (para. 8 = s. 28); giving an opinion on a special case stated by the arbitrator (para. 11 = s. 13) and appoint another arbitrator

and umpire in certain cases (para. 5=s. 8). The principle of these provisions is that the parties having by consent substituted a *forum domesticum* of their own choice in place of the court, are bound by the decision, on question of fact and law, erroneous though it may be, and the court which appointed the arbitrator cannot interfere with the award, except in the manner and to the extent described above." See also, *Jawahar Singh* v. *Ml Raj,* 8 All. 449 ; *Ram Sarup* v. *Bindra Prosad,* 12 O.C. 23=1 Ind.Cas. 328 ; *Parma Dat* v. *Bipju,* 78 P.R. 1916=40 P.L.R. 1917 =35 Ind. Cas. 887=124 P.W.R. 1916 ; *Bansi* v. *Gopal,* A.I.R. 1928 Lah. 849 ; *Mohindra* v. *Suresh,* A.I.R. 1925 Cal. 332 ; *Gopal* v. *Ganesh,* A.I.R. 1921 Bom. 191=45 Ind.Cas. 512. Court cannot exercise its inherent power under s. 151, Civil Procedure Code. *Kaikobad* v. *Khambata (supra) ; Birsa Mal* v. *Kesar Singh,* 1 Lah. 363=58 Ind.Cas. 789=2 Lah. L.J. 249 ; *Dunichand* v. *Pritam,* A.I.R. 1925 Lah. 321 ; *Ramesh* v. *Dwarka,* A.I.R. 1925 Pat. 36=3 Pat. 778. The court which refers matter to arbitration cannot sit in appeal from the decision of the arbitrators, nor has a lower appellate court jurisdiction to go into the merits of the case. *Haradhan* v. *Radhanath,* 10 W.R. 398. The court has no power to allow a party to withdraw the suit during the pendency of the arbitration. *Sheoambar* v. *Deodat,* 9 All. 168. After filing of an award, such petition is also not maintainable. *Debi Charan* v. *Bipro Prosad,* 7 C.W.N. 186 ; *Kalian* v. *Lekhraj,* 6 All. 211 ; *Abdul Karim* v. *Muhammad,* 32 Ind.Cas. 347=2 O.L.J. 495. Where a suit is referred to arbitration and is pending before the arbitrators the court has no power to dismiss the suit under Order 9, rule 3, Civil Procedure Code, unless an express order superseding the arbitration has been passed. *Imamdin* v. *Jawahari,* 10 P.R. 1899 ; *Chet Ram* v. *Kanshi,* 71 Ind.Cas. 7. See also, *Ram Kuar* v. *Multane Chand,* 29 P.L.R. 1910=8 Ind.Cas. 224 ; *Gopal* v. *Suresh,* 12 C.L.J. 624=8 Ind.Cas. 1107 ; *Kundan Lal* v. *Chainu Lal,* 13 O.C. 341=8 Ind.Cas. 876 ; *Maharaj Bhagat* v. *Harihar Bhagat,* 65 Ind.Cas. 144=A.I.R. 1923 Pat. 115=3 P.L.T. 346 ; *Krishna Kishore* v. *Banwari Lal,* A.I.R. 1929 All. 259=1929 A.L.J. 100=113 Ind.Cas. 749 ; *Ganesh Das* v. *Damodar Das,* 10 A.L.J. 23=16 Ind.Cas. 177 ; but see *Chokkappa* v. *Ahmedulla,* 21 Ind.Cas. 558. But there is nothing in section 21 to prevent the parties from getting the suit dismissed with consent during the pendency of the arbitration. *Kokil Sing* v. *Ramasray,* 81 Ind.Cas. 994=A.I.R. 1924 Pat. 110. See also *Mangee Sahu* v. *Bhatoo Singh,* 57 Ind.Cas. 473.

Similarly in a Lahore case it was held that even after a reference to arbitration was made in a pending suit, the parties were not precluded for settling the dispute amicably by mutual agreement, and it was not therefore necessary to cancel the reference before accepting the compromise. *Aishan* v. *Abdulla,* A.I.R. 1927 Lah. 156=99 Ind.Cas. 1002. But in *Dooly Chand* v. *Mohan Lal,* 83 Ind.Cas. 606=51 Cal. 385=A.I.R. 1924 Cal. 651, a contrary view was taken by the Calcutta High Court.

Under Schedule II of the C. P. Code of 1908 the court is competent, in a fit case, to grant *interim* injunction or appoint a receiver. *Vide* Schedule II, Article 4 *infra.* See also, *Chetan Singh* v. *Gulibai,* 78 Ind.Cas. 84=18 S.L.R 303=A.I.R. 1925 Sind 102 ; *Surendra* v. *Susil,* A.I.R. 1928 Cal. 256=55 Cal. 249=109 Ind.Cas. 759 ; *Law* v. *Harret,* (1878) 8 Ch. 26 ; *Compagnie du Senegal* v. *Woods,* (188), 32 W.R. 111= 53 L.J.Ch. 116 ; *Hasky* v. *Windham,* (1889) W.N. 108 ; *Piri* v. *Roncoroni,* (1892) 1 Ch.D. 633 ; *Willesford* v. *Watson,* (1873) 8 Ch. 473 ; *Talinoff* v. *Hammond,* (1898) 2 Ch. 92=78 L.T. 456.

In India an arbitration agreement is not discharged by the death of any party thereto. *Vide* section 6 (*supra*). If before the hearing has concluded one of the parties dies his representatives should be brought on the record and made parties to the submission. But where the hearing has terminated before such death and nothing remains for the arbitrators to do but to deliver their awards, the award delivered after the death is binding upon the parties and their representatives. *Manindra* v. *Mohananda,* 13 Ind.Cas. 161=15 C.L.J. 360; *Hara Kishna* v. *Ramgopal,* 6 Ind.Cas. 170=14 C.W.N. 759; *Rangi Ram* v. *Salig Ram,* 14 C.L.J. 188=11 Ind.Cas. 481; *Binayakdas* v. *Nalini,* 70 Ind.Cas. 459=26 C.W.N. 804; *Tegha* v. *Ram,* 79 Ind.Cas. 67. But there is no rule of procedure by which an arbitrator can substitute certain persons as legal representatives of a deceased party. *Binayak* v. *Nalini* (*supra*). But now see Chapter VII.

Where the question of the costs of the litigation incurred prior to the reference is referred to arbitration, the court is precluded from dealing with the matter in the same suit. *Hira* v. *Gaya,* A.I.R. 1932 All. 183=1931 A.L.J. 1155=136 Ind.Cas. 789=54 All. 122. The court cannot remove an arbitrator to substitute a new one in his place. *Halimbhai* v. *Shankar,* 10 Bom. 381. See also, *Shiam* v. *Bhairon,* 3 A.L.J. 185.

1119. Reference to arbitration through court—subsequent compromise between parties.—Once a dispute goes to arbitration the authority of the court to proceed with the suit is suspended and it cannot, so long as the reference stands, deal with the subject-matter of the reference. After a reference to arbitration has been made in a suit through the court the parties cannot be allowed by mere consent, to abandon the arbitration and go on with the suit or ask for a fresh reference. But if a concluded compromise in undisputed terms be placed before the court by all the parties, whether before an award has been made or after, the court may grant leave to revoke the submission under s. 5, Arbitration Act, and on superseding the arbitration agreement thereafter under s. 12 (2) (b), pass a decree in terms of the compromise. But the compromise before it is accepted, must be considered on its own account as to its validity and cannot be accepted as a matter of course. In no case can a compromise be given effect to by the court without first superseding the reference. *Prafulla Chandra* v. *Panchanan,* A.I.R. 1946 Cal. 427: *Narain Das* v. *Kanpur Nagor Mahapaleka,* I.L.R. (1962) 2 All. 603=1963 All. L.J. 476=A.I.R. 1963 All. 169. (power of court to deal with care remains suspended till arbitration is superseded): A.I.R. 1962 S.C. 903=(1962) 2 S.C.J. 274; I.L.R. 24 all. 312; A.I.R. 1924 Cal. 722 and A.I.R. 1946 Cal. 427.

Refer to arbitration by some of the parties.

24. *Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as if relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of*

such a reference shall be binding only on the parties who have joined in the application.

1120. N.B.—This section is a new provision. It is possible that some parties only to a suit may be agreeable to having the difference between them settled by arbitration. This section permits this to be done provided that those differences can be separated from the rest of the subject-matter.—*Notes on clauses.*

For commenatry on this section *vide notes* under s. 21 (*supra*) under the head "All parties interested agree." The mere fact that all the parties did not join in the reference to arbitration of a dispute about inheritance is no ground for upsetting the award so far as those people who made the reference was concerned. *U Po Hlang* v. *Daw Ngwe,* A.I.R. 1941 Rang. 22. See also, *Kirkwood* v. *Maung Sin,* A.I.R. 1925 P.C. 216=89 Ind.Cas. 773=5 Rang. 186=52 I.A. 265 (P.C.). *Hassanmal* v. *Kodanmal,* A.I.R. 1927 Sind 239; *Laduram* v. *Nandalal,* 47 Cal. 555=55 Ind.Cas. 747=31 CL.J. 150; *Bhagavanulu* v. *Seetharamaswami,* A.I.R. 1923 Mad. 502; *Raghunath* v. *Ramrup,* A.I.R. 1924 Pat. 33=2 Pat. 777. See also *Jagsup* v. *Kashi,* A.I.R. 1934 All. 482; *Ishar Das* v. *Keshab Deo,* 32 All. 657.

1121. Scope.— The reference is valid where in a pending suit some of the parties agree to refer to arbitration. The award when made binds only those parties who have joined. *Mahadeo* v. *Kamada,* A.I.R. 1956 All. 51. As regards the meaning of the expression "all the parties interested" vide *Lakshmi* v. *Raghubir,* A.I.R. 1956 Punj. 249.

1122. Matters in dispute.—As regards interpretation of the words 'matters in dispute" vide *Danmal Jain* v. *Caledonian Insurance,* 1958 B.L.J.R. 305=1958 Pat. L.R. 162; see also A.I.R. 1952 S.C. 119=1953 S.C.J. 156=(1952) 1 Mad. 781; (1942) 1 All. E.R. 337.

1123. Applicability of the section.—This section only applies where dispute between the plaintiff and some of the defendants can be definitely separated from his dispute with other defendants and it can have no application at all in a suit brought against defendants in their individual capacity jointly and severally for the recovery of money. *Narsing Das* v. *Gagan Ram,* 56 P.L.R. 304=A.I.R. 1955 Punj. 31. Section 24 specifically provides for certain matters being referred to arbitrators at the instance of only of some of the parties. However a number of conditions must be satisfied before reference can be made at the instance of some of the parties, namely, (1) the matter desired to be referred to arbitration can be separated from the rest of the subject-matter of the suit; (2) the suit continues so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference in the same manner as if no such application has been made and (3) the award made in pursuance of such a reference shall be binding only on the parties who have joined in the application. *Keluram* v. *Kashmiri Lal,* A.I.R. 1959 Punj. 617 (L.B.). Once it is shown that the dispute is covered by an arbitration clause, no matter whether the dispute was brought to the notice of the plaintiff who instituted the suit in breach of the arbitration agreement, the defendant is entitled to a stay provided the other condition are satisfied. *Union of India* v. *Bharat,* A.I.R. 1962 Cal. 510 [(A.I.R.) 1940 Cal. 105 not followed and A.I.R. 1948 Cal. 230 followed; I.L.R. (1950) 1 Cal. 497 distinguished].

1124. Where interest not separable.—Where the interest of a

party not joining in the reference to arbitration, is inseparable from that of the other parties who are parties to the reference, this section will not applv and cannot be availed of. *Ram Harakh* v. *Mumtaz,* 4 D.L.R. (All). 70=A.I.R. 1949 All. 676 ; see also A.I.R. 1931 All. 453.

1125. Revision.—Where all the parties interested in the dispute did not join in the reference to arbitration the reference is invalid and the High Court will interfere in revision and at the instance of a person who was interested in the dispute and was not made a party to the reference but the High Court will not interfere and set aside the award in revision at the instance of a party who joined in the reference to arbitration, took part in it and having lost it was trying to back out of it. *Achisan* v. *Babur Ali,* A.I.R . 1945 Cal. 156=I.L.R. (1944) 1 Cal. 619=79 C.L.J. 123.

Provisions applicable to arbitrations under this Chapter.

25. *The provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter.*

Provided that the Court may, in any of the circumstances mentioned in sectione 8, 10, 11 and 12, *instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit.*

1126. N.B.—This section is also new. This section applies with necessary modification certain other provisions of the Act to arbitration in suits.—*Notes on clauses.*

1127. Proviso.—Under sections 8, 10, 11 and 12 the court is given the power to fill up the vacancies or making the appointment. In such case the court is also given the power to supersede the arbitration and proceed with suit. *Vide* notes under S. 8. See also, *Hrishikesh* v. *Mohan,* 57 Ind.Cas. 890 ; *Jumma Kunwar* v. *Nasib,* 1902 A.W.N. 72 ; *Chokappa Mudaliar* v. *Ahmedulla,* 21 Ind.Cas. 558 ; *Manger Sahu* v. *Bhatoo,* 57 Ind.Cas. 473=5 Pat.L.J. 672. A date should be fixed for hearing after passing of the superseding order. *Krishna* v. *Banwari,* A.I.R. 1929 All. 259=27 A.L.J. 100=113 Ind.Cas. 749 ; *Kundan Lall* v. *Chainu Lal,* 8 Ind.Cas. 873=13 Oudh Cas. 341 ; *Gopal Lal* v. *Suresh Chandra,* 8 Ind.Cas. 1167=12 C.L.J. 624. An order superseding an arbitration is appealable under S. 39(1), clause (1). There is no rule of law except S. 151, Civil Procedure Code, which can authorise a court to revise its own order superseding a reference to arbitration. *Salli Singh* v. *Mullo Singh,* 138 Ind.Cas. 524=A.I.R. 1932 All. 656. But *vide note* under S. 19 *supra.* Under the proviso to S. 25 the matter is entirely discretionary and in a proper case, the court has a discretion to supersede the arbitration. The application for reference to arbitration emphasised on the person named therein. Two of the arbitrators had voluntarily resigned. The plaintiff had no confidence in the other arbitrators now named by the defendants. They had all been characterised as partisans and defendant's men. Besides the allegation was that the third arbitrator has also since been gained over. *Held,* that sufficient grounds for the exercise of the discretion in the case for superseding the arbitration had been made out. *Satyaram* v. *Kunj,* A.I.R. 1957 Pat. 712.

1128. Ss. 5, 12(2)(b) 15 and 25.—A pending suit was referred to a sole arbitrator. He made an award to which the plaintiff objected. The objections were decided and the award was remitted to the arbitrator for reconsideration. Before a fresh award could be made, an application was made by the plaintiffs under S. 5 of the Act, praying that the authority of the appointed arbitrator be revoked. One of the grounds urged was that the plaintiffs did not expect justice from the hands of the arbitrator. The Munsiff found that the allegation was correct and he accordingly revoked the authority of the arbitrator under S. 5 and in view of S. 12(2)(b) and S. 25, directed that the suit should proceed. On an application for revision by the defendants; *Held*, that on merits the court below was perfectly justified in exercising jurisdiction, under Ss. 5, 12 (2; (b) and 25 of the Act, in revoking all powers of the arbitrator and in directing that the suit shall proceed in Court. *Gopal* v. *Kedar*, (1958) All. W.R. (H.C.) 66. See also, *Narayan Prosad* v. *Kalawati*, I.L.R. (1956) 1 Cal. 506.

1129. Arbitration Act s. 25—Arbitrator misconducting.—Where arbitration is through court and arbitrator misconducts, the court can supersede arbitration. *Ganesh* v. *Banwari*, A.I.R. 1959 Punj. 593. Section 25 gives a very wide discretion to the court in the matter of dealing with arbitration, and if this discretion is exercised with due care and circumspection, the High Court will not lightly interfere with it. *Ibid.* Where the reason for superseding the arbitration were very good and cogent and the court not only exercised the discretion which was vested in it by law but followed the only course open to it in the circumstances, namely of superseding the arbitration, it will be wrong to interfere with it. *Ibid.*

1130. Section 8 and section 25.—Where in a pending suit the underlying object of an agreement to refer to arbitration is to entrust the determination of the maters in difference to a person of their own choice and not that if the named arbitrator is unable to act for one reason or another, the arrangement is automatically to come to an end, the court has no jurisdiction to refer the matters to another arbitrator. Section 8 read with section 25 applies to such a case. *Jawar Lal* v. *Jagadish* A.I.R. 1951 All. 335=6 D.L.R. (All.) 146. Where in arbitration in suits, one of the arbitrators expressed his unwillingness to act as an arbitrator, under the provisions of this section. the court is perfectly competent to supersede the arbitration and proceed with the suit itself. *Kanhayalal* v. *Ram Kumar*, A.I.R. 1956 Raj. 129 (D.B.).

1131. Section 19 is applicable to a case falling under section 20.—The variant provision in section 25 serves to indicate that section 19 is applicable to a case falling under section 20, where there is no pending suit, but the agreement to refer has been filed in court, and the court is invested with power thereafter to make orders of reference on the basis of such agreement. *Abdul Halim* v. *Chairman*, P.L.D. 1949 Lah. 278.

CHAPTER V.

GENERAL.

Application of Chapter.

26. *Save as otherwise provided in this Act, the provisions of the Chapter shall apply to arbitrations.*

1132. N.B.—This section is new.

1133. Scope.—All that the section provides is that the provisions of chapter V of the Act shall apply to all arbitrations which are governed by the Act; the section does not mean that the Act applies to parole agreements to refer disputes to arbitration or that it applies to arbitrations not governed by the Act as well. *Gauri* v. *Ramlochan,* 29 P.L.T. 105 = A.I.R. 1948 Pat. 430 = 3 D.L.R. (Pat.) 26. Chapter V contains the general provisions relating to all arbitrations *i.e.,* arbitration without intervention of a court or arbitration in suit or arbitration with the intervention of a court where there is no suit pending. *Beajrang* v. *Agarwal* A.I.R. 1950 Cal. 267.

Power of arbitrators to make an interim award.

27. *(1) Unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit make an interim award.*

(2) All references in this Act to an award shall include references to an interim award made under sub-section (1).

1134. N.B.—Section 27 is a new provision, based on the 1934 Act of Parliament, and conferring on arbitrators the power to make an interim award—*Notes on clauses.* See now section 14 of the English Arbitration Act of 1950.

1135. Old law.—Neither under the Indian Arbitration Act nor under the Second Schedule of the Civil Procedure Code, in the absence of any provisions in the agreement, it was competent for an arbitrator to give an award piecemeal. *Gangadhar* v. *Indar Singh,* A.I.R. 1938 All. 195 = 1938 A.W.R. 63 = 1938 A.L.J. 113 = 174 Ind.Cas. 671 = I.L.R. 1938 All. 236. In the above case *Rachhpal Singh, J* said: "The arbitrator gave two awards in the case. The first award was made by him on 18th April, 1934. The arbitrator decided the dispute between the parties in respect of *mahal Naubat Singh* and also about profits of the same *mahal.* A short time after, the arbitrator made a second award under which the other point in dispute between the parties were decided by him. It was pleaded that it was not competent to the arbitrator to give his decision about the points in dispute piecemeal as had been done in the case. The contention, therefore, was that both the awards given by the arbitrator were not valid and, therefore, the application of the plaintiff should be rejected.....We think that the contention is well-founded and is amply supported by the authorities which have been cited before us by him. The first authority to which a reference might be made is in *Comyn's Digest,* Vol. I, page 666. It is laid down there as follows: 'So an award ought to be entire; and, therefore, if it be made, part at one day and part at another though all made before the time limited for it, shall be void.' In *Russell's Laws of Arbitration,* Edn. 11, p. 224 the statement of law on the point is stated as follows: 'It is *implied in all cases, unless something to the contrary is expressed, or may be inferred from the submission,* that the arbitrator can make but one award. *Gould* v. *Staffordshire Potteries Water Works Co.,* (1850) 5 Ex. 214 = 1 L.M. & P. 264 = 19 L.J.Ex. 281 = 155 E.R. 92 per *Parke, B.* This must be one entire and complete instrument in itself, therefore, if it made part at one day and part at another, though each and every part is made within the time limited for the award, it will be void (*Comyn's Digest, Arb. E.* 16). If without special power, the arbitrator makes two awards, each deciding part of

the matters referred, and not one entire award on all together, both may be set aside for there is no one final award on all the subjects. *Winter* v. *Munton,* (1818) 2 Moore 723=19 R.R. 560.'

"Sir Tej in his argument, addressed to us has also cited the view expressed in a book recently published on the Law of Arbitration in England and that is the Law of Arbitration by *Quintin Megarel Hogg.* At p. 137 the learned author states that :

"The principle from Bacon's abridgment set out at the beginning of this chapter requires an award to be final as well as complete. It is not enough that the arbitrator should determine the issues referred to him and all of them ; he must further determine them finally, so in relation to them no further controversy can arise.' The view enunciated in the abovementioned books is amply supported by authority. In this connection we need only refer the case in *Gould* v. *Staffordshire Potteries Waterworks Co., supra,* where *Baron Parke* made observations which clearly support the contention raised before us by learned counsel for the appellant. *Baron Parke* observed as follows : '.....and this was contended for by analogy to the ordinary practice or submission to arbitration, where everything to be enquired into must be included in the award. But the ground for the rule is to be found in the agreement of the parties to the submission, in which it is usually one of the terms that the arbitrator is to make but one award. That condition in all cases, unless something to the contrary, is either expressed in or may be inferred from the submission.....' This view has been taken in several English cases and it is clear that there should be one and complete award which should determine the dispute between the parties finally. The law in India is the same. We may also refer in connection with this matter to the case of *Ganesh Narain Singh* v. *Malida Koer,* 13 C.L.J. 399=10 Ind.Cas. 450. *Mookerjee, J.* at page 403 observed that :

'It is well settled that the arbitrator must be careful to see that his award is a final decision on all matters requiring his determination. The obligation so to decide depends upon the question whether the submission requires that all or only some of the matters in dispute are to be determined by him.....The same rule has been adopted in the American courts in a series of decisions.....The position of course is different when the arbitrator is empowered to make one or more awards at his discretion as in *Dowse* v. *Cox,* (1825) 3 Bing. 20=10 *Moor* 272 ; *Wrighton* v. *Bywater,* (1838) 3 M. & W. 199=1 H. 50=6 Dowl. P.C. 359, and the decision of this court in *Soshemukhi Debia* v. *Nobin Chunder Roy,* (1879) 4 C.L.R. 92, must be taken to fall within this class of cases. In the case before us, however, it was clearly the duty of the arbitrator to give a complete adjudication of the matters in controversy.'" See also, *Mukundaram* v. *Saligram,* 29 Cal. 590 (P.C.)

1136. Scope of the section.—This section is modelled after the provision of clause (k) of the First Schedule of the English Act of 1889, inserted by S. 7 of the English Arbitration Act of 1934. In commenting on this provision, *Russell* says : "Prior to the provision the arbitrator or umpire had no power unless authorised by the submission or subsequent agreement of the parties to make an interim award. An interim award may now be made deciding the question of liability and postponing the question of damages."—*Russell* on *Arbitration,* 13th Edn., p. 463. But that the idea of interim award was not inconsistent with the provisions contained in para. 14, clause (*a*) of Sch. 2, Civil Pro. Code is

amply proved by this Act, for while by this section, it authorises the arbitrator to make an interim award, this Act reproduces in S. 16 the same provision as is contained in para. 14, clause (*a*), Sch. 2. *Durga Prosad* v. *Anardeyi*, A.I.R. 1947 Cal. 75. In the above case the Court observed : "That the idea of interim award is not inconsistent with the provision contained in para. 14, clause (*a*) of Schedule II, to the Civil Procedure Code, is amply proved by the present Arbitration Act, 1940, for while by S. 27, it authorises the arbitrator to make an interim award, the present Act reproduces in S. 16 the same provision as is contained in para. 14, cl. (*a*) of Schedule II. Paragraph 3(2) of Sch. II, bars the court from dealing with 'such matter' which by reference, means the 'matter in difference' referred to arbitration. The question whether the arbitrator will make one or more awards was not a matter in difference in the suit and was not referred to arbitration and I do not see how the court is precluded from making an order giving certain powers to the arbitrator in the conduct of the arbitration proceedings. Further, the order empowering the arbitrator to make interim award or awards was made by consent of all parties and the appellant can hardly be heard to complain against it. In my judgment the principle laid down in *Mukund Ram Sukul* v *Saliqi Ram Sukul*, 21 I.A. 47=21 Cal. 500 is applicable to the case now before us." Where the first award which has not decided some of the matters referred to arbitration as the parties were not prepared with their statements regarding them definitely states that there will be a supplementary award and in pursuance of this reservation in the first award, the second award was given, the two awards taken together make the complete award disposing of all the disputes referred to arbitration, and the arbitrators cannot be said to be *functus officio* at the time when the second award is given. *Mukundalal* v. *Prokash*, A.I.R. 1939 Cal. 739=70 C.L.J. 43 ; see also *Chandumal* v. *Donald*, 23 C.W.N. 707. But now explicit power is given to the arbitrators under the section to make such an award.

1137. Reason of the amendment inserted in the English Act.— "At present an arbitrator, or umpire, has no power, unless authorised by the submission, or subsequent agreement of the parties, to make an interim award. In many cases it is desirable that he should be able to do so, and in some cases one of the parties may not be willing to give him such authority—*e.g.*, where one party clearly owes the other large sum but there is a dispute as to some matter in their dealings. An interim award may also be very useful in order to deal with liability, and with a postponement of the enquiry into damages."—*Extract from the Report of the Committee,*

1138. Sub-section (1)—unless a different intention appears.— Under the old law an arbitrator or umpire could make only one final award, in the absence of some special authority to make more than one. This section empowers him, unless the arbitration agreement expresses a contrary intention, to make an interim award. This interim award may well be final as to some of the claims referred ; although it is perhaps more usual for some awards merely to determine certain of the issues arising upon a claim—for instance, to determine the issue of liability while leaving questions of amount to be dealt with later. *Russell*, 15th Edn., p. 208 citing *Whitworth* v. *Hulse*, (1866) L.R. 1 Ex. 251 ; *Randall* v. *Randall*, (1805) 7 East. 81 ; *Samuel* v. *Cooper*, (1835) 2 A. & E. 752 ; *Re Wright* v. *Cromford Canal Co.*, (1841) 1 Q.B. 98. Even under the old law it has been held that there is no rule of law that a partial award

would be invalid. The question has been decided on the intention of the parties, the matters being a subject of contract between them. *Alagu* v. *Veluchami,* 74 Ind.Cas. 609=A.I.R. 1923 Mad. 576=45 M.L.J. 76; see also, *Risden* v. *Inglet,* 78 E.R. 1065=Cro.Eliz. 839; *Ormelide* v. *Coke,* 79 E.R. 303=Cro.Jac. 355," *Wrightson* v. *Baywater,* 150 E.R. 1114 (1117)=6 Dowl. P.C. 359.

In *Ratha Krishna Murte* v. *Chengalraya,* A.R. 1948 Mad. 365= (1948) 1 M.L.J. 164, the arbitration related to 5 contracts between the buyer and seller of various quantities of corn. The arbitrators agreed regarding two contracts and they disagreed with regard to the 3 remaining contracts. The arbitrators made two awards, first upon the two contracts they agreed and secondly, respecting the three contracts upon which they disagreed. As regards the latter, they referred the matters for decision of the umpire. These were held to be interim awards and provision was made in the bye-law for such awards as such, such awards were held to be valid.

Power to Court only to enlarge time for making award.

28. (*1*) The Court may, if it is think fit, *whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.*

(*2*) Any provision in an arbitration agreement whereby the arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

1139. N.B.—This section corresponds to s. 12 of the Indian Arbitration Act of 1899 and para. 8 of Schedule II of the Civil Procedure Code of 1908. Under Paras. 4 and 5 of Schedule I of the Indian Arbitration Act the arbitrators or umpires can themselves enlarge time for making an award, though it seems that they must do so before the time actually expires. Under the Code it is the court which has this power. The clause proposes that the power should in all cases rest in the court only, who may extend the time whether the time has expired or not or whether the award has actually been made or not.—*Notes on Clauses.*

We have revised sub-clause (2) so as to allow of provision being made in an arbitration agreement for enlargement of the time for making the award where all the parties consent to such enlargement."—*Report of the Select Committee.*

1140. Section 12 of the Indian Arbitration Act.—"The time for making an award may, from time to time, be enlarged by order of the court, whether the time for making the award has expired or not."—*Section* 12 *of the Indian Arbitration Act,* 1899.

1141. Para. 8 of the Second Schedule of the Civil Procedure Code of 1908.—Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such cases shall proceed with the suit."—*Para.* 8 *of the Second Schedule of the Civil Procedure Code of* 1908.

1142. Scope of repealed analogous sections.—The words of para. 8 of Schedule 2, Civil Procedure Code confer the same power on the court as regards enlargement of time as is conferred by S. 12, Arbitration Act, 1899. *Jethalal* v. *Amrit Lal,* A.I.R. 1939 Cal. 260=42 C.W.N. 883=I.L.R. (1938) 2 Cal. 482=180 Ind.Cas. 346. The words "fixed for making of an award" are merely definitive of the period referred to in the paragraph and the whole phrase "period fixed for making of award" must be taken to be a description of the period which the court is entitled to enlarge. Hence the period fixed for making of the award is either the period originally specified in the order of reference or the period subsequently allowed after the expiration of the same. The fact that the award is already made does not affect the power of the court one way or the other. It is however a factor which ought to be taken into consideration for the purpose of determining whether or not the application for enlargement of time should be granted or not, *Ibid.* See also, *Lord* v. *Lee,* (1868) 3 Q.B. 404 ; *Patto Kumari* v. *Upendra,* A.I.R. 1919 Pat. 93=50 Ind.Cas. 52=4 Pat.L.J. 265 ; *Shib Kristo* v. *Satish,* 39 Cal. 822=18 Ind.Cas. 69 ; *Kahan Singh* v. *Mohan Lal,* A.I.R. 1916 Lah. 80=34 Ind.Cas. 177=56 P.L.R. 1917 ; *Sri Lal* v. *Arjun,* A.I.R. 1915 Cal. 101=27 Ind.Cas. 233=18 C.W.N. 1325 ; *contra Shib Krishna* v. *Satish Chandra,* 38 Cal. 522=12 Ind.Cas. 13 ; *Chokkappa Chetty* v. *Santhia,* A.I.R. 1940 Mad. 926=(1940) M.W.N. 988=52 L.W. 537=(1940) 2 M.L.J. 481 ; *Dhan* v. *Noonitlal,* A.I.R. 1934 Bom. 398=36 Bom.L.R. 831=152 Ind. Cas. 1068 ; *Knowles* v. *Bolton,* (1900) 2 Q.B. 253 ; *Lallubhai* v. *Jamnadas,* A.I.R. 1930 Bom. 462=125 Ind.Cas. 425 ; *Tejpal* v. *Nathmull,* 54 Ind. Cas. 668=46 Cal. 1059 ; *Martirosi* v. *Subramanyam,* A.I.R. 1928 Mad. 69=51 Mad. 103 (F.B.) ; *Shivji* v. *Ranji,* A.I.R. 1931 Bom. 125=32 Bom.L.R. 1650=129 Ind.Cas. 886=55 Bom. 452 ; *Himalayan Assurance* v. *Assudamal,* 88 Ind.Cas 878=A.I.R. 1926 Sind. 8. In cases where an award is remitted for the decision of the arbitrators or umpire without fixing any time for the return of the award, the court has the power to extend the time after the arbitrators or umpire have, after the remission, given the award. *Martirosi* v. *Subramanayam, (supra).*

1143. Section 13 of the English Arbitration Act.—Section 13 of the English Arbitration Act which lays down that the time for making an award may from time to time be enlarged by an order of the High Court or a Judge thereof, applies only where the time for making the award is fixed, either under provisions of the Act or otherwise. *Joseph* v. *Kedernath,* A.I.R. 1959 Cal. 328.

1144. Scope of this section.—If an arbitrator makes an award beyond time, the delay may be condoned at any time by the court in a proper case, for this section gives power to the court to extend time even after the award had been made. *Nani Bala* v. *Ramgopal* A.I.R. 1945 Cal. 19=48 C.W.N. 721. Sub-section (1) is very wide and confers full discretion on court to enlarge time for making award at any time. Court can exercise that power, even after the award has been made and filed, during the hearing of the petition under Ss. 14 and 17 and after the parties had led their evidence on merits. *Narsing Das* v. *Bisandayal,* A.I.R. 1954 Orissa 29 , see also, *Lord* v. *Lee,* (1867) 3 Q.B. 404=37 L.J.Q.B. 121 ; *Knowels* v. *Bolton Corporation,* (1900) 2 Q.B. 253=19 L.J.Q.B. 481 ; *Tejpal* v. *Nathumal,* A.I.R. 1920 Cal. 115=46 Cal. 1059 ; *Amarnath* v. *Uggar Sen,* A.I.R. 1949 All. 399=I.L.R. (1949) All. 720=4 D.L.R. (A) 57=1949 A.W.N. 30 ; *Radha Krishna* v. *Madho Krishna,* A.I.R. 1952 All. 856=1952 A.L.J. 407 ; *Ramnath v. Nanjee,* A.I.R. 1953 Cal. 787. This

section applies to all arbitration. *Radha* v. *Madho,* A.I.R. 1952 All. 856. But this discretion should be exercised judicially. *Chimman* v. *Brijmohan,* A.I.R. 1943 Oudh 117.

Order for extension of time under this section does not amount to fresh submission, where agreement is illegal and order of reference upon such agreement is illegal. *Nandkishore* v. *International Mercantile Cor.,* A.I.R. 1953 Cal. 415. Court cannot exercise powers conferred by sub-section (1) *suo motu*. *Narsing Das* v. *Bisandayal,* I.L.R. (1953) Cut. 455 =A.I.R. 1954 Orissa 29.

The provision in an arbitration agreement that the arbitrator is to be at liberty to extend the time of making his award by endorsement on the back of the agreement cannot be given effect to in view of the provisions of this section. *Barindra* v. *Bani,* 54 C.W.N. 796. An award given by an arbitrator after the time limited by the arbitration agreement or by order of the court for making the award had expired is vitiated. *I. G. H. Ariff* v. *Bengal Silk,* A.I.R. 1949 Cal. 350. The rule of construction of a statute is that the heading prefixed to section or sets of sections in statutes cannot control the plain words of statutes but they can certainly explain an ambiguity in words if it exists. The marginal note of s. 28 is not in any way against the tenor and phraseology of s. 28, rather it clarifies that the enlargement of time can be obtained only by a motion to court. *Sowaran Singh* v. *Municipal Committee, Pathankot* I.L.R. (1963) 2 Punj. 320=A.I.R. 1963 Punj. 427.

1145. Court may.—The powers of the court under this section is unlimited and the court has ample power to extend the period of four months. But the power must be exercised with judicial discretion. Under Art. 158, Limitation Act, the limitation for setting aside the award or for getting it remitted for reconsideration is thirty days from the date of service of the notice of the filing of the award. An extension of time long after the expiry of the period of four months and after close of the arguments in the case on the face of it unjust and improper. *Lakshmi* v. *Union of India,* 1957 B.L.J.R. 608=A.I.R. 1957 Pat. 633. The Court's powers under s. 28 to extend the time are entirely discretionary and are not limited. The court can enlarge the time for making the award either before or even after the time for making the award has actually been made or even after the award has been made. What is necessary for the court in its proper exercise of discretion is a case to be fit before it enlarges time. The policy of the law is that arbitrations should not be unduly prolonged and for that purpose the First Schedule, clause (3) provides a period of four months.

Where the Arbitrators were prevented from making the award within four months by an order of stay from the court, it is a fit and proper case where the time certainly should be extended. The conduct of the party in appearing before the arbitrator even after the time for making the award had expired without any objection on the ground of time is to be read as a further consideration in favour of enlarging the time for the award. *Kanhayyalal* v *Aviharan,* 97 Cal. L.J. 225=A.I.R. 1957 Cal. 658 see also *Bhagwan* v. *Bisheswar,* 1958 A.L.J. 307=1958 All. W.N. (H.C.) 479=A.I.R. 1958 All. 568 ; *Rice Mills* v. *State,* I.L.R. (1958) Cut. 348= A.I.R. 1959 Orissa 4. The limit of time is the condition or the form of court's control over the arbitrators, and the court is not authorised either to abandon the control or substitute any other form of control. *Rabindra* v. *Jogendra,* 80 Ind.Cas. 459=27 C.W.N. 420=A.I.R. 1923 Cal. 410. It is not competent to the court to delegate to the arbitrators

its own function of control as to time. *Ibid ; Gurdas* v. *Garul,* 9 Ind. Cas. 24. But such delegation is permissible with the consent of the parties. In such cases the arbitrator can only extend the time before the time originally fixed for making the award has expired. If he does not do so, he is by effluxion of time *functus officio* and has no further jurisdiction in the matter. *Co-operative Hindusthan Bank* v. *Bholanath,* 31 Ind.Cas. 597=19 C.W.N. 165. The power vested in the court under this section is permissive and discretionary, but it does not negative the right to extend the time by agreement impliedly agreed to and acquiesced in between the parties to the arbitration proceedings. *Patti Kumari* v. *Upendra,* 50 Ind.Cas. 52=4 P.L.J. 265.

Under this section the court may, at its discretion, enlarge the period for the delivery of an award of arbitration without the consent of, and even if opposed by the parties. *Govind* v. *Ramkissen,* W.R. 297. Where arbitrator applies for extension of time, the court must take into consideration all the circumstances of the case and decide if the arbitrator should be granted such extension. *Pamanmal* v. *Hunandas,* 28 Ind.Cas. 85=8 S.L.R. 26 ; *Mohharram* v. *Mayadas,* 78 Ind.Cas. 521 ; *Anand* v. *Ram,* A.I.R. 1933 Pat. 566. After hearing the parties the court is competent to supersede the arbitration and proceed with the suit. *Hrishikesh* v. *Lalmokan,* 57 Ind.Cas. 890 ; *Jamna Koer* v. *Nasib,* 24 All. 312. But the court should not unreasonably make haste in rejecting the application for time, where the arbitrator is not in collusion with either party, or he is not wilfully delaying or there is no bad faith in his conduct. *Ram Kuar* v. *Multan Chand,* 8 Ind.Cas. 224=29 P.L.R. 1908. Where a party contests the validity of an arbitration award, on the ground that it was not completed within the time fixed by the court, he must show that the delay arose from corruption or misconduct on the part of the arbitrator, or an award was made after the issue of an order of court superseding the arbitration and recalling the suit. *Russool Bibee* v. *Jan Ali,* 17 W.R. 31.

Where a court supersedes the reference to arbitration it cannot set aside its own order except under section 151 of the Civil Procedure Code. *Salle Singh* v. *Mullo Singh,* A.I.R. 1932 All. 656=138 Ind.Cas. 524 ; *Narayana* v. *Savitri,* (1936) M.W.N. 1152=44 L.W. 608=71 M.L.J. 648. The court has no doubt a discretion to extend time under this section but it will do so only if cogent reasons are forthcoming. Obviously the discretion cannot be exercised in favour of a party who himself has been negligent and has been guilty of dilatory tactics. *Oliver* v. *Mian Dost Mohammad,* A.I.R. 1935 Lah. 191. No elaborate enquiry need be held as to the validity of reference. *E. L. Price* v. *Ahmulty & Co.,* 154 Ind.Cas. 328=A.I.R. 1935 Sind 30. The court has no power to deprive itself once for all of the power to exercise discretion by an order made at the time of reference. *Narayan* v. *Savitri,* (1936) M.W.N. 1152 =44 L.W. 608=71 M.L.J. 648. There is nothing in the section to suggest that the court should not exercise this power to extend time unless it is expressly asked by a party to do so. *Madura Mills* v. *Krishna Ayyar,* 171 Ind.Cas. 690=(1937) M.W.N. 518=45 L.W. 405=A.I.R. 1937 Mad. 405. In *Narsing Das* v. *Bisandayal,* A.I.R. 1954 Orissa, 29, the court observed : "The next question for consideration is whether the trial court exercised its discretion properly in thus extending the time limit. I have already shown the defendant was mainly to blame for the delay for making the award.....In his objection petition in the trial court also he never objected to the validity of the award on the ground that it was made

beyond the statutory time limit. Under the circumstances I think the trial court exercised its discretion properly in extending the time-limit. It is true that there was no specific prayer by the plaintiffs to the court for extending the time and the court granted that extension while writing out the judgment after considering the entire evidence on record. But sub-section (1) of s. 28 does not say that the court cannot exercise the power conferred by that sub-section *suo motu*. In *Amarnath* v. *Uggar Sen*, A.I.R. 1949 All. 399, it was held that the absence of an application for the extension of time was a mere irregularity which may be waived by conduct.....It appears that the (defendants) waived this objection by their conduct and taking all the facts and circumstances of this case into consideration I am not prepared to say that the trial court exercised the discretion improperly." Where the arbitrator returned the papers to court stating his inconvenience to proceed with the matter on the due date never declined to arbitrate, *held* that the court had jurisdiction to send the papers back to the arbitrator and extend the time. *Muhammad* v. *Basant*, 54 All. 297 = A.I.R. 1932 All. 665. The power of the court under S. 28 of the Arbitration Act to extend time is not controlled by a clause in the arbitration agreement. *Maheswari Khetan Sugar Mills* v. *Narendra Jit Singh* A.I.R. 1962 All. 97. The power to enlarge time for making the award which is the subject-matter of the provisions of S 28 cannot be held to include a power to entertain petition for a declaration that the arbitration agreement exists. *Jawahar* v. *Union of India* A.I.R. 1962 S.C 378 = (1962) 1 S.C.J. 654. The language of Rule 3 of the 1st schedule and Section 28 of the Act makes it clear that the court alone has to be moved for enlarging time for making the award. *Sawaran Singh* v. *Municipal Committee*, I.L.R. (1963) 2 Punj. 320 = A.I.R. 1963 Punj. 427.

1146. Extension of time by mutual consent.—An arbitrator is a domestic tribunal and the parties who refer their disputes to him for decision can by mutual consent, which can be inferred from their conduct, acquiesce in the proceedings of the arbitrator who may submit his award beyond the date fixed by the court for returning the same. Such a conduct would be inferred from the fact that the parties conducted the case and took a willing part in the proceedings before the arbitrator, though the date fixed for the filing of the award had expired. *Asa* v. *Bhuban*, A.I.R. 1936 Lah. 466 = 163 Ind.Cas. 380 = 38 P.L.R. 725. See also, *Patti Kumari* v. *Upendranath*, 50 Ind.Cas. 52 = 4 P.L.J. 265 ; *Simsa* v. *Venkatagopalam*, 11 Mad. 85 ; *Lakshminarasimma* v. *Samasundaram*, 15 Mad. 384.

1147. Extension of time—Application for.—An oral application for extension of the period of submission on the award by the arbitrator is valid. *Sakal Chand* v. *Ambaram*, 26 Bom.L.R. 280 = 80 Ind.Cas. 260 = A.I.R. 1924 Bom. 380 ; but see *Manjee Premji* v. *Mallaykel*, 3 Mad. 59. See also *Madura Mills* v. *Krishna Ayyar*, 171 Ind.Cas. 690 = A.I.R. 1937 Mad. 405 = (1937) M.W.N. 518 = 45 L.W. 405.

It is not the arbitrator alone who can file application under s. 28 but a party to the arbitration agreement can also file application thereunder. *Aftab Ahmed* v. *Instrument Supply*, I.L.R. (1962) 1 Punj. 503.

1148. Award made beyond time—Jurisdiction of court to accept.—A court cannot accept an award given after the expiry of time allowed by the court. There can be no retrospective extension of time. *Raghubar Dayal* v. *Brijmohan Lal*, 1945 A.W.R. (Rev.) 116 = 1945 R.D. 315. The direction to file written statement by the Registrar of the Arbitral tribunal of the Bengal Motion Pictures Association before the

contribution of the tribunal can not be counted as the date of entering of reference by the arbitrator. *Shyamsunder* v. *Khanna Cinema,* (1964) 8 Fac. L.R. 16.

1149. Making the award—meaning of.—The expression "making the award" includes the announcement of the award and the award cannot be deemed to have "been made" till it is announced and one way of announcing it by filing in court. *Harbhajan Singh* v. *Mewa Singh,* 110 Ind.Cas. 748=A.I.R. 1928 Lah. 753. For distinction of the words "making" and "filing" of award—*vide Srilal* v. *Arjun Das,* 27 Ind.Cas. 233=18 C.W.N. 1325; *Mohun Lal* v. *Baz Khan,* 46 Ind.Cas. 324=5 O.L.J. 205; *Debendra* v. *Sarbamangala,* 8 C.W.N. 916; *Umersey* v. *Shamji,* 13 Bom. 119; *Arumugan* v. *Arunachalam,* 22 Mad. 22; *Sita Ram* v. *Bhagwani,* 26 All. 105=(1903) A.W.N. 205; *Asadullah* v. *Muhammad,* (1905) A.W.N. 47=27 All. 459=2 A.L.J. 201; *Bhagat Ram* v. *Ganda Singh,* 89 P.R. 1907.

1150. Suppersession of arbitration.—If the arbitrators fail to submit their award within the time prescribed, Schedule II, clause 8, Civil Procedure Code applies and it is within the discretion of the court after having both the parties to the suit to make an order under that article superseding the arbitration and proceeding with the suit. *Hrishikesh Das* v. *Lal Mohan Das,* 57 Ind.Cas. 890. See also *Chokkapa Mudaliar* v. *Ahmedulla,* 21 Ind.Cas. 558=14 M.L.T. 388=(1913) M.W.N. 863; *Manger Sahu* v. *Bhatoo Singh,* 5 Pat. L.J. 672=1 Pat.L.T. 416; *Lala* v. *Abdus,* 17 Ind.Cas. 320. See also *Abdul Hakim* v. *Chairman,* A.I.R. 1950 Lah. 32, where it has been *held* that an award not made within time can be set aside by the court under section 30(*c*) of the Arbitration Act. Where an award is thus avoided and set aside by an order of the court, may, under s. 19 which is applicable to a case under s. 20 by reason of its sub-section (5) supersede the reference and thus avoid the arbitration agreement. But if the court while making an order under s. 19, does not expressly supersede the reference and direct that the arbitration agreement shall cease to have effect it should be deemed to have declined to exercise this power. Consequently, the arbitration agreement, notwithstanding that it has been filed in court, still remains if full force according to the tenor, not only with respect to the difference which was referred to arbitration, but also with reference to all disputes between the parties which properly fall within the agreement. *Ibid.*

1151. Umpire.—This section is applicable to extension of time to an umpire. *Himalaya Assurance* v. *Assudamal,* 88 Ind.Cas. 878.

1152. Whether an award has been made or not.—The fact that the award is already made does not affect the power of the court one way or the other. It is however a factor which ought to be taken into consideration for the purpose of determining whether or not application for enlargement of time should or should be granted or not. *Jethalal* v. *Amrit,* A.I.R. 1939 Cal. 260; *Russell,* 15th Edn., p. 218; *Lord* v. *Lee,* (1868) 3 Q.B. 404. The effect of the order of enlargement is that the extended time is to be treated as if it had been originally given in the arbitration agreement. Consequently, the award and all else done in the arbitration during such extended time is rendered valid and effective. *Lord* v. *Lee* (1868) L.R. 3 Q.B. 404. Where there has been inexcusable dealy in applying for enlargement, the application, as a rule, should be refused. *Russell,* 15th Edn. p. 219. The court no

doubt, would in exercising its discretion, have regard to the terms of the submission, and see whether the conditions as to the time for making the award were an essential element of the submission or merely regulations for the observance of the arbitrator. *Ibid ; Darnley* v. *London,* (1867) L.R. 2 H.L. 43 ; *Knowles* v. *Bolton,* (1900) 2 Q.B. 253. See also *Lallubhai* v. *Jamnadas* A.I.R. 1930 Bom. 462=54 Bom. 408=125 Ind.Cas. 425 ; *Martirosi* v. *Subrahmanyam,* A.I.R. 1928 Mad. 69=51 Mad. 103 (F.B.). In the last named case it has been *held* that an appeal would lie from an order refusing to extend the time for making award. See also *Tejpal* v. *Nathumal,* 46 Cal. 1059. As regards revision *vide Bholanath* v. *Raghu,* 51 All. 1010.

1153. Sub-section (2).—"We have revised sub-clause (2) so as to allow of provision being made in an arbitration agreement for enlargement of the time for making the award where all the parties consent to such enlargement."—*Report of the Select Committee.* Rule 7 of the Rules of the Tribunal of Arbitration, Bengal Chamber of Commerce, is not in conflict with s. 28 (2) of the Arbitration Act is not *ultra vires* on that ground. Rule 7 is not a provision which empowers the arbitrators at their pleasure without consent of the parties to the agreement to enlarge the time for making the award. *Ramnath* v. *Nanjee,* A.I.R. 1953 Cal. 787 ; see also *Shibchand* v. *Panno,* A.I.R. 1943 Bom. 197. An arbitration agreement provided that the arbitration would be completed within one month from its date subject to the extension of time not exceeling six weeks thereafter, if all the arbitrators passed a resolution to that effect. The arbitrators passed an award after expiry of one month prescribed without any resolution by them extending the time for making the award. *Held* that the award was invalid as it was made after the prescribed period without any resolution. Even assuming that such resolution extending the time was passed by them, there was no agreement by the parties consenting to such extension and, therefore, time could not be legally enlarged by reason of section 28(2). *Kuppuswami* v. *Anatharamier,* A.I.R. 1948 Mad. 40=I.L.R. (1948) Mad. 83. In the above case *Gentle C. J.* observed : "Section 28(2), Arbitration Act, enacts that any provision in any arbitration agreement, whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement enlarge the time for making the award shall be void and of no effect. There was no agreement by all the parties for the arbitration to extend the time by passing the resolution envisaged in the arbitration agreement. Consequently, the time could not be legally enlarged and the period during which the arbitrators could make an award expired about six weeks before the document of 15th March, came into existence, even if that document is an award it is one which has no validity and is not, in law an award." But see *Shipchandrai* v. *Panno,* A.I.R. 1943 Bom. 197 and *Ramnath* v. *Nanji,* A.I.R. 1953 Cal. 787, where reference was made to an Association and parties are bound by the rules of the Association.

1154. Two awards in a single reference.—There is nothing wrong in law in passing an award on the dispute relating to immovable property and a second award relating to the cash where single reference is made on both the disputes. *Radha* v. *Madho,* A.I.R. 1952 All. 856=1952 A.L.J. 405.

1155. Ss. 28, 31, 32 and 32—Scope of.—The main object of introducing the provision of Ss. 31, 32 and 33 was to entrust the decision of the relevant disputes to the specified court and to require the parties to bring the said disputes for the decision of the said court in the form

of petition. *Jawaher Lal* v. *Union of India,* A.I.R. 1962 S.C. 378 (overruling A.I.R. 1950 Cal. 267 and A.I.R. 1951 Cal. 147 and approving A.I.R. 1949 Bom. 158).

1156. Ss. 28, 39 and 41—Court refusing to extend time—Power of appellate court.—Orders passed by the trial court, refusing to extend the time till the date awards are filed in court, are orders affecting the decision of the case, and if the awards are set aside only on the ground that they were filed beyond the time allowed by the court, the lower appellate court is entitled to consider the correctness of the order passed by the trial court refusing to extend the time. *Suraj Prosad* v. *Munnalal,* 1957 All. L.J. 541 = 1957 All. W.R. (H.C.) 394.

The refusal to extend time under s. 28 by the court on the application of the arbitrators or the party does not amount to an order superseding the arbitration so as to be appelable under clause (1) of section 39 of the Act. *Rice Mills* v. *State,* I.L.R. (1958) Cut. 348 = A.I.R. 1959 Orissa 4. But where the court refused to extend time under s. 28 on the ground that the Arbitrators having allowed withdrawal of reference had lost control of the matter, the order would be set aside in revision as the court had wrongly exercised its jurisdiction, *Ibid.*

29. *Where and in so far as an award is for the payment of money the Court may in the decree order* Interest on awards. *interest, from the date of the at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed ty the decree.*

1157. N.B.—Section 29 makes necessary provisions as to interest when the award makes no provision therefor. It is based on similar provision in the 1934 Act of Parliament (section (11). "Instead of fixing by the Act the rate of interest which an award shall bear and enacting that interest shall run from the date of the award, we have provided in accordance with the analogous provisions in the Civil Procedure Code that the court may fix the rate of interest, but we have made the date from which the interest shall run the date of the decree." —*Report of the Select Committee.*

1158. Old law.—In *Uttam Chand Saligram* v. *Mahmood Jewa,* 23 C.W.N. 704 = A.I.R. 1920 Cal. 143 = 54 Ind.Cas. 285 = 46 Cal. 534, the arbitrators made their award and allowed interest at 6 per cent. It was held that the award as to interest was not invalid. But this view was dissented from in *Tulsiram* v. *Jhanakalal,* A.I.R. 1936 Nag. 197 = 19 N.L.J. 151 = I.L.R. 1936 Nag. 44 = 165 Ind.Cas. 556. In *Sewdat Rai* v. *Tata Sons Ltd.,* 27 C.W.N. 494, *Greaves J.* held following *In re Morphet,* 14 L.J.Q.B. 259 that an arbitrator cannot award the payment of interest subsequent to the date of the award unless the submission expressly gave him the power to do so. But see *In re Badger,* 2 B. & A. 691. All these cases have been considered by *Mookerjee* and *Rankin JJ.* in *Bhowanidas* v. *Harsukhdas,* 27 C.W.N. 933 = A.I.R. 1924 Cal. 524. In delivering their judgment their Lordships observed : "As regards the second part, reference has been made to the decision of *Mr. Justice Greaves* in the case of *Sewdatrai* v. *Tata Sons Ltd.,* 27 C.W.N. 494 as an authority for the proposition that the arbitrators exceeded their authority when they allowed interest after the date of the award. If *Mr. Justice Greaves* intended to lay this down as an inflexible rule of law,

we are not prepared to follow his ruling. On the other hand, we find that in *Uttamchand Saligram* v. *Mahmood Jewa Mamooji,* 23 C.W.N. 704 interest was allowed as has been done by the arbitrators in this case. The decision in *In re Morphett,* 14 L.J.Q.B. 259 (1845) proceeded upon its special facts, and *In re Badger,* 2 B. & A. 691, shows that the arbitrators have authority to make a decree for such damages as might have been assumed by the court. See also, *Edwards* v. *G. W. Ry. Co.,* 11 C.B. 588 ; *Sherry* v. *Oke,* 3 Dow. 349 and *Brahan* v. *Wolfe,* (1832) 1 A.L. & Na. 233." See also, *Ramnath* v. *Audh Behary,* 1934 A.L.J. 939 =A.I.R. 1934 All. 939. By the incorporation of this section all conflicts have been set at rest.

1159. English Law.—Section 20 of the English Arbitration Act runs as follows:—"A sum directed to be paid by an award shall, unless of 1950 runs as follows : "A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt." According to this section an arbitrator may award interest, by virtue of his implied authority to follow the ordinary rules of law. *Russell,* 15th Edn. p. 224 citing, *Edward* v. *G. W. Railway,* (1851) 11 C.B. 588=21 L.J.C.P. 72 ; *Chandris* v. *Isbrandt-- sen Moller Co. Inc.* (1951) 1 K.B. 240. A statutory arbitrator, however, can only award such interest if the statute concerned so provides. *Russell,* 15th Edn. 224 citing, *Monmouth Shire* v *Newport,* (1947) 1 All. E.R. 916.

1160. Section 34 of the C. P. Code.—Section 34 applies only when the decree is for the payment of money. The expression "decree for the payment of money" as used in the section includes a claim for unliquidated damages. *Bhagwant* v. *Gangabisan,* A.I.R. 1940 Bom. 369=(1940) 42 Bom.L.R. 750. The rate of interest from the date of the decree to the date of payment is in the discretion of the court. *Umesh* v. *Fatima,* 18 Cal. 164=17 I.A. 201 ; *Bulaki* v. *Pesricha,* 109 Ind.Cas. 416. Rate of interest is a matter to be decided on the facts of each case. A.I.R. 1924 Nag. 346=76 Ind.Cas. 131. Grant of interest is a matter within the discretion of court. A.I.R. 1921 Lah. 594=29 P.L.R. 670=111 Ind.Cas. 354. Ordinarily 6 p.c. interest should be granted. A.I.R. 1933 Lah. 101 ; A.I.R. 1933 Lah. 780=144 Ind.Cas. 601. It is well settled that no decree for interest can be given prior to the institution of the suit under s. 34 unless there be a contract for such interest, *Lakshmi* v. *Union of India,* 1958 Pat. L.R. 58=I.L.R. 37 Pat. 442=A.I.R. 1958 Pat. 489.

1161. Future interest.—An arbitrator is not a court which has been given special powers to give interest after suit under s. 34 C. P. Code. In the absence of that section, even a court far less an arbitrator would not have power to give future interest and S. 29 forbids the grant of future interest at all after suit. *Vulson* v. *Kelkutty,* 1958 Ker.L.J. 965=1958 Ker. L.T. 977=A.I.R. 1959 Ker. 174 ; see also (1955) 2 M.L.J. (S.S.) 23=A.I.R. 1955 S.C. 468 ; *State of Punjab* v. *Surrinder Nath* A.I.R. 1960 Punj. 623 (*Power of appellete Court*).

Grounds for setting aside award.

30. *An award shall not be aside except on one or more of the following grounds, namely :—*

(*a*) *that an arbitrator or umpire has misconducted him- or the proceedings ;*

(*b*) *that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35 ;*

(*c*) *that an award has been improperly procured or is otherwise invalid.*

1162. N.B.—This section follows paragraph 15 of the Second Schedule to the Civil Procedure Code setting out the grounds on which an award may be set aside. *Vide Notes on Clauses.* "We have omitted ground (b) which specified fraudulent concealment of a matter which ought to have been disclosed or deceit, because we consider that this ground is adequately covered by the ground which now appears as ground in the section as revised by us."—*Report of the Select Committee.* This section also corresponds to s. 14 of the Indian Arbitration Act of 1899 as well as to s. 11 of the English Arbitration Act of 1889. Now see s. 23 (2) of the English Arbitration Act of 1950.

1163. Section 30, 32 and 33—Scope of—Conditions for applicability of s. 33.—An award could be set aside only on any of the grounds mentioned in S. 30. Section 32 enacts a bar to suits contesting arbitration agreement or award. This section has to be read with s. 33, as it is only a corollary to s. 32. A combined reading of two sections establishes that a party to an arbitration agreement or award can question the award in the manner provided by s. 33, namely, by filing an application for the purpose. Section 33 does not envisage that both sides must be parties to the agreement. The condition precedent to invoking section 33 is that the plaintiff should be a party to the agreement. The further requisite is not imposed by the section and the court cannot read those words into that section. On a reading of S. 32 and S. 33 together it is clear that the only mode of challenging the existence, validity or effect of an arbitration agreement or an award is the one indicated in section 33, an absolute prohibition is created by s. 32 against the institution of suits. The intention of the Legislature in enacting these sections is to provide for a speedy remedy in regard to matters arising out of the arbitration agreements and awards. *Moorampudi* v. *Achanta*, (1958) 1 Andh. W.R. 382=I.L.R. (1958) Andhra Pra. 77. According to the Calcutta High Court the Indian Arbitration Act, 1940, does not distinguish between an application for setting aside an award and an application for the adjudgment of an award to be a nullity and does not contemplate that an application of the latter kind under s. 33. The Act contemplates that all applications, challenging an award must be made under s. 33 irrespective of the ground of the challenge, and that they must be applications for setting aside the award except in cases where the existence of an award in fact is challenged. The non-existence or invalidity of the reference can be a ground of an application for setting aside an award, based on such invalid or non-existent reference including the case of an award in an arbitration without intervention of the court. *Sat & Co.* v. *Ishar Singh*, A.I.R. 1956 Cal. 321=60 C.W.N. 471 (F.B.) (overruling I.L.R. (1949) 1 Cal. 245 and A.I.R. 1951 Cal. 78). In the last named F.B. case *Chakravarti C.J.* said : "Ss. 30 and 33 are not co-extensive, s. 33 deals with both agreements and awards while S. 30 deals with awards only. Again S. 33 covers questions as to the existence or the validity or the effect of awards but with questions of existence or effect s. 30 has no concern. The word "existence" in s. 33 does not comprise legal existence as well, because if it does, it is not easy

to see how in that aspect it differs from "validity". Applications of various kinds are thus conceivable as application under S. 33, which may concern the existence or effect of awards and which can not possibly be applications under s. 30. *The ambit of s. 33 is thus undoubtedly wider.*

"There is nothing in the language of Ss. 30 and 33 to suggest that the invalidities as contemplated by the two sections are mutually exclusive and the invalidity for which a party may challenge an award under s. 33 cannot be the invalidity for which he can apply to the court for setting aside the award under s. 30. A stronger reason is furnished by the scope and effect of Ss. 31, 32 and 33 which are mutually interlinked. The Arbitration Act uses the expression "set aside" in a wide sense and requires that whenever an award is found fit to be removed, it must be set aside.

"The non-existence or invalidity of an agreement must be urged by means of an application under s. 30 and if it is not urged by such an application within the time limited by law, the consequence laid down in the last part of s. 17 of the Act will follow."

It cannot be said that s. 30 really lays down the powers of court and s. 33 sets forth the procedure for the exercise of such powers at the motion of a party, and that the Arbitration Act really contemplates so far as an application at the instance of a party is concerned one under s. 33 only. The difficulty, however in treating s. 33 as wholly procedural is that that section deals with the existence or validity of the arbitration agreement also to which s. 30 makes no reference in terms, and further that s. 33 contemplates a proceeding to have the effect of an agreement or an award determined. It is not correct to hold that s. 33 has no independent existence. *Ismail* v. *Hansraj,* A.I.R. 1955 Raj. 153, but see *Haritimal* v. *Hiralal,* A.I.R. 1954 Bom. 243 noted *infra.* In the Full Bench case of *Shah & Co.* v. *Ishar Singh,* 60 C.W.N. 471 (F.B.)=A.I.R. 1956 Cal. 321 *S. R. Das Gupta J.* in his dissenting judgment said : "All applications under the Act challenging the award have to be made under S 33 although an application for setting aside an award must be made on one or other of the grounds mentioned in s. 30. But it is not necessary that such an application must be for setting aside the award. The non-existence or invalidity of the reference cannot be a ground of an application for setting aside an award, particularly in the case of an award in an arbitration without the intervention of the court."

The other dissenting Judge *Bachawat, J.* said : "The Arbitration Act 1940, distinguishes between an application for setting aside an award and application for a decision that the award is a nullity and consequently, does not legally exist and contemplates that an application of the former kind may be made under s. 30 and an application of the latter kind under s. 33. Non-existence and invalidity of arbitration agreement and an order of reference to arbitration are not grounds for setting aside the award under s. 30" This Full Bench case as followed in *Basant* v. *Surendra.* I.L.R. 35 Pat 35=1957 B.L.J.R. 94=A.I.R. 1957 Pat. 417. Vide notes under s. 33 *Infra.*

1164. Ss. 15, 16, 30 and 33.—The validity of an award may be challenged under s. 15 which provides for its correction or modification by the court or it may be challenged under S. 16 which provides for its remission for reconsideration or it may be challenged under s. 30 which provides for its setting aside. But none of these sections provides for making of an application. It is perfectly clear that the authority for

making an application in each one of these cases is derived ultimately from the general provisions contained in S. 33. *Shah & Co.* v. *Ishar Singh*, 60 C.W.N. 471 (F.B.)=A.I.R. 1956 Cal. 471.

1165. Scope of the section.—An arbitration award cannot be upset except on the specific grounds given in this section. If this is not done, it could not be avoided by raising a plea that it had become infructuous. *Pertap* v. *Bechan*, 1940 R.D. 20=1940 A.W.N. (B.R.) 16. No court will review the arbitrator's conclusions or findings if he has acted within his authority and according to the principles of justice and behaved fairly to all parties, and where there is no legal misconduct. *Dwarka* v. *Kedar Nath*, 6 D.L.R. (Pat.) 56=A.I.R. 1951 Pat. 448. An arbitration, in substance, ousts the jurisdiction of the court, except for the purpose of controlling the arbitrators and preventing misconduct and for regulating the procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the award, the court has nothing to say, good, bad or indifferent. It has no right to review it or to consider it. *Debidas* v. *Keshava*, A.I.R. 1945 All. 424. It is not open to a court to set aside finding of fact arrived at by arbitrators, and the only grounds on which an award can be challenged and those mentioned in the Act. *Misrilal* v. *Bhagavati*, A.I.R. 1955 All. 327. 'This section sets out the grounds on which the court may set aside an award. They are (1) where an arbitrator or umpire has misconducted himself or the proceedings, (2) where an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid; and thirdly (which is the widest clause) where an award has been improperly procured or is otherwise invalid; and I suppose, if the court could see on the face of the award, that it is obviously and totally invalid it would, of its own motion, set it aside under section 30 rather than remit it under s. 16." A.I.R. 1945 All. 424. In an application under this section, the court cannot make shifting investigation of proceedings before arbitrators, unless it is shown that the award is bad on the face of it *Gulzarilal* v. *Busi*, A.I.R. 1953 Cal. 621. Court should not set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless there has been something radically wrong and vicious in the proceedings. *Harjhool* v. *Prabhu*, A.I.R. 1950 E.P. 266=52 P.L.R. 128. It is not open to the court to interfere with an award on the ground that the arbitrators were mistaken in awarding damages for breach of contract on a wrong basis, where the error does not appear on the face of the award. *Tularam* v. *Bilasroy*, 85 C.L.J. 164. It is not necessary for the arbitrators to exhaustively give reasons for the conclusions arrived at by him or to give his findings on the issues raised in the case. His award would be a perfectly valid and good award provided he has given a clear decision of the case. Where on the face of it the award is very vague and it is difficult to know what his findings actually were, the award is not a decision of the case at all. Further if the award does the very thing which the parties wished to avoid, namely going to a court of law and bearing expenses of protracted litigation the purported award defeats the very purpose of arbitration by throwing the parties back to the very position from which they wanted to escape. The defect in the award is a vital one and goes to the root of the award given by him and the award must therefore be treated as "otherwise invalid." *Ishwar Dei* v. *Cheddu*, A.I.R. 1952 802=1952 A.L.J. 403. An award cannot be set aside on the ground that decision of the court possibly would have been otherwise. *Ramchand* v.

Atma Ram, A.I.R. 1952 Ajmer. 6. An arbitrator is not guilty of misconduct in taking evidence on the question of the factum of the contract containing the arbitration agreement. *Pannalal* v. *Fatechand*, 88 C.L.J. 34. It is misconduct on the part of the arbitrator if the award is against public policy. *Bejoy Singh* v. *Bilas Roy*, A.I.R. 1951 Cal. 529=88 C.L.J. 202. It is not the duty of the court *suo motu* to fix a date for evidence in support of the objections to an award filed in court. It is for the parties to move the court if they want to produce evidence. *Ganga Sahai* v. *Karim Baksh*, A.I.R 1926 Lah. 584=96 Ind.Cas. 108; *Ramkishan* v. *Sushil Chandra*, A.I.R. 1923 All. 31; *Ganga Singh* v. *Jitwar Singh*, A.I.R. 1935 All. 1014=159 Ind.Cas. 441. A specific allegation of misconduct or corruption by the applicant will oblige the court. before passing a decree to record whether or not the allegation is supported. *Secunder* v. *Raja*, 12 P.R. 1869. This section vests in the court a discretion to set aside an award, if misconduct on the part of the arbitrators be shown or if it be shown that the award was improperly procured; and it is not competent for the parties by agreement to oust this jurisdiction if they desire to enforce the award under this Act. *Hurdwary* v. *Ahmed*, 1 Ind.Cas. 371=13 C.W.N. 63; *Naraindas* v. *Kewalram*, 11 S.L.R. 43. But before setting an award aside a court should make full enquiry into the objections raised against the award. *Senuk* v. *Oree*, 2 N.W.P. 241. This section does not apply to an award which had been made upon a reference to make which the court had no jurisdiction. *Tej Singh* v. *Ghasi Ram*, A.I.R. 1927 All. 563=102 Ind.Cas. 236=49 All. 812=25 A.L.J. 606; but see *Masian* v. *Amina*, A.I.R. 1937 All. 65 (F.B.). Such an award is unenforceable. *Chunna* v. *Lala*, 151 Ind.Cas. 338=A.I.R. 1934 All. 117. This section does not provide for the court setting aside an award in part only. *Mahomed* v. *Azim*, 1939 A.M.L.J. 15; *Daula* v. *Ganesh*, 1936 A.M.L.J. 54; but see *Badri* v. *Chamsa*, A.I.R. 1937 Pat. 183=15 Pat. 579=1936 P.W.N. 809=18 P.L.T. 41=168 Ind.Cas. 115 (severable part if bad can be set aside). The court is not empowered to sit on appeal on an arbitrator. *Daula* v. *Ganesh*, 1936 A.M.L.J. 54.

The object of this section is to give finality to a decree passed in accordance with the decision of the arbitrator. If the party concerned fails to impeach the award before the court making the reference or if his objection to the validity of the award is disallowed and a decree is passed in accordance therewith, the award becomes final and the decree passed upon it is not open to appeal or revision. *Rupnarain* v. *Nundrani*, 152 Ind.Cas. 90=11 O.W.N. 1203; *Sreenath* v. *Ganesh*, 8 W.R. 171. See also, *Isribai* v. *Peribai*, 121 Ind.Cas. 164=A.I.R. 1930 Sind 195; *Dacca Co-operative* v. *Dacca Co-operative*, A.I.R. 1938 Cal. 327. This section contemplates the entertaining by the first court of all possible grounds of objections against the award, including the ground that what purports to be an award is, by reason of certain events which happened prior to the references, not an award at all. *Suraj Singh* v. *Phul Kumari*, A.I.R. 1926 All. 202=48 All. 226=23 A.L.J. 997=90 Ind.Cas. 904: *Lutawan* v. *Lachiya*, 36 All. 69=12 A.L.J. 7 (F.B.). An arbitrator in substance ousts the jurisdiction of the court, except for the purpose of controlling the arbitrators and preventing misconduct and for regulating procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the award, the court has nothing to say, good, bad or indifferent. *Yeshwanttrao* v. *Dattatrayya*, I.L.R. (1947), Nag. 631=A.I.R 1948 Nag 162. *Aftab Begam* v. *Haji Abdul*, 22 A.L.J. 816=81 Ind.Cas. 525; *Raizuddin* v. *Shujauddin*, 78 Ind.Cas.

1042 ; *Chandan* v. *Bibi*, 75 Ind.Cas. 198. But finding of the arbitrators as to the extension of due date in a contract, based upon no evidence would clearly amount to legal misconduct. *Bejoy Singh* v. *Bilas Ray*, A.I.R. 1952 Cal. 440 ; see *Union of India* v. *Joginder Singh & Co.* I.L.R. (1961) Cut. 544 (the jurisdiction of the Civil Court to set aside the award of an arbitrator or to remit it for further hearing is circumscribed by the provision of s. 30 and s. 16).

1166. When a petition for setting aside an award lies.—Under the Arbitration Act, it is not competent to file a petition for setting aside an award till the award has been filed. *Ratanji* v. *Dhirajlal*, A.I.R. 1942 Bom. 101. In *Bengal Silk Mills* v. *Aisha Ariff*, A.I.R 1947 Cal. 106 (113) *Gentle, J.* said : "In my opinion an application to set aside an award cannot be made in the absence of an award being filed in court ; but directly the award is filed, irrespective whether or not notice has been received of its filing, such application is competent." See also, *Ratanji* v. *Dhirajlal* A.I.R. 1942 Bom. 101 = I.L.R. (1942) Bom. 452 = 200 Ind.Cas. 32 ; *Bengal Jute Mills* v. *Jewraj*, A.I.R. 1944 Cal. 304 = I.L.R. (1943) 2 Cal. 392 = 218 Ind.Cas. 182 ; *Shree Chand* v. *Sohan Lal*, A.I.R. 1943 Cal. 257 = I.L.R. (1943) 2 Cal. 227 = 209 Ind.Cas. 182 = 47 C.W.N. 450 ; *Sriram* v. *President*, A.I.R. 1954 Nag. 236 ; *Janardhan Prasad* v. *Chanda Sekhar*, A.I.R. 1951 Nag. 198 = I.L.R. (1950) Nag. 953 ; *O. Mohamed* v. *S. Hajee*, 76 Mad. L.W. 482 = (1963) 2 Mad. L.J. 287 = I.L.R. (1963) Mad. 922 = A.I.R. 1964 Mad. 1.

1167. Award—Setting aside—Party participating in arbitration proceeding without protest.—Where the applicant participates in arbitration proceedings without protest and fully avails of the entire arbitration proceedings he cannot be heard, when he sees that the award has gone against him, to make an objection that the whole of the arbitration proceedings are without jurisdiction on the ground of known disability of the other party (Corporation in this case) *Jupiter Insurance* v. *Corporation of Calcutta*, 60 C.W.N. 721 = A.I.R. 1956 Cal. 47. *Vide* the topic of *Estoppel, and Waiver, infra.*

1168. Bombay Industrial Relations Act (XI of 1947)—Arbitration under Applicability of s. 46—Applicability of s. 30.—All the provisions of the Arbitration Act, in so far as they are applicable have been applied to arbitrations under Chapter II Bombay Industrial Relations Act and the powers which a civil court exercises under the Arbitration Act are to be exercised by a Labour Court and Industrial Court. The legislature instead of setting up a separate machinery for arbitration under Chapter II incorporated the provisions of the Arbitration Act into the Bombay Industrial Relations Act. If an arbitrator is guilty of misconduct or if the award otherwise invalid, there is nothing in Chapter II which confers any right upon the aggrieved to challenge the award. Therefore, so far as S. 30 is concerned there is no reason why the provisions of S. 30 should not be made applicable to arbitration under Chapter II, Bombay Industrial Relations Act. *Textile Labour* v. *Labour Appellate*, 58 Bom. L.R. 26 = I.L.R. (1956) Bom. 247 = A.I.R. 1956 Bom. 746. Under the Arbitration Act an award has to be filed as provided by S. 14 and then an application to set aside an award has to be made to a court having jurisdictions under S. 31. *Ibid.*

1169. Construction of agreement of arbitration.—The agreement for reference to arbitration should be literally construed by the court so as to lean in favour of upholding the award giving by the arbitrators,

but that is no ground for sustaining the award where the arbitrators have clearly misdirected themselves and have exceeded the scope of their authority. *Gobordhan Das* v. *Lachhmi,* A.I.R. 1954 S.C. 686 ; *Suwalal* v. *Clive Mills,* A.I.R. 1960 Cal. 90. The appointment of arbitrator upon original application of reference which was defective but defect subsequently removed can not be challenged since the defect is one of irregularity and not of want of jurisdiction. *Tons Tate* v. *Kissenlal Bangur,* A.I.R. 1953 Cal. 322.

1170. Ss. 14, 15, 16, 17, 30, 31(2) and 33.—From a reading of ss. 14, 15, 16, 17, 30, 31 (1), 32 and 33 of the Arbitration Act, it is clear that the Legislature meant to fix a definite time-limit within which the existence or validity of an award could be challenged after it is filed in court and to provide method of setting an award translated into a decree and made enforceable as such. *Kasi* v. *Lakshmi,* (1960) 1 Andh.W.R. 127.

1171. Validity of a reference whether can be enquired into under this section.—The words of this section are sufficiently wide to cover an enquiry into and a decision on the question of the validity of the submission. As the basis of an arbitration is the submission, the improper procuring of an arbitration, which is covered by this section must include the question of the validity of the submission. *Rochanbai* v. *Mothumal,* 31 S.L.R. 55 = 169 Ind.Cas. 623 = A.I.R. 1937 Sind 110 ; *Mariam* v. *Amina,* 167 Ind.Cas. 99 = (1936) A.L.J. 1333 = I.L.R. 1937 All. 317 = A.I.R. 1937 All. 65 (F.B.). See also *Vulson* v. *Kelkutty,* 1958 Ker.L.J. 965 = 1958 Ker. L.T. 977 = A.I.R. 1959 Ker. 174. But a court would be unwilling to assist any party who with full knowledge of the circumstances allows the arbitrator to proceed and take part in it and seeks to evade it by raising a number of objections which never occurred to him before. *Ibid.,* see also (1940) 2 M.L.J. 520 = A.I.R. 1941 Mad. 129. If a party to a contract challenges the very existence of the court's act and if in spite of such a dispute having been raised the arbitrators proceed with the reference and makes an award then the award would be a nullity, having been made without jurisdiction. *Hanutmull Boid* v. *Fatechand,* A.I.R. 1954 Cal. 1 ; See also *Heyman* v. *Darwins Ltd.* (1942) 1 All.E.R. 337 = (1942) A.C. 356. The question which would then arise is whether such an award can be challenged in an application under S. 30 or whether S. 33 is the appropriate section under which the validity of an award made in such circumstances can be challenged. *Ibid.* The power conferred on the court to set aside an award under the Arbitration Act also presupposes the existence of a valid reference and if there is no valid reference or reference at all then the award is a nullity and a declaration to that effect can be obtained under section 33 of the Act. An application under S. 30 of the Act is not maintainable on the ground that there was no valid reference at all and consequently the arbitrators had no jurisdiction to make the award. Such grounds cannot form the ground on which an application under S. 30 can be made and the question whether or not the arbitrators who made the award cannot be gone into in an application under S. 30 and the award cannot be set aside on that ground. *Shah &C.* v. *Isher Singh,* 9 D.L.R. (Cal.) 50.

1172. Power of Court.—It is not the function of the court to disturb the findings of the arbitrators if it has been reached *bona fide.* After an award has been filed if objections are raised by a party to the reference, the court has to decide these objections. But the ambit of the powers of court is either to modify, remit or set aside the award. No other duty is cast upon the court. Where the award has to be set

aside no decree can follow on the basis of the award. *Ramtaran* v. *Adhar*, 91 C.L.J. 267 = A.I.R. 1953 Cal. 648 (D.B.); *Louis Dreyfus* v. *V. S. Balabbarayya Chattiar*, (1960) 2 M.L.J. 372, *Union of India* v. *Bakshi Ram* 59 Punj. L.R. 572 = I.L.R. (1957) Punj. 1210.

1173. Power of arbitrator—Validity of arbitration agreement—Power to decide.—The arbitrator has no power to adjudicate upon the legal validity of submission. *Sunwalal* v. *Clive Mills*, A.I.R. 1960 Cal. 90 overruling A.I.R. 1953 Cal. 618; *Mathunny* v. *Mathunny* 1964 Kar L. J. C. 75.

1174. Power of court to set aside award 'suo motu'.—There is nothing in s. 17 of the Arbitration Act to exclude the powers of the court to set aside an award except on the application of the parties. A court has power to set aside an award *suo motu* for proper reasons. Section 30, by implication, gives the court power to set aside an award which has been improperly obtained. *Motumal* v. *Hazi Ibrahim*, I.L.R. 1943 Kar, 390; *Nandkishore* v. *International*, A.I.R. 1953 Cal. 415. Where the witness speaks of material facts and is examined by the arbitrators *suo motu*, there must be an opportunity given to the parties to cross-examine him. Consequently, the arbitrators are guilty of misconduct in examining a witness without the consent of the parties and refusing to permit the parties to cross-examine him. *Dharmu* v. *Krishna*, A.I.R. 1956 Oudh 24 = I.L.R. (1956) Cut. 222.

1175. Setting aside of award—Grounds—Jurisdiction to decide disputed facts.—The question whether a person was or was not a habitual dealer in the sale or purchase of particular goods is a question of fact and within the competence of the arbitrator to decide when the contract by itself and on the face of it could not be said to be illegal. *Banwari Lal* v. *Joylal*, A.I.R. 1956 Cal. 467. See also, *Raja Brijendra* v. *Buti Saha*, 1962 Jab. L.J. 194 = A.I.R. 1962 Madh. Pra. 377.

1176. Contract containing arbitration clause void—Effect.—Where the contract itself is forbidden by court, as such illegal, the arbitration clause which forms part of the contract is also illegal and void. The taint of illegality attaches to every part of the contract, including the arbitration clause. It is impossible to say that the arbitration clause is a legal contract although the rest of the contract is illegal and the width of the arbitration clause does not save it from the illegality. If the arbitration agreement is illegal, and therefore, legally non-existent, the fountain head of the arbitrator's jurisdiction disappears and any award which the arbitrator may have made purporting to act under the legally non-existent arbitration clause is also invalid. *Sunwalal* v. *Clive Mills*, A.I.R. 1960 Cal. 90. The arbitrator has no power to adjudicate upon the legal validity of the submission. Disputes as to the legal validity of the arbitration agreement as to the existence of facts which render it illegal and void must be determined by the court and not by the arbitrator just as dispute as to its factual existence can be determined only by the court and not by the arbitrator. The arbitrator cannot by his own finding clothe himself with jurisdiction. A.I.R. 1960 Cal. 90.

1177. Court cannot enter into the merits of the dispute.—Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute. *Mair* v. *Gordhan Das*, A.I.R. 1951 S.C. 9 = 1950 S.C.R. 792; *Commander* v. *Arrungam*, A.I.R. 1954 Mys. 46.

1178. Power of Court to make shifting investigation.—Court cannot make shifting investigation of proceedings before arbitrators, unless it is first shown that the award is bad on the face of it. *Narsingdas* v. *Bisandayal,* A.I.R. 1953 Cal. 621. Where the court makes an order of reference under section 23, it substitutes a domestic power in its own place. But it does not give up its supervision over the conduct of reference by making the order of reference. The arbitrator has to make an award which is in obedience to the order of reference. It is not open to the parties by agreement to extend the powers given to the arbitrator or to give him additional powers, nor is it competent in the arbitrator to assume such powers by consent of the parties or in the exercise of such power to award to a party a sum of money *ex gratia.* To do so would be illegal and without jurisdiction. No court or juridical tribunal can award any sum to any party *ex gratia.* The fact that the arbitrator acts in the best interest of the parties will not however, make the award valid when he has acted beyond jurisdiction or in an extra-judical manner. It is legal misconduct for an arbitrator to act without jurisdiction or to assume powers which he does not possess, and if he does so, the award is bad and has to be set aside. *Sher Bambal* v. *Hossainbhoy,* 50 Bom. L.R. 89=A.I.R. 1943 Bom. 292.

1179. Power of court to call arbitrator as a witness.—On a motion to set aside an award of an arbitrator when the court comes to the conclusion that the only way in which it can satisfactorily deal with the matter before it, is by having the assistance of the evidence of the arbitrator, the court has jurisdiction to allow the arbitrator to be called as a witness in regard to the matter which passed before him during the arbitration. *Leisearch* v. *Schalit,* (1934) 2 K.B. 353; *Amir Begam* v. *Badruddin,* 36 All. 336; *Bucclench* v. *Metropolitan,* L.R. 5 H.L. 418; *Recher* v. *North British,* (1915) 3 K.B. 277. But no question can be put to an arbitrator as to what passed in his own mind when exercing this discretionary power on the matters submitted to him. *Ti Ti Ma* v. *Mahomed,* A.I.R. 1940 Rang. 203. Affidavits by arbitrators are also allowed for showing how proceedings were conducted. *In re, Enoch,* (1910) 1 K.B. 327; *In re, Hare,* 8 Dowl. 71; *Blundel* v. *Bettarsh,* (1810) 17 Ves. 232; *In re, Hall,* 2 M.L.J. 847.

1180. An award shall not be aside except on one or more of the following grounds.—An award can be set aside only on one of the grounds mentioned in the section. *Mahmud Sheikh* v. *Kanknara Co. Ltd.,* 81 Ind.Cas. 574=28 C.W.N. 634=A.I.R. 1924 Cal. 665; *Mian Natha* v. *Abdul,* A.I.R. 1930 Lah. 22; *Bachha Lal,* v. *Manu Lal,* A.I.R. 1937 Oudh 507=171 Ind.Cas. 172=A.I.R. 1937 O.W.N. 1002=1937 O.L.R. 524; *Ganga Singh* v. *Jatwar Singh,* A.I.R. 1935 All. 1014; *Pertap* v. *Cechan,* 1940 R.D. 20=1940 A.W.N. (B.R.) 16; *Akshoy* v. *S. C. Das,* A.I.R. 1935 Cal. 359=38 C.W.N. 784=156 Ind.Cas. 165; *Dattaram* v. *Harjimal,* 24 S.L.R. 145=121 Ind.Cas. 161=A.I.R. 1930 Sind 170. An award cannot be set aside on the ground that the opposite party did not object to the application. *Bachhu Lal* v. *Manu Lal,* (*supra*). A provision in the petition of compromise providing that any of the parties might object to the award on any account is *ultra vires. Khudiram* v. *Chandi,* 35 Ind.Cas. 358=1 P.L.J. 306. The arbitrators are judges of both the questions of fact and of law and the parties cannot be allowed to show subsequently that their decisions are wrong on their merits. *Raman Singh* v. *Ditta Singh,* A.I.R. 1929 Oudh 334=114 Ind.Cas. 803=4 Luck. 213=6 O.W.N. 1315. See also, *Ganesh Singh* v. *Bhakan Singh,* A.I.R. 1928 Oudh 1=107 Ind.Cas. 545=4 O.W.N. 1085=3 Luck. 1; *Ghulam* v.

Muhammad, 29 Cal. 167=29 I.A. 51=6 C.W.N. 226; *Knox* v. *Symonds*, 1 Ves.Jer. 369=3 Bro. C.C. 358; *Girdhari Lal* v. *Banowari*, A.I.R. 1933 Lah. 1034=147 Ind.Cas. 768; *Matubai* v. *Jeram*, A.I.R. 1933 Sind 252; *Nazimuddin* v. *Ghulani Ahmed*, 53 P.L.R. 1909=64 P.W.R. 1909=4 Ind.Cas. 553. Where, a reference to arbitration is made generally and not specifically, and the arbitrator enumerates a proposition of law and states his own view of law as a ground of his award, such award can be challenged in a court of law and is liable to be set aside if there be an error of law apparent on the face of the award. On the other hand, where a reference is made specifically and a dispute relating either to fact or to law is submitted to the arbitrator for his decision, his award cannot be challenged even if there be an error of fact or law or both apparent on the face of the award. *Abdul Kakim* v. *Thakur Prosad*, 1958 B.L.J.R. 581. Under s. 30 three grounds have been mentioned on which the award can be set aside and the language of that section is imperative. There is no provision in the Act under which a court can ignore the award when all the parties to the award desire it to be cancelled. *Nanak Chand* v. *Lala Pannalal* A.I.R. 1963 All. 68. The award is not liable to be set aside simply on a plea that the claim is time barred. *Union of India* v. *Salween Timber*, A.I.R. 1963 Cal. 307.

1181. Power of court while dismissing application, to reserve liberty to reagitate one of the objections.—It may well be doubted whether a court has power while dismissing an application for setting aside an award to give liberty to the unsuccessful party to reagitate an objection which might have been or should have been raised against such dismissal, as it may give rise to an anomalous or awkward position. *Munshilal* v. *Modi*, 51 C.W.N. 563.

1182. Award otherwise valid—Correctness of the reasoning whether can be examined.—It is not open to civil court in the case of an award, otherwise valid, to consider the correctness of the decision of the arbitrator or the reasoning by which the conclusion is reached. *Punjab Province* v. *Lakshmi Das*, 46 P.L.R. 50=A.I.R. 1944 Lah. 149.

1183. Discretion of court whether can be controlled by agreement between the parties.—An agreement between the parties that whatever award the arbitrators might give would be acceptable to them in every way without objection, cannot shut out an objection on the ground of misconduct on the part of the arbitrators. The discretion of the court to set aside an award on any valid ground cannot be controlled by an agreement between the parties. *Abdul Majid* v. *Bahawal*, Pak.L.R. (1950) Lah. 323=A.I.R 1950 Lah. 174=P.L.D. 1950 Lah. 228; see also 1 Cal. 466; 1 Ind.Cas. 371; 6 Mad. 368 and 42 Ind.Cas. 706.

1184. When an award should not be set aside.—Where the award is not defective it should not be set aside. *Ratanlal* v. *Heshardeo*, A.I.R. 1949 P.C. 195. In the above case *Lord MacDermott* said: "For these reasons, their Lordships are of opinion that the awards are not defective and should not have been set aside because of the manner in which the arbitrator dealt with the *Tawker* Jewellery.....On these gounds, their Lordships consider that the awards were not lacking in any material respect and must be regarded as valid and effectual." They do not, therefore, find it necessary to consider whether orders appealed from were beyond the powers conferred by the Act of 1940.

1185. Award deciding disputes forming subject-matter of several

suits without order of reference.—An award made under a written arbitration agreement deciding the disputes forming the subject-matter of several pending suits without an order of reference by court cannot be given effect to or created upon either under Order XXIII, Rule 3, C. P. Code or under the Arbitration Act. *Ariff* v. *Bengal Silk,* I.L.R. (1945) 2 Cal. 70=A.I.R. 1949 Cal. 350.

1186. Estoppel—waiver.—Any irregularity of procedure may, according to the rulings of the English courts, be waived. *Maung Myin* v. *Maung Yan Aung,* U.B.R. (1897-1901) Vol. II, 21. See also, *Kennard* v. *Harris,* 2 B. & C. 801=4 D. & R. 272; *Brij Mohan Lal* v. *Shiam Singh,* 24 All. 164=1901 A.W.N. 208; *Ghullamallah* v. *Papeerbai,* A.I.R. 1928 Sind 175=112 Ind.Cas. 286; *Nand Kishore* v. *International Mercantile,* A.I.R. 1953 Cal. 415; A.I.R. 1914 P.C. 105; *Chidambaram* v. *Subramania,* A.I.R. 1953 Mad. 492=(1952) 2 M.L.J. 524; *Zumaklal* v. *Fulchand,* A.I.R. 1941 Bom. 20. Waiver is a term loosely used and difficult to define when applied to irregularities in the proceedings before an arbitrator, or in the conduct of the arbitrator during those proceedings. It must be an intentional act with knowledge. The burden of proving a case of waiver and acquiescence is upon the person who suggests it. If there are irregularities, the only thing that a party can do, is to protest against those irregularities and is not expected to withdraw from the proceedings. Where the moment the award was filed into court by arbitrators for making a rule of law, a party to the reference raises the objection which he raised before the arbitrators, there is no waiver or acquiescence of the party to the objection raised by him. *Dharmu* v. *Krushna,* A.I.R. 1956 Orissa 24=A.I.R. 1956 Cut. 222. An applicant who stands by a partial arbitrator knowing him to be partial all the time, and takes his chance of the award turning out to be favourable to him in spite of such partiality cannot be permitted to put forward such grounds if the award ultimately turns out against him. *National Fire* v. *Union of India, A.*I.R. 1956 Cal. 11; see also, *Chouthmal* v. *Ramchandra,* I.L.R. (1955) Nag. 100=A.I.R. 1955 Nag. 126. Where a party to an award not only accepts an award but takes advantage of it by claiming rent from lessees and by applying for mutation of names of the property he is precluded from contesting its validity. *Kalumal* v. *Ahmed,* A.I.R. 1931 Sind 107=25 S.L.R. 405=134 Ind.Cas. 373; *Vishram* v. *Gangaram.* A.I.R. 1935 Sind 235. Where a party actually affirms the award by taking benefits under it and also giving up certain properties according to it, he cannot turn round and say that the award is invalid, unless he can prove that he was acting under some misapprehension. No person can affirm in part an award and then repudiate it in part. *Ananta Lal* v. *Jnanada Sundari,* A.I.R. 1930 Cal. 255=50 C.L.J. 323=125 Ind.Cas. 290. See also, *Hurrybux Deora* v. *Johurmall,* A.I.R. 1929 Cal. 796; *Gobindram* v. *Deokabai,* A.I.R. 1931 Nag. 66=13 N.L.J. 237=130 Ind.Cas. 156; *Ramdas* v. *Kodanmal,* A.I.R. 1933 Sind 207; *Meyappa* v. *Venkatachellam,* A.I.R. 1935 Rang. 34=155 Ind.Cas. 997. There is no misconduct of arbitrator in having made private enquiries or examined evidence in the absence of a party to the arbitration proceeding when that party by his own conduct waives the objection he has to such a procedure. *Dayaram* v. *Narain Das,* 119 Ind.Cas. 529=A.I.R. 1929 Sind 200. See also, *Mohidin Sahib* v. *Ramaswami Chetty,* A.I.R. 1921 Mad. 271; *Curseiji* v. *Crowder,* 18 Bom. 299. A court would be unwilling to assist any party who with full knowledge of the circumstances, allows an arbitrator to proceed and takes part in it and then seeks to evade it later by raising a number of objections which

never occurred to him before. *Venkatchellam* v. *Suryanarain*, A.I.R. 1941 Mad. 129; see also, *Haji Ebrahim* v. *Panna Lal*, I.L.R. (1949) 1 Cal. 245. Where a party to an arbitration proceeding has condoned an irregularity on the part of the arbitrators by taking part in the subsequent proceedings before them he must be deemed to have waived all objections on that account and he cannot object to the award on the ground of such irregularity. *Gunnwa* v. *Pyinnyadipa*, 1 Rang. 15=2 Bur.L.J. 30=74 Ind.Cas. 6=A.I.R. 1923 Rang. 187. See also, *Municipality of Ahmedabad* v. *Ravjibhai*, A.I.R. 1935 Bom. 127=37 Bom.L.R. 69=155 Ind.Cas. 669=59 Bom. 268. But waiver must be an intentional act and with knowledge of necessary facts. *Chaturbhuj* v. *Deokaram Nanji*, 79 Ind.Cas. 769=26 Bom.L.R. 84=A.I.R. 1924 Bom. 370; *Haigh* v. *Haigh*, (1861) 31 L.J.Ch. 424; *Bignall* v. *Gale*, 10 L.J.C.P. 169; *Hewlet* v. *Lay Cock* (1872) 2 C. & P. 574; *Mills* v. *Bowyer's Society*, 3 K. & J. 66; *Drew* v. *Drew*, (1855) 2 Macq. 1; *Jungheim* v. *Fonkelmann*, (1909) 2 K.B. 948=78 L.J.K.B. 1132; *Toyo Menka* v. *Sohan Singh*, I.L.R. 1943 Kar. 438.

In (1909) 2 K.B. 948 *Pickford, J.* observed: "All the cases of waiver proceeded upon the principle that if a person knows of a disqualification in the arbitrator or defect in the proceedings, and still continues to go on with the reference before him, he cannot afterwards object, because he must be taken to have waived the disqualification or defect. But every one of these cases proceeds upon the ground of knowledge, and I can find no case where a man has been held to waive a defect of which he has no knowledge." See also, per *Lord Chelmsford in Darnley* v. *London, Chatham and Dover Rail Co.*, (1867) L.R. 2 H.L. at page 57. The burden of proving a case of waiver and acquiescence is upon the person who suggests it. *Per Lord Selborne* in *Rolland* v. *Cassidy*, (1888) 3 App.Cas. at p. 778; *Kishandas* v. *Meghraj*, 81 Ind.Cas. 834.

"In proceedings before an arbitrator the practical question is not: Can my objection to this irregularity be waived; and how? but rather: What is the best way of avoiding a waiver, short of withdrawing from the arbitration altogether? For while withdrawal will undoubtedly preserve the right to object later to the irregularity concerned, it is dangerous: if the objection is ill-founded, or the irregularity is insufficient to invalidate an award, the arbitrator may properly go on with proceedings in the absence of the objecting party. Thus that party may ultimately find that an award is made against him in his absence, yet he is unable to have it set aside.....The obvious course, therefore, is for a party complaining of irregularity to protest against the irregularity and to continue to conduct his case in the proceedings before the arbitrator under such protest." *Russell*, 15th Edn., p. 148. In *Haigh* v. *Haigh*, (1861) 31 L.J.Ch. 424, *Turner, L.J.* said: "A party does not waive his objection by continuing to attend the proceedings after protest, or under the compulsion of the irregularities, and without any intention to waive his objection."

In *Holt* v. *Meddowcroft*, 4 M. & S. 467 (469), *Lord Ellenborough* said: "We find that the defendant did protest and did all in his power to resist the proceeding. I cannot agree that it amounts to a consent on the part of the defendant, because, being tied to the stake and dragged on to trial, he endeavours to make the best of it." See also, *Dobson* v. *Groves*, 14 L.J.Q.B. 17 (22): *Bignall* v. *Gale*, 10 L.J.C.P. 169 (171); *Hewlett* v. *Laycock*, (1827) 2 C. & P. 574 (576); *Narpatrai* v. *Devidas*, 14 Ind.Cas. 371; *Drew* v. *Drew*, (1855) 2 Macq. 1 (9).

General principles of law must be applied to arbitration as to all others. Where one of several arbitrators agrees to an award but at the instance of one of the parties wilfully refuses to sign it, though there is a legal flaw in the award. the party who procured it cannot take advantage of it. *Ramsundar* v. *Kulwant,* 66 Ind.Cas. 499=20 A.L.J. 392. Where the arbitrators examine the witness in private without informing the parties, their procedure is irregular and such misconduct would justify the setting aside of such award. It is not necessary to prove prejudice. But irregularities of this kind may be cured by waiver. *Alagappa Chettiar* v. *Chidambaram Chettiar,* A.I.R. 1931 Mad. 619=(1931) M.W.N. 451=133 Ind.Cas. 522=34 M.L.W. 507. But a mere signature to an award does not necessarily remove all objections to an irregularity. It must be clear that when the party attached his signature he was aware that the irregularity had been committed and then this act is *prima facie* evidence that he waives his objection which presumption can be rebutted only by adducing special circumstances. What amounts to waiver must be decided on circumstances of each case. *Ibid.* See also, *Gunnu Meach* v. *Rahman,* A.I.R. 1929 Rang. 166=117 Ind.Cas. 574=7 Rang. 136; *Redman,* 4th Edn., p. 155; *Mills* v. *The Master, etc.,* 69 E.R. 1024; *Parish Rathwan* v. *Parish Eligin,* 2 H.L. Scott. Rep. 535; *Muhammad* v *Najju,* A.I.R. 1936 Oudh. 150.

Where the appellant was fully aware of the counter-claim made by the respondent, and it sought to lead evidence before the arbitrator to show that the counter-claim was not substantiated, held that the irregularity, if any, made by the arbitrator in acceppting the counter-claim beyond the time fixed by him was waived by the appellant who took part in the proceedings before the arbitrator with full knowledge of the irregularity and without protest. It is well settled that in such a case the court will not permit any of the parties to lie by or act in an indecisive manner, so as to obtain the benefit of the award if it is in his favour and endeavour to set it aside if it is not. *Pioneer Engineering* v. *Union of India,* 1959 B.L.J.R. 128=A.I.R. 1959 Pat. 374. Although an award should be the result of a joint deliberation of all the arbitrators; when a party to arbitration proceedings does not raise any objection to the absence of one of the arbitrators at some of the meetings, it is not open to such party to contend subsequently that such absence rendered the award ineffective. *Baijjuri* v. *Bhoopati,* (1962) 2 Andh. W.R. 469= A.I.R. 1962 A.P. 492.

Where only some of the arbitrators take part in the hearing, but no objection is then taken and the merits of the award are not affected thereby, an order confirming such an award is not open to revision on this ground. *Thota Chenna* v. *Thota Chenna,* A.I.R. 1933 Mad. 862=65 M.L.J. 755= 38 M.L.W. 927.

The general rule is that irregularities in procedure adopted by an arbitrator may be waived by the parties, provided they know of the irregularities and waive them with such knowledge. *Rethamali* v. *Ramasami.* 51 Ind.Cas. 53=10 L.W. 57; *Manindra Nath* v *Mahanunda,* 13 Ind.Cas. 161=15 C.L.J. 360; *Moxley* v. *Simpson,* 16 Eq. 226=42 L.J.Ch. 739; *Ramchand* v. *Gobindram,* 53 Ind.Cas. 337=13 S.L.R. 75; *Zumal Khan* v. *Fulchand.* A.I.R. 1941 Bom. 20. Parties signing the award should not be allowed to pick holes in it. *Kanshi Ram* v. *Harnam Das,* A.I.R. 1940 Lah. 73; *Wazir Ali* v. *Mahbub Ali,* A.I.R. Lah. 238=22 Ind.Cas. 412; *Gitaram* v. *Kesho Ram.* 32 M.R. 754=135 Ind.Cas. 62. Not only irregularities but even improper conduct on the part of arbitrators might be

waived; all objections as to irregularities known to the parties before the pronouncement of the award must be made before the delivery of the award. *Nanjappa* v. *Nanja Rao,* 16 Ind.Cas. 478=12 M.L.T. 133=23 M.L.J. 290=(1912) M.W.N. 1091. A party will not be allowed to lie by and join in the submission, and then, if and when if suits his purpose, attack the award on that ground. *Toyo Menka* v. *Sohan Sing,* I.L.R. (1943) Kar. 438. Where the appointment of an arbitrator is open to objection under the rules, but the parties appear before him and raise no objection to his appointment, they must be taken to have accepted the appointment and to have waived the objection. *Chaturbhuj* v. *Deokaram,* 79 Ind.Cas. 769=26 Bom.L.R. 84=A.I.R. 1924 Bom. 370. But the question of waiver is a question of fact and depends upon the circumstances of a particular case. *Ibid.* See also. *Jungheim* v. *Fonkelmann,* (1909) 78 L.J.K.B. 1132. Waiver by conduct, particularly when it deprives a party of an essential and elementary right, such as a right of hearing or of evidence, must be clearly provided by the party setting up the waiver. *Dhansing* v. *Ramchand,* 83 Ind.Cas 343=20 L.W. 624=47 M.L.J. 658=A.I.R. 1925 Mad. 123=25 Cr.L.J. 1383=(1925) M.W.N. 146. A waiver must be an intentional act with knowledge. *Kishandas* v. *Meghraj,* 81 Ind.Cas. 834=A.I.R. 1925 Sind 144; *Shyama Charan* v. *Prafulla Sundari,* 30 Ind.Cas. 161=18 C.W.N. 882 (886)=21 C.L.J. 557; *Ramji Ram* v. *Saligram,* 11 Ind.Cas. 481. There is a distinction between a case where the acquiescence alleged occurs, while the act acquiesced is in progress, and where the acquiescence takes after the act is completed. *Kishandas* v. *Meghraj* (*supra*). See also, *Duke of Leeds* v. *Ahmerst,* 78 R.R. 47=16 L.J.Ch. 5. An appearance before an arbitrator, whose appointment is without jurisdiction and *ultra vires* on the ground of there being no dispute within the submission clause which can be referred to arbitration, even though the appearance is not made under protest and without prejudice, does not amount to a waiver of the right to contest that the arbitrator had no jurisdiction to act. *Kishandas* v. *Meghraj* (*supra*). The party who makes an objection must prove that he objected at the time to the umpire to his proceeding in making final award without hearing his witness. *Sitaram* v. *Sushil,* 64 Ind.Cas. 706=3 U.P.L.R. (A) 60. Where in the event of a disagreement between arbitrators an umpire is appointed, he is bound to rehear the evidence if an application is made to him to that purpose, and if he fails to do so, his award will be bad for misconduct, but if the parties do not apply to him to hear the evidence again, he would be justified in concluding that they have waived their right to do so, and in deciding the case on the materials before him. *Miller* v. *Dhanasingh,* 63 Ind.Cas. 141=15 S.L.R. 68.

1187. How the award is to be set aside.—Having regard to the provisions of ss. 32 and 33 claims to set aside arbitration awards and challenge arbitration agreements should be made by applications to court and decided by affidavits, or on other evidence, if deemed expedient by the court, and not by means of a suit. *Deokinandan* v. *Basantlal,* A.I.R. 1941 Cal. 527=45 C.W.N. 881. See also, *Kallepalli Subhayya* v. *Kurra Venkatadri,* A.I.R. 1941 Mad. 921=(1941) M.W.N. 780=(1941) 2 M.L.J. 395=24 M.L.W. 604; *Peopies Bank* v. *Kanhya Lal,* A.I.R. 1935 Lah. 602; A.I.R. 1956 Cal. 321 (F.B.)=60 C.W.N. 471. The Second Schedule to the Civil Procedure Code did not prescribe any form in which an application to set aside an award should take. *Gopalji* v. *Chhagantal,* 63 Ind.Cas. 929=45 Bom. 1071=A.I.R. 1921 Bom. 419=23 Bom.L.R. 614. In the above case it was held that it was sufficient for the purposes

of paragraph 15 of the Schedule if some notice of the objections to an award is given to the proper office or court. Order 1, rule 8, Civil Procedure Code is a rule of procedure made tor the purpose of convenience and saving of trouble and expense, and there is no reason why its provisions should not be applied to an application under this section to set aside an award on the ground of misconduct of the arbitrators. The court has power to grant leave under Order 1, rule 8 to a petitioner applying under this section. A petition under this section is one which can be heard and tried as a suit. *Abdul Gani* v. *The Reception Committee,* 60 Bom. 645=163 Ind.Cas. 532=38 Bom.L.R. 380=A.I.R. 1936 Bom. 259. An order on the objections to an award of an arbitrator should comply with the provisions of Order XX, rule 5 and the court should state its finding or decision with the reasons therefor upon each separate issue. *Sant Lal* v. *Kedar Nath,* 154 Ind.Cas. 310=1935 A.L.J. 309=A.I.R. 1935 All. 519. An objection that an award out of court of invalid for want of jurisdiction may be taken by way of a notice of motion and a separate suit is not necessary. *Vedavalli* v. *Raghava,* 121 Ind.Cas. 760. The only court which has jurisdiction to entertain an application under this section to set aside an award or to decide whether the award has been improperly procured or not, is the court in which the award has been caused to be filed. *Mathura* v. *Sukhdayal,* 121 Ind. Cas. 318=A.I.R. 1928 Sind 169. An objection to an award on the ground that it is not an award or on the ground that it is invalid must be made at the time when it is filed. *Mahomed Valli* v. *Valli Asmal,* 26 *Bom.* L.R. 171=29 Ind.Cas. 723=A.I.R. 1924 Bom. 324. The party in whose favour an erroneous action of the arbitrator operates, cannot be heard to impeach the validity of the award. *Narsing Narain* v. *Ajodhya,* 13 Ind.Cas. 118=16 C.W.N. 256=15 C.L.J. 110; *In re Bradshaw's Arbitration,* (1842) 12 Q.B. 562; *Moore* v. *Butler,* 7 A.& 9. 595; *Taylor* v. *Shuttleworth,* 6 Bing.N.S. 277; *Bhagwati* v. *Bhagwandas,* A.I.R. 1927 Sind 206=102 Ind.Cas. 277. An agreement to recognize an award peyond the scope of the dispute mentioned in the reference is void and is not binding on the parties to the reference. *Parsram* v. *Topands,* A.I.R. 1928 Sind 81=21 S.L.R. 253=102 Ind.Cas. 183.

An objection to an award on the ground of invalidity from any cause whatever should be decided by the court which made the reference and by no other court. *Lutawan* v. *Lachiya,* 21 Ind.Cas. 989=12 A.L.J. 57 (F.B.). See also, *Mahomed* v. *Valli,* 79 Ind.Cas. 723=26 Bom.L.R. 171; *Raoji* v. *Ratansi,* A.I.R. 1930 Bom. 431=54 Bom. 696; *Suraj* v. *Phul,* A.I.R. 1926 All. 202=23 A.L.J. 997; *Srikishen* v. *Relumal,* 34 Ind.Cas. 845; *Madan* v. *Narain,* AI.R. 1929 All. 521; *Emnabai* v. *Fakir,* 65 Ind. Cas. 50; *Baldeo Sahai* v. *Abdur Rahim,* A.I.R. 1932 Oudh 156=137 Ind. Cas. 151; *Alim* v. *Molidine,* 19 Ind.Cas. 348=6 S.L.R. 168.

1188. Separation of valid from invalid portion.—Where the award is not wholly invalid but valid in part and valid portion can be separated from the invalid portion the court is justified to separate the invalid portion from the valid portion A.I.R. 1956 Cal. 51. It is not possible for a party to an arbitration having accepted and been benefited from part of the arbitrator's decisions to question the rest. *Ramsahai* v. *Harish,* A.I.R. 1963 M.P. 143.

1189. Jurisdiction of arbitrator.—An arbitrator cannot himself give himself jurisdictior. by a wrong decision as to the facts upon which the limit of his jurisdiction depends. The final decision on the question of jurisdiction rests with the law courts and not with the arbitrator.

Premnath v. *Union of India,* I.L.R. (1957) Punj. 1448=59 Punj. L.R. 645=A.I.R. 1958 Punj. 340; see also A.I.R. Punj. 240. When the very existence of the contract is disputed, the arbitration clause which is a part and parcel of the agreement no longer remains in force. In such an event, it is not open to the arbitrator to enter upon the reference and proceed to declare the award. *Varjivandas* v. *Rabindra Motilal,* 1961 Nag. L.J. 369=63 Bom. L.R. 332=I.L.R. (1961) Bom. 792. Where all that the arbitrators were required to do under the arbitration agreement to find out whether A, a Hindu widow had in fact adopted B and after finding that A had adopted B, the arbitrators proceeded further and set aside the adoption. Held that, the act of setting aside the adoption was wholly without jurisdiction. *Ajit Singh* v. *Fateh Singh,* A.I.R. 1962 Punj. 412.

1190. Order under this section whether operates as res judicata—old law.– Where an objection to an award falling within the purview of this section have been raised and disallowed or when they are partly reserved for a separate suit, a suit seeking to set aside an award on those very grounds is barred on principles of *res judicata* as mentioned in section 11 of the Civil Procedure Code. *Khimji* v. *Nathibai,* 76 Ind.Cas. 953=A.I.R. 1925 Sind 42. In the course of the judgment in the above case the court observed : "It may be observed that a valid award made without the intervention of the court is operative from the date of its passing and binds the parties even though neither party has sought to enforce it either by the summary procedure or by a regular suit. As between the parties and their privies a valid award is entitled to that respect which is due to the judgment of a court of last resort. *Muhammad Newaz Khan* v. *Alam Khan,* 18 I.A. 73=18 Cal. 414=70 P.R. 1891; *Bhajahari Saha Banikya* v. *Behary Lal Basak,* 33 Cal. 881=4 C.L.J. 162 and *Baidaya Nath Chattopadya* v. *Panchanani Dassee,* 72 Ind.Cas. 128=37 C.L.J. 542=28 C.W.N. 140=A.I.R. 1924 P.C. 72.....Where, however, a party objects to the filing of the award under section 525, Civil Procedure Code, on the grounds which fali within the purview of clauses (*a*) and (*b*) of the proviso to section 521, Civil Procedure Code, and the court after dealing with the objections orders an award to be filed under the provisions of section 526, old Civil Procedure Code, of paragraph 21 of the Second Schedule, the validity of the award has been put in issue and made the subject of trial, and the order of the court filing the award cannot thereafter be contested by a separate suit." [*Vide Chintamallaya* v. *Thadi Gangirddi,* 20 Mad. 89=7 M.L.J. 61; *Manganlal* v. *Lalchand,* 9 Bom. I.R. 259; *Ghulam Jilani* v. *Muhammad Hussan,* 29 I.A. 51=4 Bom.L.R. 161=12 M.L.J. 77=6 C.W.N. 226=29 Cal. 167 (P.C.)=*Rajmal Girdharilal* v.*Maruti Sivaram,* 59 Ind.Cas. 775=22 Bom.L.R. 1377=45 Bom. 329].

In the first named case the court continued: "Ordinarily when jurisdiction has been conferred upon a Special Court for the investigation of certain matters in controversy between the parties such jurisdiction is exclusve and the ordinary jurisdiction of a civil court is ousted. *Sailesh Chandra Sarkar* v. *Bejoy Chand Mahatap,* 65 Ind.Cas. 711=26 C.W.N. 506=A.I.R. 1922 Cal. 4. The Arbitration Act not only creates special jurisdiction but provides a special remedy which is not available at Common Law in so far that the Arbitration Court may either set aside an award or remit the award to the arbitrators for reconsideration where the award is attacked on the ground of technical misconduct.....In *Thorburn* v. *Barness,* (1867) 2 C.P. 384=36 L.J.C.P. 384=16 L.T. 10, *Willes J.* observed at page 403 that when parties have agreed that

an arbitrator selected by them should be the Judge between them, they can only take advantage of the misconduct of the arbitrator by an appeal to the equitable discretion of the court and as pointed out by *Montague Smith J.* at page 405, that a 'Court of Equity would upon a proper application take all the circumstances into their consideration and would probably not set the award aside but would send it back for re-hearing. Where a plaintiff fails to adopt the course which is open to him, he must be taken to have acquiesced in the decision of the arbitrators."

But the rule of *res judicata* will apply under the present Act to such awards where judgment has been delivered under section 17 of the Act of 1940 and a decree has been followed. *Vide* notes under s 17 under the heading "*Binding effect of decree based on award—Res-judicata.*"

1191. Procedure to be followed by the arbitrators.—Although there is no provision in the Arbitration Act which lays down the procedure to be followed by arbitrators in arbitrator proceedings, an arbitrator, who may or may not be acquainted with procedural law, is undoubtedly in a position of a judge selected by the parties in whose sense of justice they have faith, and his procedure should be such a reasonable man would follow in deciding a dispute impartially. In the absence of any special procedure agreed or consented to by the parties, or justified by the peculiar circumstances of the case, his procedure therefore, be governed by the principles of natural justice. *Krishna Gopal* v *Chandi Prosad,* 8 D.L.R. (Nag.) 6=A.I.R. 1953 Nag. 309; See also *Harisingh* v. *Kakinarh Co.,* 34 C.L.J. 39 (47); *Andrews* v. *Michell,* (1905) A.C. 78; *Harrey* v. *Shelton,* (1844) 7 Beav. 455; *Matson* v. *Town* (1824) Ry. & Mo. 17; *Brok* v *Delcomyn,* (1864) 76 C.B.N.S. 403. *In re Catailla Eitson and Jewson & Sons* (1896) 40 Sol. Jons. 349 it was observed: "Whether the arbitration was conducted on the footing that it was a mercantile or a legal arbitration the first principle of justice must be equally applied in every case". *In re Gregson and Armstrong* (1894) 70 L.J. 106, *Mathew J.* observed: "Arbitrators are not merely valuers, they have judicial function to perform. Though intending no injustice they must observe the fundamental rules which govern judicial proceedings." A finding of fact upon no evidence by the arbitrators would clearly amount to legal misconduct. *Bajranglal* v. *Gomesh,* A.I.R. 1957, Cal. 78=55 C.W.N. 147. But where the arbitration clause in a contract provides for reference of disputes relating to the contract to the arbitration of the Bengal Chamber of Commerce whose rules empower the Chamber to decide on the statements filed by the parties before them, it cannot be said that the Bengal Chamber acted unreasonably, or was guilty of misconduct in any way if in the exercise of their discretion they have decided a dispute relating to the extension of the due date of the contract, on the written statements filed by the parties without asking any oral evidence, particularly when there was no request by either of the parties calling upon the arbitrators to take evidence. *Bejoy Singh* v. *Bilas Roy,* 88 C.L.J. 202=A.I.R. 1951 Cal. 529. As regards duties of Arbitrators and umpire vide paras 558 to 565 *supra.*

CLAUSE (a)

1192. Clause (a) An arbitrator or umpire has misconducted himself or the proceedings.—This clause is taken from clause (1) of Section 11 of the English Arbitration Act of 1889. The words "or the

proceedings" have been acted by s. 15 of the English Arbitration Act of 1934. The reason of the amendment is thus stated. "Section of the Act of 1889 speaks of an arbitrator or umpire having "misconducted himself". When a motion is made under that section it is common to hear counsel direct or suggest any of turpitude and to allege only technical' misconduct. But we believe that laymen whose awards are impugned under the section feel some grievance from the phrase that it employs. We suggest that the section, or its equivalent, might well use the phrase (in both sections) 'has misconducted the proceedings' in place of 'has misconducted himself." "—*Extract from Report of Committee of Arbitration.* "The words 'or the proceedings' are introduced by s. 15 of the Arbitration Act, 1934, to meet the case where there has been no moral turpitude on the part of the arbitrator or umpire, but mere technical misconduct. The suggestion of turpitude previously conveyed was often a cause of grievance to arbitrators or unpires whose awards were set aside under this section. The amendment, can have little, if any, effect upon the authorities referred to in this connection."—*Russell* on *Arbitration,* 13th Edn., p. 178. The words "misconducted the proceedings" in the words of *Atkin J.* mean "such a mishandling of the arbitration as is likely to cause some substantial miscarriage of justice, and one instance of this is where the arbitrator refuses to hear evidence upon a material isue." *Williams* v. *Willis,* 83 L.J.K.B. 1296 (1299). So by retaining the words "misconducted himself" and by adding the words "or the proceedings" the scope of the section has been made wide enough to include all such irregularities as would cause miscarriage of justice. Arbitrator should perform their quasi-judicial manner and should not make a farce of the enquiry before them. They should give full opportunity to the parties to adduce their evidence and also allow them to be heard. *Chinoy* v. *Anjiah,* (1958) 2 Andh. W.R. 69=I.L.R. (1958) Andh. Pra. 243=A.I.R. 1958 Andh. Pra. 384. Where the defendant was given an opportunity to file a statement within three days and though that statement was filed the arbitrators without going through that statement and without giving an opportunity to the defendant to be heard or fixing a further date for hearing gave their award and no date was fixed even for their award, it was held that it was impossible to hold that the award was passed after full enquiry and therefore, the arbitrators were guilty of judicial misconduct. *Ibid.* Where the rules of arbitration by which parties agree to abide authorise the arbitrators to decide a case without hearing any evidence at all and authorise them, even when they decide to hear evidence, to determine what evidence will be relevant and necessary, unless something glaringly unjust is done it is not for the courts to revise their discretion and decide what evidence should or should not have been taken. *Kathihar Jute* v. *Lachminarayan,* A.I.R. 1958 Cal. 501. On the facts of the above case it has been held that in the matter of production of evidence the arbitrator were not guilty of misconduct of any kind.

1193. Conduct of Arbitration proceedings.—The following passage in the Halsbury's Laws of England, Vol. 2, 3rd Edn., page 35, summarises the English law on the subject:—"In the conduct of the proceedings the arbitrator or umpire must confirm to the directions which may be contained in the agreement of reference itself. Subject to any such direction, he should observe as far as may be practicable the rules *which prevail at the trial of action in court.* But he may deviate from those rules, provided that, in so doing he does not disregard the substance of

justice. Thus the arbitrator is bound by the rules of evidence, and although the parties may agree that the rules of evidence as observed in the courts shall not be strictly followed, he must not admit and act upon evidence which is obviously inadmissible, and which goes to the root of the question which he has to decide" cited in *Vellore Electrical Corporation* v. *State,* A.I.R. 1959 Mad. 351 (354).

1194. Sub-section (2) of section 11 and clause (a) of this section.—Under sub-section (2) of section 11, the court is empowered to remove an arbitrator or umpire who has misconducted himself or the proceedings. This power is discretionary. Under section 30 (*a*), the court is entitled to set aside the award of such an arbitrator or umpire. It seems that the powers of the court under the Act are limited by the words of this section. *Russell,* 13th Edn., p. 173. See *Re Smith and Nelson's Arbitration* (1890) 25 Q.B.D. 545.

1195. Laws of England previous to the enactment of the English Arbitration Act of 1889.—*Vide* notes under section 11, p. 187 *supra.*

1196. Authority of arbitrator is confirmed by the terms in the reference.—*Vide* notes under section 11, p. 189 *supra.*

1197. Interpretation of arbitration agreement.—*Vide* notes under s 11.

1198. Miconduct of arbitrator, meaning of.—The word "misconduct" as used with reference to arbitration does not necessarily or at all imply anything in the nature of fraud. It certainly may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator as he is occupying a *quasi*-judicial position. *Bhogilal* v. *Chimanlal,* 52 Bom. 116=30 Bom.L.R. 92=107 Ind.Cas. 707=A.I.R. 1928 Bom. 49=I.L.T. 40 Bom. 29; *Ayyamal* v. *Narayanappa,* (1927) M.W.N. 917. The term "misconduct" has in the legal sense a wider significance than *personal misbehaviour.* "Legal misconduct" means misconduct in the judicial sense of the word not from a moral point of view and *means some honest erroneous breach of duty causing a miscarriage of justice. Gummis & Co., Ltd.,* v. *Anammal,* A.I.R. 1924 Sind 75. See also *Williams* v. *Wallis* (1914) 2 K.B. 478=83 L.J.K.B. 1296 (1299). One should not be guided simply by the meaning attached to the word "misconduct" as a ground for setting aside an award. There are categories of legal misconduct. Where these did not reflect in any manner on the integrity or impartiality of the arbitrator he could not be held to have been guilty of any misconduct, which was likely to have affected adversely the confidence of the parties. *Rollies* v. *Chetti,* A.I.R. 1956 Mad. 369. So long as the arbitrators act within the scope of their authority there can be no doubt that their decision must be accepted as valid and binding. The agreement for reference to arbitration should be liberally construed by the court so as to base in favour of upholding the award given by the arbitrators, but that is no ground for sustaining the award where the arbitrators have clearly misdirected themselves and have exceeded the scope of their authority. *Gobardhan* v. *Lachmi,* A.I.R. 1954 S.C. 689. The conduct of the arbitrator must not be legal misconduct. *Sriram* v. *President,* I.L.R. (1954) Nag. 126=A.I.R. 1954 Nag. 236.

The failure of the arbitrator to enquire into the objections raised by a party to arbitration amount to misconduct of arbitration proceedings. *Jayantilal* v. *Surendra,* 1956 Nag. L.J. 538=1956 P.L.J. 46=A.I.R. 1956 Nag. 245. Misconduct not amounting to moral turpitude is

called legal misconduct and has very wide meaning. It is difficult to give an exhaustive definition of what amounts to legal misconduct. It may however be stated that legal misconduct means misconduct in the judicial sense arising from some honest, though breach and neglect of duty and responsibility on the part of the arbitrator causing miscarriage of justice. There may be ample misconduct in a legal sense to make the court set aside the award even when there is no ground to impute slightest improper motive to the arbitrator. It includes failure to perform the essential duties which are cast on the arbitrator as such. It also includes any irregularity of action which is not consonant with general principles of equity and good conscience which ought to govern the conduct of the arbitrator. *Indian Minerals* v. *Northern India Lime*, A.I.R. 1958 All. 692. The failure to take evidence is at best a legal misconduct which cannot be taken as a ground to challenge the award. *Pratabmull Rameshwar* v. *K. C. Sethia*, A.I.R. 1960 Cal. 702 when an entirely new point involving a complete departure from the course followed in the litigation; appeals to the umpire, it should be made quite clear to the parties to enable them to present an argument on it and if putting forward reasons for submitting that it was wrong. *Societe Franco—Tunisienne* v. *Govt. of Ceylon*, (1959) 1 W.L.R. 781 (admission of liability by party based on wrong view of law).

The word "misconduct" should be interpreted in the sense in which it is used in English law with reference to arbitration proceedings. It does not necessarily imply moral turpitude, but it includes neglect of the duties and responsibilities of the arbitrators and of what courts of justice expect from them before allowing finality to their awards. *Yusuf Khan* v. *Riyasat Ali*, 3 O.W.N. 279=93 Ind.Cas. 446=13 O.L.J. 224= A.I.R. 1926 Oudh. 307. Legal misconduct ensues where the arbitrator's procedure is so irregular as to be opposed to the principles of natural justice. *Municipality of Ahmedabad* v. *Ravijbhai*, A.I.R. 1935 Bom. 127=37 Bom.L.R. 69=155 Ind.Cas. 669=59 Bom. 268; *Abdul Majid* v. *Ali Ashraf*, A.I.R. 1937 Pat. 343=170 Ind.Cas. 351; *Aboobaker Latif* v. *Reception Committee*, A.I.R. 1937 Bom. 410. It is difficult to give any exact definition of what amounts to misconduct on the part of the arbitrators. The expression appears to be of wide import, because if on the one hand it does include action on the part of the arbitrator which is on the face opposed to rational or reasonable principles that should govern the procedure. Similarly although it does not necessarily imply corruption or moral turpitude on the part of any arbitrator, yet a mishandling of the arbitration as is likely to amount to some substantial displacement of the ordinary rules of justice does amount to misconduct. Misconduct would, therefore, be a question of fact in each case and has to be ascertained from the facts of the entire proceedings. The principle enunciated by the authorities is that when an arbitrator in arriving at the decision was influenced by secret enquiry of the case made by him after recording the evidence and by the opinion of third persons about the merits of the case, his conduct would amount to judicial misconduct. But this principle of law would not include the case where an arbitrator is selected because of his personal knowledge or where the parties who are *sui juris* agree to a reference that the arbitrator shall decide the dispute on his own knowledge or without evidence. *Lal Chand* v. *Dev Raj*, A.I.R. 1951, Pepsu 115. Misconduct is an ambiguous word and includes any mishandling of the arbitration proceeding or any neglect of duty on the part of arbitrators which is likely to lead to substantial miscarriage

of justice. A gross mistake may be evidence of misconduct. It does not mean personal turpitude such as corruption and bribery. *Khushiram* v. *Mathuradas,* 52 C.W.N. 826 ; see also *Russell,* 15th Edn., p. 52. For further discussion *vide* page 191 supra. Misconduct contemplated by this section is prior and not subsequent to the making of the award. *Louis Dreyfus* v. *Tarachand,* A.I.R. 1926 Sind 242=95 Ind.Cas. 378. See also, *Udaichand* v *Debibux,* 47 Cal. 951=60 Ind.Cas. 987. Failure to give a reasonable opportunity to a party of being heard amounts to misconduct on the part of an arbitrator. Such misconduct when there is no imputation of dishonesty, is technical misconduct and not moral misconduct and the court in the exercise of its discretion remit the award to him for reconsideration. *N. D. Joggi* v. *Ganga,* 76 Ind.Cas. 275 ; *Rewachand* v. *Veshomal,* 1 S.L.R. 116. See also, *Odlum* v. *Vancouver City,* (1916) 113 L.T. 795=85 L.J.P.C. 95 ; *Anning* v. *Hartley,* 27 L.J.Ex. 145 ; *In re Arbitration between Montogomery Jone & Co.,* (1898) 68 L.T. 406 ; *Crompton* v. *Mohan Lal,* 25 Ind.Cas. 391=41 Cal. 313. In *Sadhu Singh* v. *Ramdeo,* A.I.R. 1943 Pat. 313, *Fazl Ali C.J.* said : "It was pointed out by the Judicial committee of the Privy Council in *Amir Begam* v. *Saiyed Badruddin,* 23 Ind.Cas. 625=18 C.W.N. 755 (P.C.) that if irregularities in procedure can be proved which would amount to no proper hearing of the matter in dispute that would be misconduct sufficient to vitiate the award without any imputation on honesty or impartiality of the arbitrator. I take it therefore that if there is an indication of gross negligence or recklessness on the face of the award, that might also amount to a form of misconduct on the part of the arbitrators, because that might by itself be sufficient to show that there was no proper hearing of the matter in dispute "to use the words which have been used by the Privy Council." Change of previous intention by arbitrator before award is made is not misconduct. *Harcharan* v. *Mochan,* A.I.R. 1935 Lah. 491. In *Hart* v. *Duke,* (1862) 32 L.J.Q.B. 55, where an arbiraor did no allow certain entries to be read which he did not think relevant, *Blackburn J.* said : "You may call it misconduct if you like : but it imputes him no more misconduct than is continually imputed to every judge an West Minster Hall." See also *Catalina* v. *Norma,* (1938) 61 Ll.L.Rep. 360, where the arbitrator made remarks during the course of the hearing showing his preconceived views as to general truthfulness of the nationality of the claimants. *Russell,* 15th Edn. p. 191.

1199. Burden of proof.—Where a party contests the validity of an award, the onus on him to prove that the award is bad. *Ramchand* v. *Gobindram,* 53 Ind.Cas. 337=S.L.R. 75 ; *Govind Singh* v. *Bhirgunath,* 82 Ind.Cas. 16=22 A.L.J. 676=46 All. 686=A.I.R. 1924 All. 788. See also, *Babu Ram* v. *Lala Ram,* A.I.R. 1929 All. 415=116 Ind.Cas. 853 ; *Amir Begum* v. *Badruddin,* 23 Ind.Cas. 625=A.I.R. 1914 P.C. 105=36 All. 336 (P.C.)=18 C.W.N. 755=12 A.L.J. 537=16 Bom.L.R. 413=27 M.L.J. 181 : *State of Orissa* v. *Chanda* P.C. I.L.R. (1961) Cut. 467= A.I.R. 1962 *Orissa* 91.

1200. Powers and duties of arbitrators.—*Vide* notes under s. 11 (*supra*), at pages 193—196.

1201. Probable Bias.—In determining whether or not the arbitrators were biased so that the award may be set aside it is not necessary to go to the extent of showing that the arbitrators were in fact biased. It would be enough to show that there is a possibility of bias and if that is made out the award should be set aside. *Bhulka Brothers, In re* (Cal.) 1953 M.L.J. Dig. p. 28. An arbitrator must be a person who stands

indifferent between the parties, and has interest direct or remote in the subject-matter of the controversy or in the parties. *Re Samuel,* (1848) 10 L.T.O.S. If an arbitrator becomes unfit for his office, by reason of personal misconduct, or has a personal interest in the subject-matter of the award, unknown to one of the parties, so that it is not probable that he will faithfully and honestly discharge his duty, he is not a proper person to act as arbitrator. *Russell,* 9th Edn., p. 93 ; *Beddow* v. *Beddow,* 9 Ch.89=47 L.J.Ch. 589 ; *Parker* v. *Burroughs,* Colles' Parl.Cas. 257 ; *Kimberley* v. *Dick,* L.R 13 Eq. 1 ; *Kemp* v. *Rose,* 1 Giff 258. It is not necessarily an objection on the ground of bias to the award of an umpire in an arbitration under the Land Clauses Consolidation Acts to determine the value of land compulsorily taken that, during the pendency of the arbitration and before making his award, he has given evidence on behalf of one of the parties in another enquiry as to the value of other land taken for the same purposes and under the same parliamentary powers. *Haighs and the London etc. Ry. Co.,* (1896) 1 Q.B. 648. Once the arbitrator is appointed by a party and undertakes to discharge his duty as such he becomes a Judge in the case and is bound to act impartially and with scrupulous regard to the ends of justice. He should in no sense consider himself to be the advocate of the cause of the party appointing him, nor is such party to be deemed as his client. He should refrain from identifying himself with the interest of such party and from looking forward to future employment as arbitrator, an office, which it should be mentioned carries emoluments. Each doing his utmost, in utter disregard of propriety and sense of proportion, to try to further the interest of the party nominating him, amounts not merely to a misconduct in the legal or technical sense but is grossly improper and inconsistent with their plain duty as arbitrators seriously disposed to settle a dispute referred to them for arbitration. *Gajanand* v. *Phulchand,* A.I.R. 1930 All. 675=1930 A.L.J. 1373. Normally, the parties to an arbitration agreement are entitled to have their dispute settled by an unbiased arbitrator with no interest in the result of the proceeding. The fact that the Superintending Engineer is interested to the extent that he is employed and paid by the Government would, by itself, be not sufficient to disqualify him from acting as arbitrator in a contract relating to Government work where it has not been shown that the Superintending Engineer is biased or that there is a probability that he would be biased, the presumption is that the gentleman, holding such a High Office, would keep in mind the duties and responsibilities of an arbitrator and would act as an honest, disinterested and impartial tribunal, absolutely uninfluenced by the fact that he is head of the department to which the dispute relates. *Daulat Ram* v. *State,* I.L.R. (1957) Punj. 1760=A.I.R. 1958 Punj. 19 ; *Union of India* v. *Baksi Ram,* 59 Punj. L.R. 572=I.L.R. (1957) Punj. 1210.

1202. Bias—Test.—Any direct pecuniary or proprietory interest in the subject-matter of a proceeding however small, operates as automatic disqualification to incapacitate a person from adjudicating or assisting in adjudicating on it. In such a case the law assumes bias, *R.* v. *Camborne,* (1952) 2 All. E.R. 850.

1203. Arbitrator discovered to be indebted to one of the parties. A court does not act without jurisdiction in passing an order superseding a reference to arbitration made by it on the ground that some of the arbitrators have since been discovered to be indebted to one of the parties, and proceeding with the trial of the suit, especially when its order is made without any protest from the parties. *Nanha Prasad* v.

Jagdambi Singh, 179 Ind.Cas. 161=A.I.R. 1939 Pat. 170. In *Bibi Hakiman* v. *Mahomed Wahiduddin,* 6 C.W.N. 235=29 Cal. 278, the court observed : "But there is another important fact which appears in the evidence of the arbitrator himself. He says he is indebted to the plaintiff. The admission is made after some slight hesitation. It is argued for the appellant that there is nothing to show whether this indebtedness existed at the time of the reference, or whether the arbitrator became indebeted subsequently. If it existed at the time of the reference and was not disclosed by the defendant, that would be a good reason for the revocation of the authority given to the arbitrator. If it came into existence subsequently, that also was a good reason for the revocation of the arbitration agreement. And so upon either of these two views, this indebtedness of the arbitrator and the plaintiff would also be a good reason for revocation of the reference. The fact, moreover, that it was never disclosed would be a ground for invalidating the award on account of judicial misconduct. The view we took is supported by the case of *O. R. Coley* v. *A. Da Costa,* 17 Cal. 200; *Toolsi Moni Dasee* v. *Sudevi Dasee,* 3 C.W.N. 361 and *Kali Prosonno Ghosh* v. *Rajani Kanta Chatterjee,* 25 Cal. 141." Seen also, *Venkatachellam* v. *Suryanarayanamurty,* A.I.R. 1941 Mad. 129=(1940) 2 M.L.T. 520=M.L.W. 556=(1940) M.W.N. 1083; *Beddow* v. *Beddow,* 9 Ch.D. 89=47 L.J.Ch. 588; *Malmesbury Railway* v. *Budd,* (1876) 2 Ch.D. 113; but see, *Morgan* v. *Morgan,* 1 Dowl. 611. But the failure of an arbitrator to disclose the fact of his indebtedness to the father-in-law of one of the defendants would not amount to misconduct where the debt due by the arbitrator is an ordinary business debt. *Jagrup* v. *Kashi,* A.I.R. 1934 All. 658=148 Ind.Cas. 1168=148 Ind.Cas. 1168=(1934) A.L.J. 694. See also, *Drew* v. *Drew,* 25 L.T. 282, *vide* notes under section 11 *supra,* under the heading *Fraudulent concealment of fact, etc.*

1204. Misconduct—Arbitrator accepting fee from one party before award.—From the scheme of the Act it appears that the Act by its Ss. 14(2) and 38 provide for two remedies and two remedies only for the recovery by the arbitrator of his fee. Where neither the amount of fee of the arbitrator nor the amount to be paid by each party was fixed in the arbitration agreement but the arbitrator before he gave the award accepted a fee of Rs. 500 from one of the parties without the knowledge of the other and made a direction in the award that half of it should be paid by the other party to the first party, it was held that the arbitrator was guilty of misconduct vitiating the award *First National Bank* v. *Beri Brothers,* A.I.R. 1956 Punj. 239.

1205. Relationship.—The failure of a party to an agreement which provides for a reference to arbitration to disclose to the opposite party his relationship and monetary dealings with the arbitrator, amounts to a fraudulent concealment of a matter which he ought to have disclosed within the meaning of Rule 15, clause (1) sub-clause (*b*) of Schedule II of the Code, and is a good ground for setting aside the award. *Nihal Chand* v. *Shanti Lal,* 155 Ind.Cas. 522=(1935) O.W.N. 582=A.I.R. 1935 Oudh. 349; but see, *Bykunt* v. *Preonath,* 22 W.R. 447. In case of arbitration where a person is appointed by two parties to exercise judicial function and appointment, and every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to

arbitration to that particular individual should or should not be made. The fact that the arbitrator is related to one of the parties as the brother of his son-in-law does afford a real likelihood of an operative prejudice on his part, and the existence of such relationship with one of the parties unknown to the other disqualifies him from acting as an arbitrator. *Ghulam Mahomed* v. *Gopaldas,* A.I.R. 1933 Sind 68=143 Ind.Cas. 635. See also, *Motharam* v. *Mayadas,* A.I.R. 1925 Sind 150=78 Ind.Cas. 521=19 S.L.R. 251. See notes under section 11. But the failure of the arbitrator to disclose the fact that he was indebted to the father-in-law of defendant No. 4 who is a *proforma* defendant did not amount to misconduct within the meaning of this section. *Jagrup* v. *Kashi,* A.I.R. 1934 All. 658=148 Ind.Cas. 1168=1934 A.L.J. 694.

1206. Oher interest.—It is well settled law that where the interest is known to the parties at or before the time of the appointment of the arbitrator, no complaint can be made by a party who has agreed to appoint such an arbitrator with full knowledge of the arbitrator's interest either in the parties or in the subject-matter of the arbitration. It is equally well settled law that if the arbitrator has undisclosed or concealed personal interest either in the parties or in the subject-matter of the arbitration then that is a sufficient ground for setting aside the award. But the fact of the arbitrator having such interest or bias must be established and satisfactorily proved before the court and if so established and proved the court will set aside the award. It is however no part of the arbitrator's duty to answer a query whether he has or not any personal interest in the subject-matter or parties. Failure to reply to a query of this description does not mean that the arbitrator's interest or bias is *ipso facto* proved by reason of such failure to reply. *Haji Ebrahim* v. *Northern Indian Oil,* 85 C.L.J. 176. Where parties have, out of court, referred a matter in dispute to arbitration by an arbitrator and it subsequently transpires that the arbitrator has been acting as *amuktear* of one of the parties without any remuneration, the other party is entitled to withdraw from the reference. *Bibi Hakiman* v. *Mahomed Wahiduddin,* 6 C.W.N. 235. Where the arbitrator is directly interested in the subject-matter of the litigation in that he would get a share out of the money which may be decreed to the plaintiff on the strength of the award and the plaintiff does not disclose this matter in court when the case is going to be referred to his arbitration, he, the plaintiff, can be considered to be guilty of fraudulent misconduct and the case comes within part (*b*) of para. 15, Schedule II of the Code of Civil Procedure. *Yusuf Khan* v. *Riyasat Ali,* 3 O.W.N. 279=93 Ind.Cas. 446=13 O.L.J. 224=A.I.R. 1926 Oudh 307. A court is justified in holding that an award is not valid and binding upon the defendant, when the arbitrator was the retained pleader of the plaintiff, and no disclosure of the fact was made, before the arbitrator was appointed, to the defendant who was consequently unaware of it. *Kali Prosonno* v. *Rajani Kant,* 25 Cal. 141. In the above case *Maclean, C.J.* observed : "It is admitted that the arbitrator in this case was the retained pleader of the plaintiff. It is proved that the defendants were not aware of that most important fact until after the proceedings had terminated before the Subordinate Judge. It is equally clear that the fact was not disclosed to the defendants. What then is the position of matters ? You have a gentleman appointed as arbitrator who had been admittedly retained as the pleader of the plaintiff ; you have the fact that there is no disclosure of that fact made by the plaintiff or by the arbitrator himself, to the defendant, and that

the defendant goes to arbitration in ignorance of that fact. To my mind that circumstances alone is sufficient to justify the court in holding that the award is not valid and binding upon the defendant. In cases of arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of the parties concerned in relation to his selection and appointment, and every disclosure, which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made." See also, *Madho Mal* v. *Gurdial,* 63 Ind.Cas. 1007 ; *Ghulam Mahomed* v. *Gopal Das,* A.I.R. 1933 Sind 68. But known interest does not disqualify. The law on the subject was thus stated by *Russell* in his 12th Edn., at p. 42 ; "If the parties, with full knowledge of the facts, select arbitrator who is not an impartial person or who had to perform other duties which will not permit of his being an impartial person in the ordinary sense of the words, the court will not release them from the bargain upon which they have agreed ; and if a party, in order to secure a contract, has submitted to the jurisdiction of a Tribunal which has an interest of its own in the decision, the court will not on that account release him from his bargain, however, improvident it may consider it, so long as the court is satisfied that he knew or should have known what kind of bargain he was entering into." See also, *Cross* v. *Leeds Corporation,* (1902) *Hudson* on *Building Contracts,* 4th Edn., Vol. II, p. 339 ; *Jackson* v. *Barry Rail Co.,* (1893) 1 Ch. 238 ; *In re Elliot,* (1848) 2 De G. & Sn. 17 ; *Eckersley* v. *Messey Docks,* (1894) 2 Q.B. 667 ; *Ives* v. *Williams,* (1894) 2 Ch. 478. But in England S. 14 (1) of the Arbitration Act of 1934 has made obsolete the pre-existing law on this point. Commenting on that sub-section *Russell* says : "Sub-section (1) of this section(=S. 14)* now overrules these decisions in so far as they decide that because a party knew at the time when he made the agreement or ought to have known that the arbitrator named might not be impartial or had some interest in the subject-matter he could not come afterwards to the court and complain of the person to whose appointment he had agreed." *Russell,* 13th Edn., p. 475. But in the Indian Act of 1940 there being no corresponding section it seems that the intention of the Legislature is to follow the old law.

In a case where interest is shown it is not necessary, in seeking to have the award set aside, to prove actual bias or partiality on the part of the arbitrator or that the existence of the interest had any operation in his mind. *Motharam* v. *Mayadas,* 78 Ind.Cas. 521=A.I.R. 1925 Sind 150.

Where both the arbitrators are pleaders, the mere fact that one of them has appeared for the other in various cases does not show that the latter was under the former's obligation and would therefore not take a fair view of the matter under arbitration. *Thadomal* v. *Menghraj,* A.I.R. 1930 Sind 190=123 Ind.Cas. 694. See also, *Rajendranath Das* v. *Abdul Hakim,* 39 Ind.Cas. 767 ; *Bright* v. *River Plate,* (1900) 2 Ch. 835. When an umpire sat with arbitrators, one of whom was secretly interested, the umpire's award was set aside. *Blanchard* v. *Sun Fire Office,* 6 T.L.R. 367. But where the interest of the arbitrator in one of the parties is known to the other party the award would not be bad. *Johnstone* v. *Cheape,* (1817) 5 Dowl. 247. See also, *Bombay Burma Trading* v. *Aga,* 38 I.A. 169=34

*Now see S. 24 (1) of the English Arbitration Act of 1950 and *Russell,* 15th Edn., p. 102.

Mad. 453=12 Ind.Cas. 44. A shareholder or a manager of a Railway Company is not a competent arbitrator in a case where the Railway Company is a party. *Re Fran Kemburg etc.*, (1894) 10 T.L.R. 939; but see, *Ranger* v. *Western Ry. & Co.*, (1854) 5 H.L.Cas. 72; *Re Wausbeck Ry. Co.*, (1866) L.R. 1 C.P. 269; *Jackson* v. *Barry Rail. Co.*, (1893) 1 Ch. 239. In *Co-operative Hindusthan Bank Ltd.* v. *Bholanath*, 31 Ind. Cas. 597=19 C.W.N. 165, *Citty, J.* observed: "Now it is clear that if an arbitrator, unknown to one of the parties, has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator, as the fact of his having such interest might influence his decision. But in this case, as his interest was so small and was apparently unknown even to himself, it is impossible that it could have influenced his award in any way." See also, *Senuk Kachu* v. *Oree Dhobey*, 2 N.W.P.H.C.R. 241.

The existence of any circumstance calculated to bias the mind of an arbitrator unknown to either of the parties who have submitted to his decision is a sufficient ground for the interference of the court. Therefore, where a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for the work not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a certain specified amount, although he refused to guarantee that amount, the court did not consider the decision of the architect made under such a bias as binding, but gave directions so as to ascertain under the authority of the court how much remained justly due to the plaintiff. *Kemp* v. *Rose*, 1 Giff. 258=32 L.T.O.S. 51. In *Demis* v. *The Grand Junction Canal*, 3 H.L.Cas. 759, it was held that *Lord Chancellor* was disqualified to sit as a Judge because he had an interest in the plaintiff's company as a shareholder to the amount of several thousand pounds.

If a party to a contract agrees that in case of any dispute arising out of the contract or in any matter concerning the contract he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him, being a decision by a person in his own cause. The only possible ground on which perhapse he may attack it, is by showing that it was arbitrary or otherwise unjust. *Burma Oil Co.* v. *Naraindas*, A.I.R. 1927 Sind 253=22 S.L.R. 51. See the case of *Secretary of State* v. *Augustus John Arathoon*, 5 Mad. 173 and the observation referred to therein at page 176 of *Morten, B.*, in the case of *Grafton* v. *Eastern Countries Ry. Co.*, 8 Ex. 699=91 R.R. 712, that parties ought to be careful how they enter into contracts containing stipulations giving such powers. The case of *Burma Oil Co.* v. *Naraindas*, *supra*, was followed by *Rupchand, A.J.C.* in *Dataram* v. *Forbes*, A.I.R. 1930 Sind 17=117 Ind.Cas. 778. See also, *Mathew* v. *Otterton*, (1694) 4 Mod. 266. In a case where a person with a known interest in one of the parties has been appointed an arbitrator, all that is required that the arbitrator must keep his mind open at the time of making his award. *Jackson* v. *Barry Railway Co.*, (1893) 1 Ch. 238.

In this connection the following observation of *Niamatullah, J. in Gajanand* v. *Phul Chand*, A.I.R. 1930 All. 675=(1930) A.L.J. 1373, should be borne in mind: "Once the arbitrator is appointed by a party and undertake to discharge his duty as such, he becomes a judge in the case and is bound to act impartially and with scrupulous regard to the ends of justice. He should in no sense consider himself to be the advocate of the cause of the party appointing him, nor is such party to be deemed

to be his client. He should refrain from identifying himself with the interests of such party and from looking forward to future emolument as arbitrator, and office, which, it should be mentioned, carries emoluments. This case is a sad commentary on what the arbitrators thought to be their duty. Each did his utmost, in utter disregard of propriety and sense of proportion, to try to further the interests of the party nominating him."

1207. Probaability of bias.—In *Eckersley* v. *Mersey Dock*, (1894) 2 Q.B. 667, at pages 670, 671, *Lord Esher, M.R.* observed : "When the proposition sought to be established on behalf of the plaintiff is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be suspected of being biased, although in truth he would not be biased.....If it was not for the agreement of the parties—if the rule applicable to judges were applied—it is obvious that it would be impossible to say that the engineer, under whose superintendence the work was to be done, could act as arbitrator, because some persons would suspect him of being biased in favour of the parties whose servant he was. But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected, shall be the arbitrator. A stronger case than that must, therefore, be shown. *It must in my opinion, be shown, if not that he would be biased, that at least there is a probability that he would be biased.* That seems to me distinctly to have decided in *Jackson* v. *Barry Ry. Co.*, (1893) 1 Ch. 238. The case relied on by the plaintiffs is *Nuttal* v. *Mayor of Manchester*, 8 T.L.R. 513. The decision has been discussed, and, as I understand, it may be explained on the grounds that there was an unseemly personal dispute, raising a vindictive feeling between the engineer and contractor, and also that the engineer has expressed an opinion on the matter he had to decide so strongly as to amount to a prejudgment."

1208. Indebtedness of arbitrator to the estate which is to be distributed—misconduct.—It is no doubt true that if an arbitrator has a personal interest and that interest is known to the parties, has appointment as an arbitrator cannot be questioned. But where an arbitrator is personally concerned and *prima facie* stands indebted to the estate, it is but fair and reasonable to expect that whatever evidence was brought to the notice of the arbitrators to show that the indebtedness did not exist should be placed in the hands of all the parties concerned and also on the record so that it could be scrutinized further. If this is not done by the *sarpanch* or the umpire who is himself indebted to the estate it involves a turpitude which vitiates the award. *Chouthmal* v. *Ram Chandra*, I.L.R. (1955) Nag. 100 = A.I.R. 1955 Nag. 126 (D.B.).

1209. Arbitrator-expert—legal misconduct.—Where the arbitrator has to decide whether a particular heap of cotton-seeds is of the required quality it is no legal misconduct on the part of the arbitrator to decide that half of the heap is of the required quality especially when the arbitrator is expert in the commodity. It is always possible to separate good seed from bad from a heap *Shriram* v. *President*, A.I.R. 1954 Nag. 236.

1210. Authorisation to arbitrators to decide dispute after making enquiries in any way they liked.—Where arbitrators were authorised by the agreement between the parties to the reference to decide the dispute between them after making enquiries in any way they liked, an award is made without examining any witness, it is not open to the parties to challenge the award on the ground of the failure to examine the witnesses. *Basiruddin* v. *Mansoor*, 1949 R.D. 353. The reason is that the procedure

is laid down by the agreement of arbitration. A.I.R. 1956 Cal. 361=97 C.L.J. 199.

1211. Setting aside of award for adjudicating on matters not included in the submission.—The court will not set aside an award on the ground that the arbitrator had exceeded his authority by adjudicating on a matter not included in the submission, when the party complaining agreed at the hearing that the arbitrator should deal with the matter. *Anandi Lal* v. *Keshavdeo,* I.L.R. (1945) 2 Cal. 526=A.I.R. 1949 Cal. 549.

1212. Clause in contract—it covers dispute relating to extension of date.—A contract contained the following arbitration clause: "All matters, questions, disputes, differences and/or claim arising out of and/or concerning and/or in connection with and/or in consequence of or relating in this contract whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to arbitration." *Held,* that a dispute as to the extension of the date under the contract was within the purview of the above clause. *Khusiram* v. *Kiran Gwan.* 88 C.L.J. 165.

1213. Architect—Arbitrator.—In *Hickman* v. *Roberts,* 82 L.J.K.B. 678=(1913) A.C. 229, under a building contract the decision of the building owners relating to any matters or thing or the goodness or sufficiency of any work, or the extent or value of any extra or omitted work, was to be final, conclusive, and binding on all parties; and payments as the work proceeded were to be made on the certificate of the architect. The architect ,having taken a wrong view of his position and being improperly influenced by the building owners, delayed issuing his certificate for the outstanding balance due to the contractor. *Lord Justice Fletcher Moulton,* in the Court of Appeal after referring to what he had done, says: "He is no longer fit to be a Judge, because he had been acting in the interest of one of the parties, and by their discretion. That taints the whole of this acts and makes them invalid whatever subsequent matter his decision is directed to." In the House of Lords, *Lord Chancellor Lord Loreburn,* referring to the above remark of the Court of Appeal, said: "I agree with that, but is not in my opinion a case to which the term 'turpitude' or fraud' are apt."

So now it is settled that if the parties, with full knowledge of the facts, select an arbitrator who has to perform other duties which will not permit his being an impartial person in the ordinary sense of the words, the court will not release them from the bargain upon which they have agreed. *Kover Parvathamma* v. *Kover Subbamma,* A.I.R. 1935 Mad. 249=(1935) M.W.N. 141=41 M.L.W. 261=68 M.L.J. 537=157 Ind. Cas. 607; *Johnson* v. *Barry Railway Co.,* (1893) 1 Ch. 238=68 L.T. 472. See also, *Commander* v. *Armugam,* A.I.R. 1954 Mys. 46; *Smithconey* v. *Becker,* (1916) 2 Ch. 86.

The fact that the Chief Engineer is of one of the parties to the contract, who was nominated as arbitrator in the contract, had a duty to which the works in respect of which contract was given and might already have formed an opinion upon the matters in dispute is not enough, in the absence of any evidence that he would not act fairly, to prevent him from being the proper person to decide the dispute. *McKenzies* v. *Sulleman,* A.I.R. 1933 Sind 75=140 Ind.Cas. 626=27 S.L.R. 169. See also, *Ives & Barker* v. *Williams,* (1894) 2 Ch. 478=63 L.J.Ch. 521; *Jackson* v. *Barry Ry.,* (1893) 1 Ch. 238=68 L.T. 472; *Mulchand* v. *Radhakishan,* A.I.R. 1926 Sind 27=90 Ind.Cas. 932; *Mahomed* v. *Thanumal,* A.I.R. 1941

Sind 202. When one of the parties to a contract is a firm, a clause for the submission of the disputes to the arbitration of its directors is perfectly legal. *Jubilee Chamber* v. *Lala Amrit Sha*, 42 P.L.R. 48=A.I.R. 1940 Lah. 180.

1214. Award by Bengal Chamber of Commerce where the Court was not duly consituted.—In the case of an arbitration by the Bengal Chamber of Commerce and industry, the award made is in award of the Chamber itself and not of the arbitral court, but the Chamber being a corporate body, can function only in accordance with its rules and therefore when the Court constituted one which cannot be constituted under the rules, the award made by the Chamber through such a court is an award made without jurisdiction and as such is a nullity. *Kathihar* v. *Lachminarayan*, A.I.R. 1958 Cal. 501. Where according to the agreement, the disputes arising between the parties were to be referred to the arbitration of the Bengal Chamber of Commerce under the Rules of its Tribunal of Arbitration for the time being in force. It is implicit in the Rr. 1 (2) and 1 (5) that each of the separate disputes arising out of separate contracts, between the same party must be decided by in separate reference by the Arbitrator appointed for determining a particular dispute. The deviation or breach on the part of the Arbitrator by itself constitutes a legal misconduct. *Prabartak Commercial* v. *Ram Sahaimull More*, A.I.R. 1963 Cal. 137.

1215. Treating arbitration.—Treating the arbitrator may be a form of procurement or may amount to a mere indiscretion, and the court will not, it would seem, set aside an award on that ground unless either there was an intention to corrupt or influence the arbitrator or he was in fact corrupted or influenced. *Russell*, 15th Edn., p. 289 either *Re Hopper*, (1867) 36 L.J.Q.B. 97 ; *Re Maunder*, (1883) 49 L.T. 535 ; *Mosely* v. *Simpson*, (1873) 16 Eq. 226. But it is always desirable that arbitrators or umpire should avoid such treating by anyone of the parties. *Mosely* v. *simpson supra*.

1216. Receipt of fees in advance.—Where a lawful and reasonable fee has been agreed by the parties to be paid to an arbitrator, he is not guilty of misconduct in getting payment of such fee before the commencement of the inquiry. *Narasimhalu* v. *Subramania*, 75 Ind.Cas. 850=17 L.W. 648. See also, *Subraya* v. *Manjunath*, 29 Mad. 44. But demand of fees which is unreasonable and exorbitant is tantamount to misconduct on the part of an arbitrator. *In re, Enoch & Zaretsky*, (1910) 1 K.B. 372= 79 L.J.K.B. 363. In the above-named case an umpire in the course of an arbitration refused to state case on a question of law on the application of one of the parties unless a payment of £150 were made to him to cover expenses. It was held that the umpire had been guilty of misconduct and as such he must be removed. Se also, *In re, Prabble and Robinson*, (1892) 2 Q.B. 602, where *Lord Coleridge, C.J.* observed : "It is, I think, an open question whether an excessive and extravagant charge by an arbitrator, made by him in the award as part of the award, might not amount to such misconduct as would justify the court in setting that award aside. I am far from saying that it might not." Where arbitrators take away money from one of the parties singly whether for charges or anything else before making their award, that is sufficient cause to set aside the award. *Akshoy Kumar* v. *S. C. Das*, A.I.R. 1935 Cal. 359=38 C.W.N. 784=156 Ind.Cas 165. But where the arbitrators took money as fees from one of the parties and it was done by mutual arrangement between the contending parties, the award is not vitiated by reason of any

misconduct on the part of the arbitrators. It is imperative that arbitrators should always scrupulously avoid any course of action which even remotely bears the completion of their having put themselves into a position where it might be said against them that they had received a pecuniary inducement which might have had some effect on their determination of the matters submitted to their adjudication. *Ibid.*; see also, *Shephard* v. *Brand,* 2 Barnard. 463=(1734) Lee temp. Hardw. 53; *Re Kennyworthy and the Queen Insurance,* (1893) 9 T.L.R. 181. Where the costs charged by the arbitrators appear below the signatures of the arbitrators and are therefore not part of the award, the fact that they are excessive is no ground for challenging the award though the costs could be reduced by the court in a proper case upon an application by the party. *Thadomal* v. *Menghraj,* A.I.R. 1930 Sind 190=123 Ind.Cas. 694. See also, *In re, Stephens Smith & Co.,* 36 Sol.J. 464.

1217. Whether arbitrator should decide according to law.— Patent errors of law are legal misconduct on which a court can in the exercise of its inherent powers set aside an award under this action. *G. P. Gunnis & Co.* v. *Amanmal Tulsidas,* 83 Ind.Cas. 353=17 S.L.R. 133 A.I.R. 1924 Sind 75 (F.B.). In delivering his judgment *Kincaid, J.C.* observed: "But *Mr. Raymond,* Additional Judicial Commissioner has set the award aside not on the ground of a mere mistake in law but on the ground of a patent error of law on the face of the award. His finding was based on the leading case of *North Eastern Railway* v. *Lord Hastings,* (1900) A.C. 263. It is also well established law that where there is an error patent on the face of the award the court should interfere. The authority for that decision is the well known case of *Hodgkinson* v. *Fernie,* (1857) 3 C.B.N.S. 189. Doubt was, it is true, thrown on the correctness of the finding by the Madras Hich Court in *Madepalli Venkatswami* v. *Madepalli Suranna,* 45 Ind.Cas. 644=41 Mad. 102=34 M.L.J. 323, *vide* page 195 *supra.* But the doctrine was re-affirmed by the Privy Council in *Attorney General for Manitobo* v. *Kelly,* (1922) 1 A.C. 268=91 L.J.P.C. 101, where their Lordships quoted with approval the further words of *Lord Haldane* in *British Westing House Electric and Manufacturing Co.* v. *Under ground Electric Railways Co.,* (1912) A.C.) 673=81 L.J.K.B. 1132=107 L.T. 25. 'It was further argued before your Lordships that the arbitrator was in reality made Judge of law as well as of fact and that the well known case of *Hodgkinson* v. *Fernie,* (1857) 3 C.B.N.S. 189 was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie, supra,* to the effect that where an error of law appears on the face of the award the error can be reviewed, is well established part of the law of the land.' The doctrine has also been accepted by the Bombay High Court, to whose decision this court has always paid great deference. In *Jivraj Baloo Spinning and Weaving Co., Ltd.* v. *Champsey Bhara & Co.,* 53 Ind.Cas. 799=44 Bom. 780 (793)=21 Bom.L.R. 1037, *Macleod, C.J.* observed: 'The rule is clear, as laid down in *Landauer* v. *Asser,* (1905) 2 K.B. 184=74 L.J.K.B. 659=93 L.T. 20 that the court will set aside an award if there is an error of law patent on the face of it.' Lastly our own court accepted the correctness of this proposition in *Haji Abdullah* v. *Sassoon & Co.,* 56 Ind. Cas. 76=13 S.L.R. 201."

In the above case *Madgavkar, A.C.J.* also observed: "With third question I have dealt in my previous judgment. From the reasoning and conclusions therein formulated, I see no reason to modify after hearing the arguments afresh before the Full Bench. On the contrary, an impor-

tant case reported since, *Gzarnikow & Co* v. *Roth, Schmidt & Co.*, (1922) 2 K.B. 478 (484, 488)=127 L.T. 824 re-affirms the propositions of the law of arbitration, and its administration by the courts which I ventured to lay down, and on which my conclusions were based. To the language of the Lord Justices in that case, and particularly of *Bankes L.J.* and *Scrutton L.J.*, I would not presume to add. Parties may contract to settle their disputes before a tribunal of arbitrations; but they cannot contract themselves out of the law of the King's Court nor are the arbitrators at liberty to apply any other law. And while arbitrators are within the limits of the law, Judges of law as well as of fact, the courts, while they will not allow themselves to be made Courts of Appeal against the decisions of arbitrators on fact or on law, will at the same time, when awards are filed, not 'release real and effective control over commercial arbitrations' or 'allow the arbitrator or the arbitration tribunals to be a law unto himself or themselves to give him or them a free hand to decide according to law or not according to law, as he or they think fit, in other words, to be outside the law' so that 'there must be no Alsatia where the King's writ does not run.' *Czarnikow & Co.* v. *Roth, Schmidt & Co., supra.* In other words it is for the courts to see that the arbitrators observe the spirit of the law and of its procedure and are not guilty in the award of patent injustice or unfairness or patent errors of law." So where an error, whether of fact or of law appears on the face of the award or upon some paper accompanying or forming part of the award, the award will be set aside unless the error is immaterial to the decision. *Durga Prosad* v. *Anardevi,* A.I.R. 1947 Cal. 75; see also *Hodgkinson* v. *Fernie,* (1857) 3 C.B. (N.S.) 189; *Buereger* v. *Barnett,* (1919) 89 L.J.K.B. 161; *Olympia Oil* v. *Produce Brokers* (1916) 86 L.J.K.B. 421; *Arcors Ltd.* v. *London,* (1933) 45 L.I.L.Rep. 297; *Union of India* v. *Premachand,* A.I.R. 1951 Pat. 201; *Gauri Sankar* v. *Biharilal,* A.I.R. 1952 Nag. 314. An acceptation has been, however, engrafted to this doctrine to the effect that when a specific point of law is referred to arbitration the award cannot be set aside if the arbitrator wrongly decides the point of law. *Durga Prosad* v. *Anardevi, supra;* see also *British Wasting House* v. *Underground Co.,* (1912) A.C. 673=81 L.J.K.B. 1132; *In re King* (1913) 2 K.B. 32=82 L.J.K.B. 733; *Att. Gen.* v. *Kelly,* (1922) 1 A.C. 268=91 L.J.P.C. 101; *Govt. of Kelantan* v. *Duff,* (1933) A.C. 395=92 L.J.Ch. 307; *Absalon Ltd.* v. *Great Western,* 1933 A.C. 592=102 L.J.K.B. 648; *Barton* v. *Blackburn,* (1934) 150 L.T. 325; *Gopinath* v. *Salil,* A.I.R. 1938 Cal. 705=I.L.R. (1938) 2 Cal. 349=179 Ind.Cas. 106. *Durga Prosad* v. *Sew Krishendas,* A.I.R. (1949) P.C. 334=54 C.W.N. 74. See also *Jupiter* v. *Corporation,* 60 C.W.N. 721=A.I.R. 1956 Cal. 470.

"In each case of an application for setting aside an award on the ground of error of law apparent on the face of the award the court has to decide whether the reference was one in which the question of law arose incidentally as being material in the decision of the matter which had been referred to arbitration or it was one in which a specific question of law had been referred to the decision of the arbitrator as the sole tribunal. If the reference was of the former class the case falls within the general rule and the award may be set aside if an error is apparent on the face of it. If, on the other hand, the reference was of the latter kind it falls within the exception and the award cannot be set aside even if it is erroneous. In coming to a decision that the case falls within the exception the court insists on being clearly satisfied that the parties intended to give up their rights to resort to the King's Court and in lieu

thereof to submit that question to the decision of a tribunal of their own' *Per Lord Trevethin in Govt. of Kalantan* v. *Duff, supra.*" *Per Das J.* in *Durga Prosad* v. *Amardevi, supra.* See also *Durga Prosad* v. *Amardevi,* 50 C.W.N. 880 ; *Hanuman* v. *Jessa Ram,* 50 P.L.R. 181 = A.I.R. 1949 East. *Punj.* 46. The terms of reference or even pleadings may be looked at for ascertaining whether specific questions of law were as such referred to the arbitrator or such questions of law arose incidentally as material in the decision of the disputes referred to arbitration in general terms. *Ibid.* ; see also *Venkata Rao* v. *Padma Valli,* A.I.R. 1944 Mad. 324 = (1944) 1 M.L.J. 140.

The mere fact that the arbitrators have erred in law is so ground for interference. *Raghupati* v. *Ram Gopal,* A.I.R. 1939 Cal. 557. See also, *Ghulam Jilani* v. *Muhammad Hussain,* 29 Cal. 167 = 29 I.A. 51 (P.C.) ; *Dwarkanath* v. *Kedar Nath,* A.I.R. 1951 Pat. 446 = 6 D.L.R. (Pat.) 56. A wrong view of law cannot make an award invalid. *Mahadeo* v. *Kamala,* A.I.R. 1956 All. 51. The principle that for a breach of contract a party is entitled by way of damages to the difference between the contract price and the market price, is not an absolute and inviolable principle. It is only a presumptive text and therefore from the mere fact that the amount of damages awarded is not the amount of difference between the contract price and the market price, it does not necessarily follow that the arbitrators have not applied the law of the land, have misguided themselves and been guilty of misconduct. *Fateh Chand* v. *Juggilal,* 59 C.W.N. 223 = A.I.R. 1955 Cal. 465. In the above case the court observed : "When the pleadings of the parties before the arbitrators present a problem of construction, it is not open to the court to construe the pleadings for itself. then decide on its own construction that a particular issue of fact arose out of them, then final that the burden of proof in respect of that issue of fact lay on a particular party ; then see whether the arbitrators could be said to have placed the burden where in the court's view it lay and it found that the burden had not been laid on the proper party or that the evidence required in the case had not even been called for, conclude that the arbitrators had misconducted the proceedings and the award made by them cannot stand. If the court undertakes the construction and then decides in what manner proceedings should been conducted, it takes upon itself which the parties by this agreement had entrusted to another authority." Where in his award an arbitrator states reason for his decision which are erroneous on a point of law, there is an error of law on the face of the award and the award is bad and should be set aside. *Mahomedali* v. *Charatsing,* 80 Ind.Cas. 596 ; *Co-operative* v. *U. Kyard,* A.I.R. 1941 Rang. 104 ; but see *Dwarkadas* v. *Krishna Kishore,* 61 Ind.Cas. 628 and *Muhammad Newaz* v. *Alam Khan,* 70 P.R. 1891 = 18 Cal. 414 = 18 I.A. 73. Where it was provided in a reference to arbitration that the dispute should be decided according to Muhammadan law and the arbitrators did not profess to decide the matters according to Muhammadan law and their decision was contrary to the well-known principles of that law, *held* that the decision of the arbitrators was perverse. *Nga Tok* v. *Nga Kasim,* 14 Ind.Cas. 978 = 5 Bur.L.T. 55. An award of damages by arbitrators on the basis of rates exceeding the maximum rates fixed by Control Order while such is in force, is clearly illegal. *Chhogmal* v. *Sankal Chand,* 51 C.W.N. 828. Before a court can set aside an award on the ground that an error of law appears on the face of it in the reference to some documents, it must be demonstrated affrmatively that the law was departed from by the

arbitrator in noticing the existence or contents of those documents, and mere reference to certain documents in the award is insufficient to establish that it was wrong in law to refer to them. *Haji Ebrahim* v. *Northern Indian Oil,* 85 C.L.J. 175. An arbitrator has no power to alter devolution of property in a mode at variance with the ordinary principles of the law governing the parties, in the absence of special custom prevailing in the family. He has no power to make property which is divisible by law indivisible forever. *Jafri Begam* v. *Syed Ali,* 5 C.W.N. 585=23 All. 383 (P.C.). See also, *Lilo Shah* v. *Bhola Nath,* A.I.R. 1935 Lah. 52=157 Ind.Cas. 731 ; *Sreelal Mangtulal* v. *J. F. Madan,* A.I.R. 1925 Cal. 599=88 Ind.Cas. 49=52 Cal. 100 ; *Muhammad Newaz* v. *Alam Khan,* 18 Cal. 414 (P.C.) ; *Dinabandhu* v. *Chintamoni,* 26 Ind.Cas. 697=19 C.W.N. 476 ; *Ramdutt* v. *E. D. Sasoon,* A.I.R. 1929 P.C. 103=56 Cal. 1048 ; *Tyldesby's Case,* 68 L.J.P.B. 252 ; *Board of Trade* v. *Crazer,* (1927) 1 K.B. 269 ; *Tirtu Das v. Motiram,* A.I.R. 1947 Sind 110.

1218. Procedure to be adopted by the arbitrators.—Arbitrator's procedure should not be opposed to natural justice. *Vide* notes under s. 11, pp. 295-298 *supra.* In the conduct of the proceedings the arbitrators or umpire must conform to the directions which may be contained in the agreement of reference itself. Subject to any such direction he should observe as far as may be practicable the rules which prevail at the *trial of an action in court.* But he may deviate from those rules, provided that, in so doing he does not disregard the substance of justice. Thus the arbitrator is bound by the rules of evidence, as observed in the court, and although the parties may agree that the rules of evidence, as observed in the courts shall not be strictly followed, he must not admit and act upon evidence which is obviously inadmissible and which goes to the root of the question which he has to decide." *Halsbury's Laws of England* Vol. II, 3rd Edn. p. 35 cited in *Vellore Electric* v. *State,* A.I.R. 1959 Mad. 351 (354)=72 Mad. L.W. 307=(1959) 1 Mad. L.J. 318. The proceedings before the arbitrators need not be conducted with such meticulous care as is required in ordinary courts so long as there is substantial compliance with the principles of natural justice. *Gusumurty* v. *Nara Sinha,* A.I.R. 1954 Orissa, 234. The arbitrator's procedure should be such as a reasonable man would follow in deciding a dispute impartially. In the absence of any *special procedure agreed or consented to by the parties,* or justified by the peculiar circumstances of the case as when an arbitrator is appointed on account of his skill and knowledge of the subject, his procedure should be governed by the principles of natural justice. *Krishna Gopal* v. *Chandi Prosad,* A.I.R. 1953 Nag. 309. See also cases cited therein.

1219. Acts not amounting to misconduct.—Where the arbitrator has refused the applicant's claim to be represented by a lawyer, it has been held that in so refusing, there could not be any misconduct because they acted within the expressly conferred rules under the Rules of Arbitration. *Nandlal* v. *Ambala,* 60 C.W.N. 810=A.I.R. 1956 Cal. 476. It cannot be said that the provisions of the C. P. Code regarding the formal framing of issues or their formal determination separately is a procedure at all enjoined as compulsory in an arbitration proceeding. *Jupiter General Ins.* v. *Corporation of Calcutta,* 60 C.W.N. 721=A.I.R. 1956 Cal. 470. Where parties agree to go to arbitration they stipulate not so much for vague principles of natural justice as for concrete principles of contractual justice according to the contracts of the parties and

their specific stipulations. Where the contract of arbitration itself prescribes a private procedure of its own, than so long as such agreed procedure is not against the laws and statutes of the land, then such agreed procedure must prevail over the notions and principles of natural justice. Parties have the right by contract to provide for their private procedure. Where private procedure speaks in clear terms the voice of natural justice remains silent. Where the parties expressly agreed not only to go to the arbitration of the Bengal Chamber of Commerce but also to have such arbitration according to the published and well known Rules of Arbitration of such Chamber of Commerce, and in such a case the arbitrators expressed their unwillingness to allow an opportunity to the applicants' representative, after examining the questions which the applicants' representative wanted to put, on the ground that some of the questions were irrelevant and the majority of the questions were covered by the written submissions of the parties, it cannot be argued that the arbitrators had violated the principle of natural justice. If the parties by voluntary agreement have chosen the rules of artificial justice, they must be given effect to. *D. L. Mills* v. *Dalusam,* A.I.R. 1956 Cal. 261=97 C.D.L. 199. See also *Ibid.;* for interpretation of Rule 11 of the Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce.

1220. Appointment of umpire by arbitrator.—In the absence of any provision different in the arbitration agreement where the reference is to an even number of arbitrators the arbitrators should as provided in Schedule I, para. 2, appoint an umpire not later than one month from the latest date of their respective appointments. If the arbitrators do not appoint an umpire within the prescribed period, they are guilty of legal misconduct and the award would be vitiated. *Jaider* v. *Kanhayalal,* A.I.R. 1953 Ajmer. 49; see also 36 Cal. 388; A.I.R. 1951 All. 474. *Vide notes* on para. 2 of Schedule I *infra.*

1221. Unreasonable delay.—Unreasonable delay on the part of the arbitrator amounts to a legal misconduct. *Kesholal* v. *Laxman Rao,* I.L.R. (1940) Nag. 659=1940 N.L.J. 393=A.I.R. 1940 Nag. 386. It is the duty of an arbitrator to make up his mind and decide dispute. It is his duty to see *prima facie* that the proceedings are conducted with reasonable diligence, and if he so far fails in those duties, that he does nothing whatever for some five years and cannot satisfactorily explain the delay, then he can be said to have failed in material respects in his ordinary duties as an arbitrator and so he is guilty of misconduct within the meaning of this section, and, accordingly the award may be set aside. *Bhogilal* v. *Chimanlal,* A.I.R. 1928 Bom. 49=52 Bom. 116=30 Bom.L.R. 92=107 Ind.Cas. 707. See also, *Coly* v. *Da Costa,* 17 Cal. 200, *Pestonjee* v. *Manekjee,* 12 M.I.A. 112=10 W.R. 51. In *Savlappa* v. *Devachand,* 26 Bom. 132=3 Bom.L.R. 691, the ground mainly alleged for establishment of fraud was the delay in making the award. But the court negatived the charges of fraud and said: "But it is impossible to support a charge of fraud built on so flimsy a basis; there is no more reason to presume fraud than to presume negligence, and, if there was only negligence, then admittedly the suit will not lie." Where delay in making an award by the arbitrators was caused by the voluntary absence of one of the parties that party cannot impugn the award on the ground of delay. Nor is such a delay a sufficient ground for revocation of the submission by the party in default. *Kunj Lal* v. *Banwari Lal,* 48 Ind.Cas. 711.

1222. Making award after statutory period fixed in para 3 of schedule 1.—The court can extend the time for making an award, *Amar Nath* v. *Uggar Sen,* A.I.R. 1949 All. 399=I.L.R. (1949) All. 729 ; *Narsing* v. *Bishan Dayal,* A.I.R. 1954 Orissa 29. If an arbitrator makes an award beyond time, the dealy may be condoned at any time by the court in a proper case under s. 28. *Nani Bala* v. *Gopal,* A.I.R. 1945 Cal. 19 (21)= 48 C.W.N. 721 ; A.I.R. 1948 Mad. 40 ; A.I.R. 1949 Cal. 350 ; A.I.R. 1950 Lah. 72. *Amarnath* v. *Uggar Sen,* A.I.R. 1949 All. 399=I.L.R. (1949) All. 720. If, however, the court refuses to extend the time limit there may be some justification for holding that the arbitrators are guilty of legal misconduct in making the award after the expiry of the statutory period and the award may be liable to be set aside. *Narsing Das* v. *Bisandayal,* A.I.R. 1954 Orissa 29. But filing of an award by arbitrator is a ministerial act and not judicial or *quasi*-judicial act of the arbitrator. It has nothing to do with the validity of the award except so far as Art. 178 of the Limitation Act affects the question, *Haji* v. *Northern Indian,* 85 C.L.J. 176.

1223. Awarding damages at blackmarket rate.—In Tokaram's case, A.J.O. O. & D. Nos. 180 and 181 of 1949 (Cal.) *Harries C.J.* observed : "Their Lordships of the Privy Council have laid down that damages must be calculated as arising on due date and the Calcutta High Court in a number of cases have *held* that if the arbitrators take into account black market rates and not the controlled rate in assessing damages such amounts to misconduct and the award is to be set aside" *Hanutmul* v. *Fatehchand,* A.I.R. 1954 Cal. 1. See also *Bajranglal* v. *Ganesh Commercial,* A.I.R. 1951 Cal. 78=55 C.W.N. 147 ; 52 C.W.N. 828. See also *Devikanandan & Co.* v. *Union of India* A.I.R. 1961 Punj. 136=63 Punj. L.R. 134.

1224. Whether arbitrators have greater latitude than court.—*Vide* notes under s. 11 p. 199 *supra.*

1225. Arbitrators how far bound by the rules of evidence.—*Vide* notes under s. 11, pp. 301—304 see also the topic "whether the arbitrator should decide according to law" *supra.*

1226. Misconduct—Arbitrator proceeding with reference inspite of private notice of revocation.—Where an arbitrator proceeds with a reference inspite of private notice of revocation from a party which is not sanctioned by court, he cannot be said to be guilty of misconduct. *Bawa Chattagir* v. *Matanomal,* 3 S.L.R. 149=4 Ind.Cas. 359.

1227. Misconduct—Omission to give notice of award.—The omission to send a written notice of the award to the parties may be due to the ignorance of the arbitrators of the rules of procedure provided in the Arbitration Act and cannot necessarily be referable to any deliberate misconduct on their part. *Misri Lal* v. *Bhagwati,* A.I.R. 1955 All. 573. Validity of award is not affected by failure to send notice of award. 1957 M.P. L.J. (Notes) 194.

1228. Arbitrator as a witness.—An award given by the arbitrators some of whom gave evidence in the arbitration proceedings can be upheld if the parties agreed, while entering into the contract to refer to arbitration, that the arbitrators should also be witnessess. *Brojendra Kumar* v. *Purna Chandra,* A.I.R. 1931 Cal. 53=34 C.W.N. 689= 129 Ind.Cas. 428=58 Cal. 269. See also, *Haridas* v. *Baidyanath,* 40 Ind.Cas. 646. Where in a commercial arbitration, two arbitrators disagree, and the dispute is referred to an umpire, there is no rule of law which prevents an arbitrator from being called as a witness before

the umpire. *Bourgeois* v. *Weddell & Co.*, 93 L.J.K.B. 232=(1924) 1 K.B. 539=130 L.T. 635. For further discussion *vide* notes under s. 11 at page 300 *sopra.*

1229. Arbitrator's personal knowledge.—An arbitrator cannot import his own knowledge into a case, or base his decision upon information obtained otherwise there from the evidence submitted to him by the parties unless permitted to do so by the terms of reference. *Abdul* v. *Bahram,* A.I.R. 1935 Pesh. 69=155 Ind.Cas. 1022 ; *Sheodutt* v. *Pandit,* A.I.R. 1955 Nag. 116=1955 Nag. L.J. 253=I.L.R. (1955) Nag. 274. See also, *Abdul* v. *Muhammad,* A.I.R. 1927 Lah. 425=101 Ind.Cas. 153=8 Lah. 329 ; *Ganga* v. *Baldeo,* A.I.R. 1922 All. 64=65 Ind.Cas. 779; *Gopalam* v. *Myneni,* A.I.R. 1926 Mad. 752=50 M.L.J. 514=23 M.L.W. 681=(1926) M.W.N. 445=95 Ind.Cas. 740. In the last-named case the court observed : "It is clear that the award was not passed on a consideration of the evidence in the case and that is enough to vitiate it : See *Chintalapudi Sanyasi Rao* v. *Chintalapudi Venkata Rao,* A.I.R. 1923 Mad. 301, and the cases quoted therein. *Palavesam Chettiar* v. *Narayana Aiyar,* A.I.R. 1925 Mad. 1086=88 Ind.Cas. 660, and *Lakshmi Narain* v. *Sheonath Pande,* 54 Ind.Cas. 443=42 All. 185=18 A.L.J. 78. The case in *Ramdhari Sahu* v. *Ramcharittar Sahu,* 38 Cal. 143=7 Ind.Cas. 333 relied on the plaintiffs is not on all fours. The case in *Maung Shwe Hpu* v. *U Miu Nyun,* 91 Ind.Cas. 659=A.I.R. 1925 Rang. 383 is relied on by the plaintiffs ; but if that decision means that, where arbitrators have held a private enquiry of their own, their award is not vitiated unless it can be shown that they have used the results of their enquiry in coming to their conclusion—a matter extremely difficult to prove—we are not prepared to agree. It would open a very wide door for misconduct and such a principle seems to us to be opposed to the principle laid down in *Dobson* v. *Groves,* 115 E.R. 239, which is that it is only by express agreement of the parties that arbitrators are entitled to decide a case on their own personal knowledge." See also, *Ram Lal* v. *Mahadeo Prosad,* 89 Ind.Cas. 832=A.I.R. 1925 Oudh 741 ; *Bari Bahu* v. *Pratap Singh,* 57 Ind.Cas. 604 But where an arbitrator has been selected by reason of his special knowledge of the affairs of the parties to decide their dispute, he is entitled to take broad view of the law and give an award, which he conceives to be just and equitable. *Raminder Singh* v. *Mohinder Singh,* 190 Ind.Cas. 599=A.I.R. 1940 Lah. 186 ; *Lenka* v. *Karim,* A.I.R. 1929 Mad. 144=114 Ind.Cas. 367 ; *Ramanuja* v. *Vatapathra,* (1942) 2 M.L.J. 698 ; *Bari Bahu* v. *Pratap Singh,* 57 Ind.Cas. 604. For further discussion *vide* notes under s. 11, p. 304 *supra* : *Uti Widow of Bali* v. *Ali Widow of Bhithu,* 64 Punj L.R. 860=A.I.R. 1963 Punj. 32 : *Mathunny* v. *Mathunny,* 1964 Ker L.T. 275.

1230. Arbitrators agreeing to be bound by the opinion of third parties.—*Vide* notes under section 11, p. 307 *supra.*

1231. Arbitrator taking assistance from third party.—If the assistance was used to ministerial work, it does not render the conduct of the arbitrator as judicial misconduct. *National Electrical* v. *Punjab State,* I.L.R. (1962) 2 Punj. 789=A.I.R. 1963 Punj. 56 ; 29 Cal. 854 (P.C.) ; A.I.R 1925 Pat. 810 ; A.I.R. 1935 Bom. 127

1232. Enquiry behind the back of the parties.—If the arbitrator makes enquiries behind the back of the parties that is misconduct. *Payyavalu* v. *Kesanna,* (1952) S.C.J. 630=A.I.R. 1953 S.C. 21=1953 S.C.R. 119=1953 All. L.J. 73 ; see also *Badrilal* v. *Lakshya,* A.I.R. 1936 Nag. 291=I.L.R. 1937 Nag. 35 ; *Abdul Hamid* v. *Muhammad Afzal,* A.I.R. 1927 Lah. 425=101 Ind.Cas. 153=8 Lah. 329 ; *Raj Kishore* v. *Jogeshar,* A.I.R.

1931 All. 276=52 All. 398 ; *Alagappa* v. *Chidambaran,* A.I.R. 1931 Mad. 619=133 Ind.Cas. 522 ; *Kanhaiya* v. *Shoa,* A.I.R. 1935 Pat. 16=152 Ind. Cas. 838. For further discussion *vide* notes under s. 11 *supra.* See also *G P. Modi* v. *N. Modi,* A.I.R. 1951 Pat. 321=28 Pat. 969 ; see also p. 307 *supra* . *Mathula* v. *Thomas,* 1962 Ker L.T. 873=1962 Ker L.J. 374= I.L.R. (1962) 1 Ker 486=A.I.R. 1962 Ker 320 (arbitration agreement authorising taking of evidence as he finds necessary—held award not invalid on the ground of arbitrators taking evidence in the absence of the party).

1233. Arbitrator taking evidence behind the back of parties.—Where an arbitrator takes evidence behind the back of the parties without notice to them, and bases his award on that evidence, it amounts to misconduct which affords ground for setting aside the award. *Ganga Prasad* v. *Nagar Mal,* 5 D.L.R. (Pat.) 18 ; see also 3 C.W.N. 361 ; 13 C.L.J. 399 ; 15 P.L.T. 493 ; 86 Ind.Cas. 773.

1234. Enquiry by arbitrator in the absence of parties.—A provision in the arbitration agreement that the arbitrator will have power to make any decision he likes in regard to the property of the joint Hindu family of the parties, does not give him an overriding power of making enquiries in the absence of the parties, to receive evidence from one party in the absence of another or to consult others in regard to what award he should make. *Mehar Chand* v. *Magan,* A.I.R. 1952 Punj. 364.

1235. Outside legal advice taken by arbitrators and umpire.—*Vide* notes under s. 11, p. 308 *supra.*

1236. Reference empowering arbitrator to dipose of case with or without inquiry.—*Vide* notes under s. 11, p. 309 *supra ; Lakshmi Ice* v. *Union of India,* A.I.R. 1963 J. & K. 3.

1237. Making secret enquiries by arbitrators.—An arbitrator has no authority to make enquiries behind the back of the parties and to base his decision thereon. An arbitrator who makes secret enquiries privately and does not give an opportunity to the parties to explain the materials thus obtained is guilty of misconduct and the award is liable to be set aside. *Ashrafi Lal* v. *Ramdeo,* 1951 A.L.J. 674=A.I.R. 1952 All. 546, see also p. 310 *supra.*

1238. When arbitrators can proceed ex parte.—Though the strict rules of evidence are not applicable to arbitration proceedings, there is a thing known as natural justice and it would be repugnant to the fundamental conception of natural justice that evidence should be allowed to go in without calling the person against whom evidence is admitted and without allowing the parties to test such evidence by cross-examination. *Husein Ebrahim* v. *Kesardeo,* A.I.R. 1954 Cal. 111 ; *Khusiram* v. *Mathura Das,* 52 C.W.N. 826. Where a party to an arbitration proceeding receives notice of the hearing but does not appear the arbitrators are right in making an *exparte* award....*Lang* v. *Holland,* 27 Ind.Cas. 526=8 S.L.R. 136 ; *Ramnarain* v. *Liladhar,* 33 Cal. 1237 ; *Premnath* v. *Omprakash,* A.I.R. 1956 Punj. 187. Where from the conduct of one of the parties to an arbitration it is abundantly clear that he has no intention of appearing before the arbitrators, the arbitrators are justified in proceeding *ex parte. Graham Trading* v. *Chandulal,* A.I.R. 1935 Sind 228=159 Ind. Cas. 824. See also *Nabin Chandra* v. *Sinclair,* 25 Ind.Cas. 951 ; *Ganges Manufacturing* v. *Indra Chand,* 33 Cal. 1169. Where the *solenama* provides that if the parties do not appear after due notice the arbitrator can proceed *ex parte,* the award made by the arbitrator cannot be objected on the ground that the arbitrator carried on an *ex parte* enquiry owing to

the failure of one of the parties to the reference to appear before him after propr notice. *Hemchandra* v. *Jnanendra,* A.I.R. 1926 Cal. 116=90 Ind.Cas. 624. In *Protap Sing* v. *Kishanprasad,* A.I.R. 1932 Bom. 68= 33 Bom.L.R. 1357=135 Ind.Cas. 174, *Wadia J.* observed : "I should just like to add that even when an arbitrator considers that the time and place fixed by him for the meeting are reasonable and if after service of notice one of the parties to the arbitration fails to attend before him, he is entitled no doubt to proceed with the arbitration *ex parte.* But it is still advisable for him, though it is not compulsory, that he should give the party notice of his intention to do so. See *Halsbury's Law of England,* Vol. I, para. 970." See also *Prem Nath* v. *Om Prokash,* A.I.R. 1956 Punj. 187. Where *ex parte* decree was passed by the arbitrator without giving opportunity to one of the parties to produce witness it is misconduct on his part. *Saxena* v. *Damodar,* A.I.R. 1956 Punj. 234. In the above case it has been held that in order to justify an arbitration proceeding *ex parte* a very strong case must be shown of wilful delay by the party not attending and that the notice fixing the date of hearing must be sufficiently long. A.I.R. 1956 Punj. 243. So when the arbitrators give clear notice that they would not grant any further adjournment and if a party does not choose to appear on the "final" date they would proceed *ex parte,* then the party who does not attend inspite of such notice absents himself at his risk and if the arbitrator actually proceed *ex parte* there is no misconduct on the part of the arbitrators. *Banwari Lal* v. *Joy Lal,* A.I.R. 1956 Cal. 467.

The procedural rule applicable to arbitration proceeding is more tolerant than the rule followed in Courts of Law. Broadly stated the principles governing the arbitrator's right to proceed *ex parte* are :—if a party to an arbitration agreement fails to appear at one of the sittings the arbitrator cannot or, at least ought not to proceed *ex parte* against him at that sitting. Where the non-appearance was accidental or casual, the arbitrator ought ordinarily to proceed in the ordinary way fixing another date of hearing and awaiting the future behaviour of the defaulting party. If, on the other hand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the reference, the arbitrator should issue a notice that he intends at a specified time and place to proceed with the reference and that if the party concerned does not attend he will proceed in his absence. If he issues a similar notice and the party concerned does not appear an award made *ex parte* will be in order. But if he does not issue such a notice on the second occasion but nevertheless *ex parte* the award will be liable to be set aside inspite of a notice of a peremtory hearing having been given in respect of the earlier date, subject however, to the condition that prejudice was caused to the party against whom *ex parte* order was made. But this duty to give notice of an intention to proceed *ex parte* is not an absolute duty. *Jagilal* v. *General Fire,* A.I.R. 1955 Cal. 354=59 C.W.N. 146 (Per *Chakravartti ; C. J.* and *Lahiri JJ.*). It is a well established principles of law that an arbitrator ought not to hear or receive evidence from one side in the absence of the otherside without giving the otherside affected by such evidence the opportunity of meeting and answering it. *Banwari* v. *Jogannath,* A.I.R. 1958 All. 717 ; see also *Damodar* v. *Saxena,* 60 P.L.R. 638=A.I.R. 1959 Punj. 476 ; *Prem Chand* v. *Fort Gloster,* A.I.R. 1959 Cal. 620 ; *Dulari* v. *Rajendra,* A.J.R. 1959 All. 711. *Vide* also notes under s. 11.

1239. Notice of date of hearing.—In *Udaichand* v. *Debi Bux,* 60 Ind.Cas. 987=47 Cal. 951, *Mookerjee J.* observed : "As regards the second

point, reliance has been placed by the appellant upon the decision in *Gladwin* v. *Chilcote,* (1841) 9 Dowl. P.C. 550=5 Jur. 749. The case is an authority for the proposition that in general the arbitrator is not justified in proceeding *ex parte* without giving the party absenting due notice. It is advisable to give the notice in writing to each of the parties or their solicitor, and the notice should express the arbitrator's intention clearly, otherwise the award may be set aside. *Waller* v. *King,* 9 Mod. 63 ; *Wood* v. *Leake,* 12 Ves. (Jur., 412 and *Hall* v. *Anderson,* (1840) 8 P.C. 326. There is no statutory rule, however, that if an arbitrator proceeds *ex parte* without giving notice of his intention to proceed in that manner, the award made by him must be set aside. In the absence of such an inflexible statutory provision, the procedure commended in *Gladwin* v. *Chilcote, supra,* and the other cases mentioned can be regarded only as a rule of prudence and convenience. As *Lord Denham C.J.* put it in *Scott* v. *Van Saudan,* (1844) 6 Q.B. 237=8 Jur. 1114, the law is that, if either party, after the arbitrator has given sufficient notice and proper opportunities of attending, will not appear, the arbitrator may proceed in his absence. There is obvious good sense in the view that notice that the arbitrator will proceed with the reference on a certain day is notice he will then proceed *ex parte* if one of the parties absents himself without sufficient reason." See also, *Dutt* v. *Baidyanath Ghosh,* 21 C.W.N. 985 ; *Sohanlal* v. *Ram Pershad,* 1935 All. 852 ; *Bhowanidas* v. *Harsuk Das,* 27 C.W.N. 933 ; *Haridas Dutt* v.*Baidyanath Ghosh,* 21 C.W.N. 985 ; *Sohanlai* v. *Ram Pershad,* A.I.R. 1953 Ajmer 38. An arbitrator who has given due notice of the proceeding to the parties is entitled to proceed *ex parte* if one parties does not choose to appear. There is no provision in the Arbitration Act requiring the arbitrator to give a second notice of his intention to proceed *ex parte* against a person who is absent after service of notices. *Dosi Lal* v. *Lal Shiv,* A.I.R. 1954 All. 244 ; *Udai Chand* v. *Debi Bux,* A.I.R. 1920 Cal. 853=47 Cal. 951 and notes under section 11. Where notice of reference was received by a party on behalf of himself and his wife, the award is binding. *Abdul* v. *Thakur Prosad,* 1958 B.L.J.R. 681. A verbal notice of the date fixed for the hearing of the arbitration proceedings to a party's agent, who was admittedly in touch with the arbitrator regarding arbitration proceeding is valid notice to the party. *New Great Insurance* v. *Biharilal,* 1958 B.L.J.R. 488. Where a party to arbitration proceedings has been served with notice but has failed to appear *ex parte* proceedings started in his absence are not invalid because no second notice of the intention of the arbitrators, to proceed *ex parte* is given. The failure to give such a notice does not amount to misconduct. *Ibid. ;* see also A.I.R. 1920 Cal. 853 ; A.I.R. 1954 All. 244.

"The procedure before arbitrator may be regulated either by the statute or by agreement of submission. Where the procedure is prescribed by the agreement of submission and that procedure is not contrary to the laws of the land, that procedure must prevail." *Damodar Prosad* v. *Saxena,* A.I.R. 1959 Punj. 476 per *A. N. Dhandari, C. J.* A.I.R. 1945 All. 423=I.L.R. (1946) All. 47 ; A.I.R. 1944 (P.C.) 334=(1949) 2 M.L.J. 760 ; A.I.R. 1938 Cal. 166=I.L.R. (1927) 2 Cal. 465 and A.I.R. 1956 Cal. 361=97 C.L.J. 199. "In the absence of specific provisions to the contrary in the statute or contract of agreement the parties to an arbitration proceeding are entitled to a reasonable notice of the time and place of the hearing and have an absolute right to be heard and to present their evidence before the arbitrators. If they are deprived of this right the court will not heistate to set aside the award on the ground of misconduct even though there may have been no improper intention. The rule that the

parties to an arbitration agreement have a right to be heard is, however, subject to the qualification that where the agreement of submission provides in clear and unequivocal language that the arbitrator may proceed in the absence of the parties or that he may or may not hear the witnesses, or that he may give his award without enquiry, the award will not be invalidated on the ground that the arbitrator had refused to hear evidence. If the arbitrator acts within the scope of his authority conferred upon him by the agreement of the parties and if he keeps himself within the jurisdiction so conferred his award is as valid and binding as a judgement of a court of law. When the right to a hearing is waived either expressly or by implication, the proceedings are as regular and an award as valid as though full opportunity to be heard had been given." *Damodardas* v. *Saxena, supra*

1240. Special notice.—In *Bhowandas* v. *Harsuk Das,* 27 C.W.N. 933, the Court observed : "As regards the first point it need not be disputed that the arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear. *Crompton* v. *Mohan Lal,* 41 Cal. 313 ;*Sukhamal* v. *Babu Lal,* 42 All. 525 and *Udai Chand* v. *Debi Bux,* 47 Cal. 951=60 Ind.Cas. 987. But it is plain that the complainant has not been prejudiced in any manner by the failure of the arbitrator to give such notice ; as was stated in *Udai Chand* v. *Debi Bux, supra.* The true test is has the complainant who has taken exception to the validity of the award, been in fact prejudiced by the omission of the arbitrators to serve a special notice on him ?" But it is always advisable for the arbitrator to give special notice as mentioned above of every duty to the parties concerned. *Gladwin* v. *Chilcot,* 5 Jus. 749. Where one party having ineffectually attempted to revoke his submission refused to attend, the arbitrator may proceed *ex parte. Harcourt* v. *Ramshottam,* 1 Jome & Walk, 512 ; *Wood* v. *Leake,* 12 Ves. 412. Where a plaintiff became insolvent after a cause was referred, and the arbitrator gave the attorney of both parties notice of his intention to proceed with the reference ; and the plaintiff not attending, the arbitrator proceeded *ex parte,* the court refused on application by the assignee to se aside the award. *Hobbs* v. *Farrars,* 8 D.P.C. 779=4 Jus. 825. In *Angus* v. *Smythies,* 2 F. & F. 38, it has been held that after one of the parties has failed to attend a meting the arbitrator may, at the next, without a peremtory appointment, proceed in his absence.

1241. Taking documents from one of the parties without knowledge of the other.—*Vide* notes under section 11.

1242. Powers of minor's guardian to allow arbitrator to proceed on his own information.—*Vide* notes under s. 11.

1243. Delegation of powers by arbitrators.—If the making of an award is a judicial act the arbitrator must exercise their judgment in valuing the properties in dispute and in making proper allotments. The arbitrator cannot delegate their right to one of them, or to strangers unless the parties to the reference consent therein. *Ram Taran* v. *Adhar,* 91 C.L.J. 267=A.I.R. 1953 Cal. 646. An arbitrator has no authority to delegate his functions, except possibly the performance of what is called "ministerial acts." *Punjab Province* v. *Lakhim,* A.I.R. 1944 Lah. 149. If he does so, he is guilty of judicial misconduct and the award is invalid. *Juggobandhu* v. *Chand Mohan,* 31 Ind.Cas. 33=22 C.L.J. 237. In the above case the court observed : "There was a serious charge of judicial misconduct, and, if established, would invalidate the award for it cannot be disputed that an arbitrator has no authority to delegate his

functions, except possibly the performance of what are called 'ministerial acts'. *Lingood* v. *Eads,* 2 Atk. 501 (504 ; *Emery* v. *Wase,* 5 Ves. 845 (848), on appeal, 8 Ves. P505 ; *Little* v. *Newton,* (1841) 9 D.P.C. 437.*Tandy, in re* (184) 9 D.P.C. 1044 ; *Whitmore* v. *Smith,* (1861) 7 H. & N. 505 ; *Eads* v. *Willams,* (1854) 4 De. G.M. & 474. The subordinate judge states in his judgment that the arbitrator was authorised to take assistance in technical matters ; that indeed, was permissible to him, in so far as such assistance was necessary for the discharge of his duties. *Caledonian Ry. Co.* v. *Lockhert,* 3 Mac. H.L. 808 ; *Emery* v. *Wase, supra ; Hopcraft* v. *Hickman,* (1824) 2 B.S. 180 ; *Anderson* v. *Wallace,* (1835) 3 Cl. & F. 26. But this would not entitle him to delegate his powers practically to another person. The decision must ultimately be his own judgment in the matter, although in the process of formation of that conclusion he may take the assistance of experts. *Nanijappa* v. *Nanja Rao,* 16 Ind.Cas. 478=23 M. L.J. 290=(1912) M.W.N. 1091 ; [see also *Bajranglal* v. *Ganesh,* A.I.R. 1951 Cal. 78=55 C.W.N. 147]. Where a charge of judicial misconduct of this description was made against the arbitrator, it was incumbent upon the court to examine him to ascertain whether the allegation was well founded or not. This is obviously good sense, but if authority is needed for this elementary proposition reference may be made to the decision of the Judicial Committee in *Amir Begum* v. *Badruddin Hussain,* 23 Ind.Cas. 625=18 C.W.N. 755=19 C.L.J. 494=36 All. 336=16 Bom.L.R. 413=27 M.L.J. 181 (F.B.)." See also, *Sheo Karan* v. *Kanhaya,* A.I.R. 1935 Lah. 113=152 Ind.Cas. 1023=37 P.L.R. 18 ; *Ramchandra* v. *Manohar,* A.I.R. 1931 All. 751=133 Ind.Cas. 531 ; *Pandit Sankara* v. *Jagannath,* 9 O.L.J. 410=A.I.R. 1922 Oudh 276 ; *Surubjeet* v. *Gouree,* 7 W.R. 269. But the writing of a part of the award by junior at the dictation of the arbitrator is an act of a ministerial character which could be delegated to a third party. *Nihal Chand* v. *Shanti Lal,* A.I.R. 1935 Oudh 349=1935 O.W.N. 582=155 Ind.Cas. 572=(1935) O.L.R. 324 : but see, *Ramdas* v. *Judagi,* A.I.R. 1928 Pat. 231=107 Ind.Cas. 532. So also when an award is passed, the writing out of it on a stamp paper, which would be necessary before it could be filed in court, is merely a ministerial act. *Parshottamdas* v. *Kekhushru,* A.I.R. 1934 Bom. 6=35 Bom.L.R. 1101=149 Ind.Cas. 324. See also, *Dandekar* v. *Dandekar,* 6 Bom. 663. *Kula Nagabushanam* v. *Kula Sesha Chalam,* 1 M.H.C.R. 178. To have the lands measured and to prepare the maps for the purpose of arbitration are ministerial acts. *Muhammad Khalil* v. *Abdul Rahim,* 93 Ind.Cas. 261=4 Pat. 670=A.I.R. 1925 Pat. 810 ; *Buta* v. *Municipal Committee,* 29 Cal. 854=7 C.W.N. 82=87 P.R. 1902 (P.C.). Where parties to an arbitration agreed to accept certain estimate and valuation made by a certain person, and the arbitrator proceeded to examine that person as a witness and accepted his estimate and valuation, *held* that the arbitrator was thereby not guilty of delegating his authority to that person. *Muhammad Fakhruddin* v. *Muralidhar,* 6 Ind.Cas. 621. *In re Collyer—Bristow & Co.,* (1901) 2 K.B. 839 the umpire heard the evidence and employed *Messrs. Collyer—Bristow & Co.,* solicitors to draw up the award. Notice was given to the parties that the award was ready, and it was taken up by the company, who paid £107-6s-4d the amount fixed by the arbitrator as payable on taking up the award. *Held,* that the umpire being chargeable with the bill and the company having paid it, the case came within the words of the Act and the bill was taxable, but that the order should be to tax it in the Chancery Division.

Where the language of the award does not more than indicate that

the umpire took advice upon the general rules of law basing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon, the award is not bad for misconduct. *Louis Drefus* v. *Arunachala,* A.I.R. 1931 P.C. 289=8 O.W.N. 1066=35 C.W.N. 1287=58 I.A. 1931 A.L.J. 1116=33 Bom.L.R. 1536=54 C.L.J. 372=61 M.L.J. 623=34 M.L.W. 676=134 Ind.Cas. 1080 (P.C.). It is not misconduct in an arbitrator to consult an outsider on a question of law or as to the style, syntax or grammar of his award: but if the arbitrator arrives on a finding of fact by consulting an outsider and allows him to affect his decision, it amounts to misconduct. An arbitrator who makes an enquiry or receives confidental information behind the back of the parties is guilty of misconduct. *Abdul Halim* v. *Ismail Momin,* 86 Ind.Cas. 793=3 Pat. L.R. 59=A.I.R. 1925 Pat. 465=6 P.L.T. 544. Where the members of a certain committee undertake that they would abide by the business or dealings between the members, the committee has no power to leave the decision of the matter entirely in hands of one or more of its members. *Ram Chandra* v. *Monohar,* A.I.R. 1931 All. 251=133 Ind.Cas. 531. Where the arbitrators have the option of determining the liabilities payable by a firm, of collecting outstanding dues to the firm, or discharging the mortgage debts either themselves or of appointing a receiver to carry out all these purposes, the arbitrators are right in exercising the option in appointing a receiver to carry out all these details that would take necessarily pretty long time. *Dayaram* v. *Naraindas,* A.I.R. 1929 Sind 200. See also *Mukund Ram* v. *Saligram,* 21 Cal. 590=21 I.A. 47. Delegation is allowable only in ministerial act. *Punjab Province* v. *Lakshmi,* A.I.R. 1944 Lah. 140; *Motilal* v. *Girish Chandra,* 12 C.L.J. 346 Partial delegation of judicial act is bad if the defective part is inseparable. *Johnson* v. *Latharn,* (1850) 19 L.J. Q.B. 329. When the agreement contained a clause to the effect that should one *panch* resign, the unanimous decision of the other two would be binding on the parties and the award given by the remaining two panches was unanimous, the award cannot be said to be invalid on the ground that the other two arbitrators were competent to give award. *Raja Brijendra* v. *Buto Saha,* 1962 Jab.L.J. 194=A.I.R. 1962 Mad. Pra. 377.

1244. Misconduct of umpire.—*Vide* notes under s. 11, p. 316 *supra.* The participation of an umpire in arbitration proceedings is no ground for setting aside an award. *Gaurisanker* v. *Biharilal,* A.I.R. 1952 Nag. 314. The fact that the umpire did not give any reasons in the award cannot by itself vitiate an award. Nor can the validity of the award be impugned on the ground that each item of claim and counter claim was not specifically dealt with and umpire's decision thereon recorded. *Union of India* v. *Mangaldas,* (1958) 2 M.L.J. 16=I.L.R. (1958) 420=A.I.R. 1958 Mad. 296.

1245. Increasing the number of arbitrators.—The Arbitration Act does not limit in any way the number of arbitrators, nor does it prevent the parties, if they choose to do so as a matter of business by common consent, altering the number or constitution of the tribunal so constituted. *Abdus Shakur* v. *Mohammad,* 62 Ind.Cas. 426=19 A.L.J. 348=42 All. 456. A submission in writing contained a reference to two arbitrators and an umpire. Subsequently, four additional men were appointed as arbitrators and neither side objected to the tribunal as ultimately constituted. The seven arbitrators proceeded to make an

unanimous award, and on an application, under section 11 of the Arbitration Act, 1899, by the party in whose favour the award was made to file the award, the opposite party objected that although he had submitted to arbitration and had been a party throughout the proceedings and had consented to the award being made, there was in fact no legal reference. It was held that no objection having been made at any stage before the additional arbitrators entered upon their duties, and the objector having co-operated in and acquiesced in the altered state of things, he was absolutely estopped by well-known principle of equity from raising the question now that the matter had been decided against him. *Abdus* v. *Mohammad*, 1 Ind.Cas. 426=19 A.L.J. 348.

1246. Awards affecting the rights of strangers, effect of.—When the award purports to interfere with the rights of strangers, the strangers will not in any event, be affected by it; but as between the parties to the award its provisions must be held to be operative. *Jnanendra Nath* v. *Jitendra Nath*, A.I.R. 1928 Cal. 275=32 C.W.N. 108=107 Ind. Cal. 70. But in an earlier case of the Calcutta High Court (*Soudamini* v. *Gopal Chandra*, 28 Ind.Cas. 557=21 C.L.J. 27=9 C.W.N. 948) *Mookerjee J.* observed: "There is further difficulty in the way of the enforcement of this award. It cannot be disputed that as submission only refers to the arbitrator questions between the parties, the moment he touches the interest of strangers, he exceeds his authority and his award is void. *Turner*, v. *Swanson*, 1 M. & W. 572. *Alder* v. *Savill*, 5 Taunt. 454, *Lewis* v. *Rossiter*, 44 L.J.Ex. 136. The principle is well-illustrated by the case of *Ingram* v. *Milners*, 8 East. 445. There, the arbitrator ordered some bankers, parties to the reference, to pay to the other party, the defendant, out of funds in their hands belonging to a firm of which the defendant was a member, a certain sum stated to be the amount of a debt to the defendant from his partners, who were, however, not parties to the submission. It was ruled that the direction was void. In the case before us the plaintiff and the defendant are two of the legatees under the will, and the daughters of the testator, who are not parties to the submission, have a substantial interest in the estate. They are entitled to succeed in the specified contingencies, and one of them was entitled to be married at the expense of the estate. In these circumstances, it is impossible for the court to enforce this award to the detriment of the persons who are not parties therein." In *Ramchand* v. *Gobindram*, 53 Ind.Cas. 337=13 S.L.R. 75, the court observed: "No doubt the ordinary rule is that, as the submission only refers to the arbitrator the question between the parties, the moment he touches the interest of the strangers, he exceeds his authority and his award is void. But this strict rule of English law obviously cannot be applied in partition case like this, and the reference clearly referred the question of maintenance allowances and of marriage and *shradh* ceremony expenses to the arbitrators."

Where all the parties to the reference represent to the arbitrator that the whole of the properties in dispute belonged to them and that third persons had no interest in such properties the arbitrator is justified in treating the whole of such properties as belonging to the reference. If, as a matter of fact, third persons had any interest in those properties, and the parties to arbitration agreed to have such properties partitioned between them by the arbitrator it is not open to any one of them to contest the validity of the award on the ground that it deals with matters in which third parties are interested. *Mahommed Khalil* v. *Abdul Rahim*, 4 Pat. 670=A.I.R. 1925 Pat. 810.

1247. Award based on legal and moral grounds.—Where the

award is a fair and honest settlement of a doubtful claim based both on legal and moral grounds it should not be interferred with. *Sitanna* v. *Masivada,* A.I.R. 1934 P.C. 105=148 Ind.Cas. 828=39 M.L.W. 414=15 P.L.T. 497=1934 A.L.J. 433=38 C.W.N. 697=59 C.L.J. 345=36 Bom.L. R. 563=67 M.L.J. 20=61 I.A. 200=57 Mad. 749 (P.C.). An arbitrator may, in forming his judgment act upon merely moral consideration of which a court of law could not take cognizance. *Badruddin* v. *Amir Begam,* 13 Ind.Cas. 520=14 O.C. 308. Subject to any limitation contained in the instrument of his appointment and to any statutory discretions as to the manner in which he is to discharge his duties, an arbitrator may conduct his proceedings in any manner he thinks fit, so long as he acts in accordance with the principles of justice, equity and good conscience. He is not fettered by rules of practice which the courts of law adopt for general convenience, nor, bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it or the rules relating to evidence to be found in Indian Evidence Act. *Ibid.* An arbitrator is not debarred from granting interest on equitable ground in the case of a security deposit when fiduciary relationship exists between the depositor and the depositee. *L. M. Das* v. *State of West Bengal,* A.I.R. 1961 Cal. 456. *Ram Sahai* v. *Harishchandra,* 1962 M.P.C. 345=1962 Jab.L.J. 1099=1963 M.P.L.J. 121=A.I.R. 1963 Madh. Pra. 143.

1248. Awards based on hearsay and conjectures.—An award based on any enquiry made by arbitrators from the neighbours of the parties in the presence of the latter, cannot be said to be based on a private enquiry and must be upheld though it is clearly based on hearsay and conjectures. *Budh Ram* v. *Chandra,* 67 Ind.Cas. 866.

1249. Award passed considering all the circumstances.—Where an umpire who had to ascertain the amount of damages on the basis of future profits that would have accrued if a breach of contract had not been committed, stated that there were no sufficient materials before him from which to arrive at his estimate, but passed his award only considering all the circumstances placed before him, it was held there was nothing to show that the umpire misconducted himself in any way in the sense that the award was bad on the face of it and so the court had no jurisdiction to set it aside. *Martirosi* v. *Subramaniam.* A.I.R. 1930 Mad. 723=122 Ind.Cas. 516. An arbitrator to whom parties refer disputes arising from a will and dispositions of property contained therein must be held to depart, so far as he thinks fair and just, from the wishes of the arbitrator. In doing so he is not guilty of misconduct, but is within his rights. *Uttam Singh* v. *Motiram,* I.L.R. (1946) Kar. 302=A.I.R. 1947 Sind 110.

1250. Award not duly stamped.—The fact that an award only signed by the arbitrator is not stamped, does not affect its original validity. *Ramchand* v. *Gobindram,* 53 Ind.Cas. 337=13 S.L.R. 75; *Nagabhusanam* v. *Seshachalam.* 1 M.H.C.R. 178. See also *Babu Ghulam* v. *Ghulam,* 39 Ind.Cas. 912=77 P.W.R. 1917.

1251. Special procedure.—An arbitrator is not entitled to adopt the procedure of a special nature unless all parties affected by it agrees to the adoption of such procedure. To do so is to abrogate his function as an arbitrator and that would be a technical misconduct. *Dital* v. *Dhanrajmal,* A.I.R. 1925 Sind 287. But there is nothing illegal in the parties to an arbitration agreeing before *punchayatdars* to have evidence taken after the administration of any reasonable form of oath to the witness. *Muthu Karuppa* v. *Veerabhadra,* 29 Ind.Cas. 49=2 L.W. 320=17 M.L.T. 241.

See also, *Bhagirath* v. *Ram Ghulam,* 4 All. 283=(1882) A.W.N. 24. It is for the arbitrators to regulate the procedure with regard to arbitration. In order to succeed, the company must establish that there were irregularities in procedure amounting to no proper hearing of the matter. ***D. K. Sen Gupta*** v. *Ananta,* A.I.R. 1953 Cal. 414.

1252. Arbitrators going beyond the scope of reference.—An award is bad if the arbitrators go beyond the scope of reference and deccide disputes not submitted to them. *Jagat Hari* v. *Moran,* 26 Ind. Cas. 73 ; *Balak* v. *Ram,* 158 Ind.Cas. 11 ; *Bengal Jute Mills* v. *Juoraj,* A.I.R. 1943 Cal. 13 ; *Mohinder* v. *Raminder,* A.I.R. 1944 P.C. 83. An arbitrator derives his power from the reference which furnishes the source and prescribes the limit of his authority. He is bound to make an award in conformity with it both in substance and in from. *Dattaram* v. *Harji Mal.* A.I.R. 1930 Sind 170=24 S.L.R. 145=121 Ind.Cas. 161 ; *Mahomedali* v. *Charatsing,* 80 Ind.Cas. 596 ; *Juggobandhu* v. *Chand Mohan,* 31 Ind.Cas. 33=22 C.L.J. 237. The decision of arbitrators on a matter not indifference between the parties and not referred to them is null and void for want of jurisdiction. *Mosalal Singh* v. *Konomutty,* 15 W.R. 172. Where the question submitted to an arbitrator was, whether the plaintiff had a right of way over specified strip of land, *held* that the arbitrator had no authority to lay out a new path on a piece of land over which neither party alleged a right of way. *Narsing Narain* v. *Ajodhya,* 13 Ind.Cas. 118=16 C.W.N. 256. Where the duty of the arbitrator is to ascertain a boundary existing as matter of title, and not to lay down a new boundary however fair that might appear to be in light of the circumstances disclosed in the evidence, it is open to the arbitrator, if he finds as a matter of title that the existing boundary lay between the two extremes as put forward by the parties. to make his award in accordance with such boundary. But if the arbitrator had laid down a new boundary line, not as matter of existing title but as a fair demarcation of boundary as between the parties, the award is beyond the scope of the reference. *Omanhene Kobina* v. *Chief Obeng Akessee,* A.I.R. 1934 P.C. 185=40 M.L.W. 138 =151 Ind.Cas. 948 (P.C.). The arbitrators whose only duty is to ascertain the actual value of certain property at a certain time have no power to include interest in their assesment of value. *International Railway* v. *Niogara Parks,* A.I.R. 1937 P.C. 214=169 Ind.Cas. 562 ; *Toronto City Corporation* v. *Toronto Railway Corporation,* (1925) A.C. 177=94 L.J. P.C. 25=132 L.T. 401. Where an award has clearly dealt with the subject-matter of the suit referred, the mere fact that relief given by the award is different from what either party claimed does not make the award invalid on the ground that it went beyond the scope of the suit. *Raminder Singh* v. *Mohinder Singh,* A.I.R. 1940 Lah. 186=190 Ind. Cas. 399=13 R.L. 156 In the above case the court observed : "In this connexion *Mr. Meher Chand* relied largely upon the decision of their Lordships of the Privy Council in *Ram Protap Chamria* v. *Durga Prasad,* A.I.R. 1925 P.C. 293=92 Ind.Cas. 633=55 I.A. 1=53 Cal. 258 (P.C.). But the facts of that case were entirely different. There, a pending suit between some members of a family was, on their application, referred to an arbitration. The application, however, comprised not only matters which were subject of the suit but also some others outside it, and in which another person, not a party to the suit was interested. The arbitrators made an award on all these matters, without discriminating between those which were the subject-matter of the suit and those which are not. Their Lordships *held* that the award was invalid." Where the terms of

the order of reference direct the arbitrators to decide on the mode of partion of the premises, and to partition the premises with the assistance of an engineer if necessary on the basis that each party is entitled to one-third share therein, the jurisdiction of the arbitrators is limited to effecting a physical partition. If they direct a sale of the premises and divide the sale proceeds among the parties according to their shares, the award goes beyond the terms of reference and must be set aside. *Diboprokash Suprokash,* A.I.R. 1938 Cal. 341 = 177 Ind.Cas. 289. Where the arbitration clause states that all claims must be made in writing and that if provision was not complied with, the claim should be deemed to be waived and absolutely barred, the umpire exceeds his jurisdiction in awarding a claim which has not been made. *Societe Franco Tunisienne* v. *Govt. of Ceylon,* (1959) 1 W.L.R. 787.

1253. Validity of award outside reference.—An arbitrator or umpire must not go beyond the submission and although there is a presumption in favour of the validity of the award and the onus of proving that the arbitrator has exceeded his jurisdiction rests on the person alleging it, if an award extends to matters not within the scope of the submission it must be held to be void to the extent that it is in excess of submission. *Prince* v. *G.-G. in Council,* A.I.R. 1955 Punj. 240 ; see also (1916) A.C. 314 and (1922) 1 A.C. 268. When the arbitrators are called upon to make a division of the joint family properties, it will be too much to say that if the arbitrators decide that certain properties did not belong to the joint family but belong to an individual, they were acting beyond the scope of their jurisdiction as arbitrators called upon to make a division of the joint family properties. *Dasaratha* v. *Ramaswamy,* (1955) 2 M.L.J. 693 = 1955 M.W.N. 832. Where in a suit by a Hindu reversioner for a declaration that certain alienations in respect of about 8 acres of land by a Hindu widow were void and not binding on him, the dispute is referred to arbitration, the suit is merely a declaratory one and the arbitrators are not entitled to divide the property between the different claimants. Where the arbitrators not only decide the eight acres but something more of land between the parties, they acted beyond the scope of the reference. *Gopal* v. *Sundari,* A.I.R. 1955 Pat. 277 = 1955 C.L.J.R. 52.

1254. Custom affecting rights of parties—Powers of arbitrators.—Under the clause in a contract referring to arbitration any dispute arising under the contract it is competent to the arbitrators finally to determine the existence of a cusom affecting the rights and obligations of the parties under the contract where such custom is not inconsistent with the terms of the contract. *Tularam* v. *Bilas Roy,* 85 C.L.J. 164.

1255. No obvious error.—If the trial judge comes to the conclusion that there is no obvious error in the award which can be corrected under para. 12, Sch. II, C. P. Code (=S. 15 of Act), his decision is final even if he reaches a wrong decision. *Mahomed* v. *Attar Singh,* 49 C.W.N. 802 = A.I.R. 1945 P.C. 170 (P.C.) = 170 (P.C.) = I.L.R. (1945) Kar. 335.

1256. Error apparent on face of award.—The award of an arbitrator may be set aside on the ground of an error thereof only when in the award or in any decoment incorporated with it, as for instance, a note appended by the arbitrators, stating the reasons for his decision, there is found some legal proposition which is the basis of the award which is erroneous. *Alopi Parshad* v. *Union of India,* A.I.R. 1960 S.C. 588 = 1960 S.C.J. 763 = (1960) 2 S.C.A. 45 ; *Guljarilal* v. *Busi & Stephenson Ltd.* A.I.R. 1960 Cal. 590 ; *Pannalal Paul* v. *Padmabati,*

A.I.R. 1960 Cal. 693 ; *Union of India* v. *A. L. Rallia Ram,* A.I.R. 1960 Punj. 567=62 Punj. L.R. 829 (error of law) ; *Union of India* v. *United Timber Works,* A.I.R. 1960 Punj. 478=62 Punj. L.R. 710 ; *Union of India v. Joginder Singh & Co.,* I.L.R. (1961) Cut. 544 (construction of the terms of contract incorporated in the award) :

An award being a decision of an arbitrator and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. The award of the arbitrator is ordinarily final and conclusive unless a contrary intention is disclosed by the agreement. Civil Court which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision of the domestic tribunal. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous. But the rule does not apply where question of law are specifically referred to the arbitrator for his decision ; the award of the arbitrator on those questions is binding upon the parties, for by referring the specific questions, the parties desire to have a decision from the arbitrator on those questions rather than from the court, and the court will not, unless it is satisfied that the arbitrator had proceeded illegally, interfere with the decisions. *Union of India* v. *A. L. Rallia Ram,* A.I.R. 1963 S.C. 1685 (award on account of expenditure incurred for advertisement publicity storage, agency commission and other overhead charges as compensation payable for breach of warranty and award of interest, held as not sustainable).

1257. Mistake of law visible on face of award.—Where the award passed by the arbitrator is in direct contravention of the findings arrived at and definitely recorded by him, the award is illegal on the face of it. The arbitrator who passes such an award is guilty of judicial misconduct. *Maruli* v. *Akaram,* A.I.R. 1947 Bom. 400 ; *Sakh Mahommed* v. *Nathoomal,* A.I.R. 1927 P.C. 164=55 Cal. 126=54 I.A. 427 ; *Champsey* v. *Jivaraj,* 436 (P.C.) ; *Union of India* v. *Prem Chand,* A.I.R. 1951 Pat. 201. Where the question of interpretation of certain clause in an agreement between the parties is referred to the arbitration the award is purely on a question of law and it is not open of the parties to attack the award on the ground that the arbitrator had misconducted the proceedings. There is a well known distinction between the decision of an arbitrator upon a pure question of law and a decision of the arbitrator upon the dispute between the parties, which rests incidentally upon the decision of a question of law. In the former case, the parties having elected to accept the decision of the arbitrator on the question of law, it would not be open to them to attack the decision on the ground that the decision was wrong, while in the latter case, it would be open to them to attack the finding of the arbitrator if an error of law was apparent to the face of the record, which formed the basis of the finding of the arbitrator. *Vellore Electric* v. *State,* 72 Mad. L.W. 307=(1959) 1 Mad. L.J. 318. Where a certain question of law is specifically referred to and decided by the arbitrator, the arbitrator's decision on it is final however patently he may have erred. *Kum Villa* v. *Kumvilla,* 1959 Ker. L.J. 397=1959 Ker. L.T. 445 ; A.I.R 1959 Ker. 174 ; A.I.R. 1955 S.C. 468=1955 S.CJ, 445=(1955) 2 M.L.J. (S.C.) 23.

1258. Award based on insufficient evidence.—Unless otherwise restricted by the order of reference, arbitrators are the final judges of

matters of fact so long as the act within the authority conferred on them, with fairness, the parties are bound by their decision and it is not for a court to say that in its opinion the evidence was not sufficient to establish the conclusion at which the arbitrators arrived. *Ma Sein Mya* v. *Swami,* 37 Ind.Cas. 807 ; *Haji Ebrahim* v. *Northern India Oil,* 85 C.L.J. 176. In *Darlington* v. *Harding* (1891) 1 Q.B. 245 (247), in the court of first instance *Day, J.* observed : "We are not at liberty to investigate the evidence given in this case for the purpose of ascertaining whether the arbitrator came to a mistaken conclusion as regards either law or fact." *Lawrence, J.* concurred. On appeal the judgment of the court of first instance was upheld. In *Kaikobad* v. *Khambatta,* A.I.R. 1930 Lah. 280=120 Ind.Cas. 494, the court observed : "In urging that the arbitrator had 'evolved a theory of his own' counsel really attempt to attack the findings of fact given by the arbitrator on the evidence led by the parties. This he is, obviously, not entitled to do. The arbitrator was fully justified in rejecting in part the case set up by either party and ascertaining the real facts according to his own view of the evidence. Whether his conclusions were right or wrong is not a matter which was open for consideration by the subordinate Judge or by us on revision." Where an award in which the arbitrator has set out at great length the evidence, is challenged as not being supported by evidence, the party thus asserting must show *that it is patent upon face of the award* that there is no evidence at all on which the arbitrator could have come to his conclusion. *Nana Kwaka* v. *Nana Sis Orfi,* A.I.R. 1933 P.C. 46= 143 Ind.Cas. 147=37 M.L.W. 401 ; *Bajranglal* v. *Ganesh,* A.I.R. 1951 Cal. 78=55 C.W.N. 147.

1259. Improper rejection of evidence.—Award can be set aside on the ground that arbitrator improperly refused to receive evidence. The evidence must be tendered to the arbitrator and it is not his duty *suo motu* to fix a date for evidence. *Commander* v. *Arumgam,* A.I.R. 1954 Mys. 46 ; see also, *Ganga Sahai* v. *Karim,* A.I.R. 1926 Lah. 584 ; *Manindra Nath* v. *Mohamunda,* 13 ind.Cas. 161. An unqualified refusal by the arbitrators to record oral evidence tendered by one of the parties where it is not intended that the arbitrators could decide the case without taking evidence is misconduct as would affect the validity of the award. *Kanta Prosad* v. *Ram Dayal,* A.I.R. 1951 All. 711=1951 A.W.R. (H.C.) 626. Legal misconduct would consist in the arbitrator acting upon information not disclosed to the party affected thereby i.e., when he acts contrary to natural justice. The same cannot be said when he rejects some part of the evidence since this does not infringe any rules of natural justice. *Municipal Committee Khandwa* v. *Jasrup B. B. & Sons., Ltd.,* 1956 M.P.L.J. (notes) 231.

1260. Duty of arbitrator to look into and examine all accounts and paper.—An arbitrator cannot be heard to say that he would examine only such books and papers as the party chose to show him. It is his duty to insist upon the parties producing the books in regard to all matters in controversy, as otherwise either party can steal an advantage by keeping back such books and accounts as might be unfavourable to him. If either party refuses to produce the books and help in the investigation of all the matters the arbitrator should either draw an inference or refuse to proceed. If he proceeds to give an award without examining all the document his award would be incomplete and one-sided and cannot be filed. *Laxman* v. *Ram Dulary,* A.I.R. 1952 V.P. 25 ; *Societi France Tunisienne* v. *Govt, of Ceylon* (1959) 1 W.L.I. 787.

1261. Change of intention by arbitrator whether misconduct.—

In *Harcharan Singh* v. *Mohon Singh,* A.I.R. 1935 Lah. 491=158 Ind. Cas. 379, *Din Mohammad, J.* said : "We agree with the counsel for the appellant that the judgment of the learned Judge appears to be somewhat inconsistent. Having once held that no award had been made by *Harnam Singh* on the 29th April he could not reasonably hold him guilty of misconduct for changing his mind. So long as the award was not completed it did not exist in law, and what did not exist could not be said to have been changed. The arbitrator was therefore at perfect liberty to make any award he thought fit provided that he did not lay himself open to the charge of misconduct. In this case no misconduct other than the change of his previous intentions has been attributed to him and this does not amount to misconduct as has been stated above. Just as a court cannot be held to blame if it alters a rough draft of its judgment before pronouncing similarly an arbitrator cannot be condemned for altering what he had not finally decided and pronounced." Until an award is communicated, there is nothing to prevent an arbitrator changing his mind. He cannot be said to be *functus officio* until the pronouncement is actually made, and even if he has signed the award, this does not preclude him from further considering the matter and, if he thinks fit, recording a note of dissent. *Babua Lal* v. *Badri Lal,* 49 Ind.Cas. 522. See also, *Harphool* v. *Prabhu Doyal,* A.I.R. 1950 E.P. 266=52 P.L.R. 128 ; A.I.R. 1928 Lah. 153.

1262. Contents of award leaking out before pronouncement.—In the absence of any evidence showing that the arbitrator in any way took the defendant into his confidence, no misconduct can be attributed to him by reason of the contents of the award having leaked out before it was pronounced. Hence any help given by the defendant in the preparation of the copy of the award sent to the plaintiff cannot also affect the award itself. These circumstances though raising some suspicion against the arbitrator, are not sufficient to establish a charge of misconduct. *Nihal Chand* v. *Shanti Lal,* A.I.R. 1935 Oudh 349=1935 O.W.N. 582=155 Ind.Cas. 522=1935 O.L.R. 324.

1263. Charge must be proved.—Where an award is challenged on ground that arbitrator was influenced by his conclusion in respect of disputes not subject-matter of suit, that charge has to be established from terms of award or some intrinsic evidence. *Nand Kishore* v. *International,* A.I.R. 1953 Cal. 415 ; see also, *Ram Protap* v. *Durga Prosad,* A.I.R. 1925 P.C. 293=53 I.A. 1 (P.C.) ; *Ramender* v. *Mohinder,* A.I.R. 1940 Lah. 186.

1264. Award by drawing lots whether legal.—When two sets of arbitrators do not agree and the umpire gives his award by drawing lots, he is not guilty of any misconduct and the award so made is not illegal *Puran Chand* v. *Ram Nath,* 84 Ind.Cas. 490=11 O.L.J. 685=10 O. & A.L.R. 808. In the above case the court observed : "The umpire being unable to decide between them drew lots and gave a decision accordingly. It has been argued that such a decision does not amount to a legal finding as to facts in issue, but I question whether there is anything in the Civil Procedure Code which makes such an award illegal. The law as to the arbitration proceedings is laid down in Schedule II of the Code and the only section under which the award of an umpire can be challenged is S. 15. The applicant pleads that the umpire was guilty of misconduct but there is nothing to show that the umpire must write a judgment or come to a separate decision whereas in the present case he had only to choose between two conflicting decisions of the other arbitrators. The

reference to lot could hardly be tolerated in an ordinary court but parties who refer their disputes to arbitrators do not expect the careful observance of legal forms which they would meet with in the ordinary courts of law." But the above-mentioned case was dissented from by *Harries, C.J.* in the case of *Ram Bahadur* v. *Sree Kant,* A.I.R. 1943 Pat. 286, where he observed : "Normally, the allotment of *pattis* should be the act of the will and judgment of the arbitrator and should be a matter of choice and not of chance." This has been clearly laid down in (1829) *In re, Cassell,* 9 B. & C. 624. That was a case in which an umpire had been chosen by the two arbitrators by lot, and at page 628, *Lord Tenderden, C.J.* observed : "The appointment of the third person must be the act of the will and judgment of the two, must be a matter of choice and not of chance unless the parties consent to and acquiesce in some other mode. The observation applies with equal force to allotment of *pattis* and such should be a matter of choice and not of chance unless the parties consent to or acquiesce in some other mode." *In re, Tunno & Bird,* (1833) 5 B. & Ad. 488. See also, *Hewitt* v. *Penny, Sayers* 99 ; *Miller,* (1824) 3 B. & C. 407.

An agreement to have a suit decided by lottery in void *ab initio* as being an agreement by way of wager and being opposed to public policy. The result of the lottery is not an arbitration award. *Kaluram* v. *Ram Dayal,* 3 Ind.Cas. 55 & N.L.R. 107. But in *Misri Singh* v. *Bhagwti Prosad,* A.I.R. 1955 All. 573 it has been held that when partition was to be effected by drawing lots, the action of the arbitrator in dividing properties by lots does not amount to misconduct. It is a matter of common knowledge that allotment of share which are equal is done by drawing lots after equal lots have made, and the mode of decision cannot be said to amount to wagering which is opposed to public policy.

1265. Decision against written statement.—It is no ground to set aside an award of arbitrators that the arbitrators decided the case against the written statement of the defendant. *Gurro Churn* v. *Ram Dhun,* 7 W.R. 28.

1266. Party's right to know details of claims.—Although ordinarily a litigant appearing as a party before an arbitrator is entitled to know the details of the claim which has been preferred against him, yet where it appears that the aggrieved party was not ignorant of the nature of the claim against him when he appeared before him and was supplied with details of the claim on the date of the hearing mere failure by the arbitrator to allow the party further opportunity to meet the case set up against him does not amount to judicial misconduct on the part of the arbitrator. *Kidar Nath* v. *Secretary of State,* A.I.R. 1938 Lah. 223=171 Ind.Cas. 361=40 P.L.R. 643.

1267. Arbitrator's omission to file in court deposition and documents—whether amounts to misconduct.—When an arbitrator converted his pencil notes of depositions into written depositions without having taken any steps to ensure that they were accurately transcribed, omitted to take on such transcriptions signatures of the parties, or to take other steps to ensure their accuracy, did not file those pencil notes along with his award to enable the court to see that the record of the evidence filed by him is an accurate transcript and returned to the parties the documentary evidence filed before him, he neglected his duties and ignored the responsibilities laid on him by law and was guilty of what may be termed as "judicial misconduct." But the mere fact that an arbitrator has omitted to file along with his award the depositions of the

witnesses examined by him or the documentary evidence filed before him would not justify a court in holding that the award is on that ground invalid, but there may be a case in which the procedure adopted by the arbitrator is not filing that evidence before the court may lead one to the conclusion that the arbitrator did not act in accordance with law, and that he was therefore, guilty of misconduct. The word "misconduct" does not necessarily imply moral turpitude, but it includes neglect of duties and responsibilities of the arbitrators, and of what court of justice expect from them before allowing finality to their awards. *Yusuf Khan* v. *Riyasat Ali,* A.I.R. 1926 Oudh 307=3 O.W.N. 279=13 O.L.J. 224=93 Ind.Cas. 446=1 Luck. 139.

1268. Appointment of time and place of meeting.—It is, in the first place, the duty of an arbitrator, when called upon to act pursuant to the submission, to appoint a time and place of meeting and give due notice thereof to the parties. Where the reference is to more than one arbitrator, they should all concur in appointing the time and place of meeting and in doing all other acts in the course of the reference, unless the submission provides that the decision of the majority is to be binding. *Halsbury,* 1st Edn., Vol. 1, page 460 citing *Goodman* v. *Sayers,* (1820) 2 Jac. & W. 249 (261) and *Dalling* v. *Matchet,* (1741) Barnes. 57. Unless otherwise provided by the submission, the time and place of hearing, and the fixing of adjournment from time to time, rest with the arbitrator, who, in making appointments, exercises a discretion vested in him and, provided he exercises it in accordance with principles of natural justice, his award will not be impeachable by reason of the way in which he has used such discretion. The arbitrator in fixing appointments, cannot always suit the convenience of everyone. His duty, therefore, is to hear any application which may be made to him, exercise a judicial discretion and decide honestly; and if he so acts, his award will not be set aside on the ground that he has exercised his discretion unreasonably. He has to judge upon such matters, as well as upon the main merits of the case. *Russell,* 13th Edn., p. 346. See also, *Larchin* v. *Ellis,* (1862) 11 W.R. 281; *Fetherstone* v. *Cooper,* 9 Ves. 67; *Re Whitham and Wrexham,* (1895) 29 Sol. J. 692; *Fenn* v. *Forbes,* (1853) 20 L.T.O.S. 225; *Ginder* v. *Gurtis,* (1863) 14 C.B. (N.S.) 823. The fact that sufficient opportunity was not given to all the parties to appear and produce evidence before the arbitrator, is a defect fatal to the award. *Punjab Province* v. *Lakshmi Das* 46 P L.R. 50=A.I.R. 1944 Lah. 149.

1269. Keeping notes of proceedings.—It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceeding before him, but in the absence of such notes there is no warrant for holding that an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which he was not satisfied. *Amir Begam* v. *Saiyad,* 23 Ind.Cas. 625=18 C.W.N. 755=12 A.L.J. 537=16 Bom.L.R. 413=36 All. 336=19 C.L.J. 499 (P.C.). There is no provision of law which requires persons to whom matters have been referred for decision by private arbitration to adopt any special procedure or which compels them to keep any record or to produce any record of the proceedings taken before them. *Ramdhari* v. *Ram Charitar,* 7 Ind.Cas. 333.

1270. No decision as regards real question at issue.—Of the two question referred to arbitrators arising out of a dispute the partners L and K, one was whether certain moulds used for stamping marks on

cotton goods belonged to the partnership or to K who claimed the same as his own. The award stated that both parties should have the right to use the mould. It was held that the award was bad because of the technical misconduct on behalf of the arbitrators in that they did not attempt to decide the real question at issue between the parties and that the point could not be separated from the other point. *Khairam* v. *Lal Chand*, A.I.R. 1930 Sind 103=125 Ind.Cas. 824.

1271. Duty of arbitrators when minor's interest is concerned.—It is the duty of the arbitrators to see that the minor is properly represented. Where a reference on behalf of the minor is revoked by the guardian and the arbitrators nevertheless proceed with the reference it is the duty of the guardian to watch the proceedings on the minor's behalf, and any award passed binding the minor without his being duly represented is liable to be vacated at his instance. *Lakshminarayana* v. *Ramachandra*, 45 Ind.Cas. 763. Where the guardian of a minor on whose behalf a reference was made to arbitration, has been grossly negligent or has acted fraudulently in conducting the proceedings before the arbitrators, it is open to the minor to impeach the award by a suit instituted through a guardian or when he attains majority. *Ibid.* See also, *Hoghton, In re*, 18 Eq. 573 (576)=43 L.J.Ch. 758. The court may also refuse to file the award on objection taken on behalf of the minor. *Lakshminarayana* v. *Ramchandra, supra.* An award passed on a reference out of court binding a minor who was not in fact represented in proceedings before the arbitrators, should be set aside under paragraph 15 (1) of the Schedule as for arbitrators' misconduct. *Ibid.*, per *Oldfield, J.* An arbitrator should refrain from passing an award so long as he is deprived of the power to pass a just one, and should either adjourn the proceedings in case a change in the representation of the minor is probable, or, if one is not probable either generally or within the time, if any, fixed for the award, he should refuse to act. *Ibid.* Where a reference to arbitration is made on behalf of a minor but the latter is not properly represented in the arbitration proceedings and his guardian fails grossly and fraudulently in his duties to protect his interests, the award passed by the arbitrators is not binding on the minor. *Kanatolo Venkata* v. *Kandala*, 56 Ind.Cas. 593. A guardian is incompetent to bind his ward's reversionary interest by a reference to arbitration. *Ibid.*

1272. Award based on misapprehension of the legal position of one of the parties.—An award which is based on a complete misapprehension of the legal position and rights of one of the parties is bad in law and is not binding on him. *Rambahadur* v. *Ganesh Bhagat*, 73 Ind.Cas. 542.

1273. Error in date of award.—An award cannot be set aside on the ground that there is an error of date in the award. *Banwari* v. *Joylal*, A.I.R. 1956 Cal. 467.

1274. Wrong decision—not amounting to misconduct.—Normally the court is not concerned with the merits of the decision given by the arbitrators. *Tikaram* v. *Hansraj*, A.I.R. 1954 Nag. 241 : see also, *Haigh* v. *Haigh*, (1861) 5 L.T. 507, where at page 50 *Lord Justice Turner* said : "An arbitrator being a judge selected by the parties and chosen to decide without appeal, this court has nothing to do with mere error in judgment on his part. The parties have chosen him to be their judge, and have agreed to abide by his determination, and by that determination, if fairly and properly made, they must be content to be bound ; but on the other hand, arbitrators, like judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the

ordinary rules which are laid down for the administration of justice, and this court when called upon to review their proceedings, is bound to see that those rules have been observed."

1275. Awards whether vitiated by mistake.—Where arbitrators have allotted through error of judgment an asset of uncertain and fluctuating value upon the basis of a gross overvaluation, to one branch of the family instead of to all the branches according to their respective shares, this does not amount to misconduct within the meaning of the law of arbitration. *Rajkumar* v. *Shivaprosad,* A.I.R. 1939 Cal. 500=184 Ind.Cas. 553. Where parties have selected their arbitrator and have agreed to accept the decision of the arbitrator, they will be bound by the decision even if there were mistakes in it, though it is possible that a mistake so palpable and gross as would afford strong evidence of misconduct (as was suggested in *Shiam Lal* v. *Parshottam Das,* A.I.R. 1920 All 45=58 Ind.Cas. 585=18 A.L.J. 241); *Tulsiram* v. *Jhanaklal,* A.I.R. 1936 Nag. 197=19 N.L.J. 151=I.L.R. 1936 Nag. 44=165 Ind.Cas. 556. In *Addams* v. *Great North of Scotland Ry.,* (1891) A.C. 31, *Lord Halsbury* observed.: "Where the parties have selected their judge, in such cases you have to show a great deal more than a mere error on the part of the arbitrator in the conclusion at which he has arrived before the court can interfere with his award. The parties have agreed to accept the arbitrator's decision upon the question of law as well as his decision upon facts." In *Ghulam Khan* v. *Muhammad Hassan,* 29 Cal. 167=29 I.A. 51, *Lord Macnaghten* observed : "They (arbitrators) may have erred in law, but arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate an award." In *Shiam Lal* v. *Parshottam Das, supra, Walsh, J.* concluded : "*A portion* an error in fact, and therefore an error in arithmetic, cannot vitiate an award." So where the arbitrators are selected by the parties to divide decrees, moveables and cash between the parties, they have power to divide the eitire property in such a way as they thought fit, and if they thought fair to award most of the cash to one party and most of the property to the other in such a way as to give an equal share to each party, they are entitled to do so. They are quite within the terms of their reference in so acting, and even though the shares may not be equal that would not give the court power to interfere. *Tulsiram* v. *Jhanaklal,* A.I.R. 1936 Nag. 197. But in *Montgomery, Jones & Co.,* (1898) 78 L.T. 407, *Chitty, J.,* said : "There are four grounds upon which the matter can be remitted to an arbitrator for reconsideration. Those grounds are (1) where the award is bad on the face of it; (2) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted;" Ordinarily the court should not interfere with an award on the mere ground of mistake. *Pannalal* v. *Rupo,* A.I.R. 1945 Oudh 92. There is no doubt that an award be set aside if there was an illegality apparent on the face of it, or if on the facts found the arbitrator had specifically relied on some principles of law the basis of his award and that principle was found to be erroneous in law. *Nanakchand* v. *Panna Lal,* 1948 A.L.J. 300=A.I.R. 1948 All. 444.

1276. Where relief given is quite different.—Where an award has clearly dealt with the subject-matter of the suit referred, the mere fact that the relief given by the award is different from what either party claimed does not make the award invalid on the ground that it went beyond the scope of the suit. *Raminder* v. *Mohinder,* A.I.R. 1940 Lah. 186.

1277. Re-writing of an award.—Once the arbitrators have issued an award they become *functus officio,* and they have no jurisdiction to

re-write the original award. *Chhati Lal* v. *Ram Chariter,* A.I.R. 1941 Pat. 215.

1278. Award embodying an agreement of the parties.—The fact that an award embodies an agreement arrived at between the parties does not prevent it being a valid and binding award. *Darbari* v. *Wasa Malik.* 56 Ind.Cas. 115=A.I.R. 1920 Lah. 220; *Gobardhan Das* v. *Jai Kishen.* 22 All. 224=(1900) A.W.N. 52; *Deonarain* v. *Jaisiri,* (2885) A.W.N. 259; *Meher Ali* v. *Muhammad,* (1892) A.W.N. 79=14 All. 413; *Lekkala Ramu* v. *Vetchalapa,* 80 Ind.Cas. 571=19 L.W. 562=(1924) M.W.N. 356. In *Dulan Bai* v. *Sundarsao,* A.I.R. 1938 Nag. 132=I.I.R. 1937 Nag. 449, *Niyogi, J.,* said : "It is not correct to say that an award which as here purports to be a considered award of the arbitrators, is no award simply because it appears that the arbitrators cast it in the form they did, because of an agreement arrived at by the parties. See *Gobardhan Das* v. *Jaikishan,* 22 All. 224." But the mere approval of a compromise arrived at between the parties before an arbitrator is not an award. *Shankar* v. *Gobinda,* 54 Ind.Cas. 311. See also, *Munisami* v. *Vedchala,* A.I.R. 1928 Mad. 23=101 Ind.Cas. 386. Where a suit having been referred to arbitration, the arbitrators took down the depositions of the plaintiff and the defendant but finally approved an arrangement put forward by the plaintiff and agreed to by the defendant, it was held that the decision of the arbitrators, though it was in accordance with the wishes of the parties was nothing but an award. *Sricharan* v. *Makhan,* 51 Ind.Cas. 378. Where in a dispute of certain partners referred to arbitrators, two partners compromise their claims *inter se* and other partners accept the compromise, the arbitrators can go into the question whether such compromise took place, and if they find the compromise valid, they have power to give a decree in terms of that compromise and the award so given will be binding on all the partners. *Hanu Ram* v. *Dhanna Singh,* A.I.R. 1928 Lah. 915=110 Ind.Cas. 101. The rule that an award is not open to objection on the sole ground that it merely reproduces an agreement come to between the parties, applies only where the consent of the parties is regarded by the arbitrators as evidence that the settlement proposed is fair to all. *Kantala Venkata* v. *Kandala,* 56 Ind Cas. 593. Where the parties have by agreement left the matter to the mediation of third party not during the judicial proceedings but during the arbitration proceedings there is no adjustment independent of the arbitration proceedings but has to be followed and ratified by an award. *Firm Gopiram* v. *Pokhar Das,* A.I.R. 1934 Lah. 887=154 Ind.Cas. 7.

1279. Some of the arbitrators absent during enquiry.—Where the parties agreed that the case should be decided by three arbitrators, but the enquiry was made and the award given by two arbitrators alone, and where the parties never agreed to accept the decision of two arbitrators alone, held that the action of the two arbitrators in proceeding alone in such a case was undoubtedly misconduct. *Badrilal* v. *Lakshya,* A.I.R. 1936 Nag. 291; *Nand Ram* v. *Fakir Chand,* 7 All. 523=(1885) A.W.N. 137; *Thamiraju* v. *Bapiraju,* 12 Mad. 113; *Ma Sin* v. *Pu,* A.I.R. 1936 Rang. 136=121 Ind.Cas. 801=7 Rang. 175; *Dalling* v. *Matchett,* Willes 215; *Perring* v. *Keymer,* 3 Ad. & E. 245; *Bagaya* v. *Paduma,* A.I.R. 1934 Rang. 24=12 Rang. 128=149 Ind.Cas. 1083; *Manni* v. *Ramcharan,* 1944 A.W.R. (Rev.) 270; *Patel* v. *Meenakshi,* I.L.R. (1942) Bom. 558=A.I.R 1942 Bom. 239. When a matter is referred to the arbitration of more than one arbitrator all the arbitrators must act together in every stage in order that the parties to the reference may have the benefit of the considered judgment of every one of the arbitrators in the matter of the reference.

Dharma v. *Krishna,* A.I.R. 1956 Orissa 24=I.L.R. (1956) Cut. 222. Where the suit is referred to arbitration and one of the arbitrators remains absent during the examination of one of the witnesses, the award is illegal even though the parties agree that the opinion of the majority should be accepted, for it is one thing to say that and quite another thing to say that the parties agreed that the arbitration might be conducted by a majority or less than a full number of arbitrators. But if the party is present and does not object at the time and allows the proceedings to go on and terminate it is too late for the party after the award has been made, and on the application to file the award, to insist on this objection to file the award. *Lakshmamma* v. *Goole,* A.I.R. 1932 Mad. 157=61 M.L.J. 761=(1931) M.W.N. 961=34 M.L.W. 725=136 Ind.Cas. 207; *Murtyay* v. *Bibi,* 3 I.A. 209=26 W.R. 10 (P.C.). For a final award by arbitrators to be valid, it is essential that all the arbitrators should have been present at all the meetings including the last, that witnesses should have consulted together as to the form that their award should take. *Mamidi* v. *Yedan,* 47 Ind.Cas. 597=(1918) M.W.N. 477=24 M.L.T. 102=8 L.W. 171; *Abu Hamid* v. *Golam Sarwar,* 40 Ind.Cas. 422=25 C.L.J. 396=22 C.W.N. 301. Where there are several arbitrators, all must act together and each must act in the making of the award. *Fazalally* v. *Khimji,* A.I.R. 1934 Bom. 476=36 Bom.L.R. 1005; *United Kingdom* v. *Huston & Co.,* (1896) 1 Q.B. 567; *Gurbaksh* v. *Chutta,* 47 Ind.Cas. 960=5 O.L.J. 519; *Lachman* v. *Prannath,* 65 Ind.Cas. 339=8 O.L.J. 585. But see, *Sanjivappa* v. *Vankatanarappa,* A.I.R. 1927 Mad. 436=52 M.L.J. 357=100 Ind.Cas. 634. A dispute was referred to five arbitrators, it being agreed that the opinion of the majority should prevail. Two of the arbitrators did not act. In such a case the award is null and void if some do not act. *Dhooli* v. *Dhooli,* A.I.R. 1928 Mad. 982=112 Ind.Cas. 669; *Abdulla* v. *M. V. R. S. Firm,* A.I.R. 1924 Rang. 153=77 Ind.Cas. 866. In the last-named case the court observed: "The use of the phrases 'the award of the majority will prevail' and 'will abide by the award of the majority' does not appear to mean that the parties would be satisfied if the majority of the five arbitrators acted. I think the applicant mean that if arbitrators should not be unainmous the opinion of the majority was to prevail."

The fact of absence of one of the arbitrators from a part of the hearing will vitiate the judicial character of the proceeding. *Benode Lal* v. *Pran Chandra,* 14 C.L.J. 143=11 Ind.Cas. 898; *Badri Lal* v. *Lakshya,* A.I.R. 1936 Nag. 291=I.L.R. 1937 Nag. 35; *Dwitiar Chand* v. *Dharanidhar,* A.I.R. 1929 Cal. 831; *Lakha Singh* v. *Bodil Singh,* 30 Ind.Cas. 384=2 O.L.J. 365; *Babua Lal* v. *Badri Lal,* 49 Ind.Cas. 522; *Sankat Prasad* v. *Jagannath,* 59 Ind.Cas. 714=9 O.L.J. 410=26 *Kali* v. *Gupt,* 45 Ind.Cas. 34; *Thakur* v. *Narain,* A.I.R. 1920 Lah. 202. But absence of an arbitrator from some of the proceedings due to some justifiable cause, such as illness of arbitrator does not amount to misconduct. *Abdul Majid* v. *Ali Ashraf,* A.I.R. 1937 Pat. 343; *Debendra* v. *Abhoy,* 9 Cal. 905; *Mansa Ram* v. *Karta Ram,* 76 Ind.Cas. 1007=A.I.R. 1923 Lah. 411; *Kamta Prasad* v. *Jodha Singh,* 7 Ind.Cas. 99=7 A.L.J. 890. An arbitration award is not vitiated by the mere fact that at one of the meetings of the arbitrators one of them was absent, where it is shown that nothing material was done at that meeting which in any way affected the award. *Varanasi* v. *Killamsetti,* 50 Ind.Cas. 181; *Brojendra Kumar* v. *Purna Chandra,* A.I.R. 1931 Cal. 53=34 C.W.N. 689=129 Ind.Cas. 428=58 Cal. 269; *Nadir Chand* v. *Gobinda.* 2 C.L.J. 61. Judicial acts, in order that they may be valid must be jointly performed by all the arbitrators. *Manindra* v.

Mohananda, 13 Ind.Cas. 161=15 C.L.J. 360. See also, *Sreenath* v. *Raj Chunder,* 8 W.R. 171 ; *Khelut* v. *Tara Chand,* 6 W.R. 269 ; *Nandram* v. *Fakirchand,* 7 All. 523 ; *Harvey* v. *Shelton,* 7 Beav. 455 (462). But the mere reception of a written statement by one of the arbitrators is not a judicial act. *Manindra* v. *Mahananda, supra ;* see also *U. Po* v. *Daw,* A.I.R. 1941 Rang, 22. But the irregularity, which would set aside an award, may be waived by the parties. *Ram Nath* v. *Ramranjan,* 67 Ind.Cas. 866. *Thota Chenna* v. *Thota Veeraswami,* A.I.R. 1933 Mad. 862 ; *Lakshmamma* v. *Goole Appada,* A.I.R. 1932 Mad. 157=61 M.L.J. 761=(1931) M.W.N. 961=34 M.L.W. 725=136 Ind.Cas. 230. The irregularity may be waived by the parties. *Bai Laxmi* v. *Shridhar,* A.I.R. 1943 Bom. 221=45 Bom.L.R. 416. The fact that the arbitrators were not present at the sitting held by the umpire or that they have signed the award does not vitiate the award or render it illegal. *Louis Dreyfus* v. *Tarachand,* A.I.R. 1926 Sind 252.

1280. Award not technically perfect.—Where parties prefer an amature court to a professional court, they take the risk that the decision may not be technically perfect. *Waliullah* v. *Bhaggan,* 80 Ind.Cas. 7=10 O. & A.I.R. 761=11 O.L.J. 570.

1281. Objection on ground of vagueness.—An objection that an award is vague and illegal, is itself a vague objection and does not deserve any consideration. *Dina* v. *Kalika,* 1941 O.A. (Supp.) 353=1941 R.D. 284.

1282. When the award is complete.—It is only when the submission provides for the making and publishing of the award that the award is not valid unless it is published. *Anantram* v. *Murlidhar,* 78 Ind.Cas. 194 ; *Arnutt* v. *Breame,* (1705) 1 Salk. 76. As soon as the arbitrators have made a complete award, the award is regarded as made and published. The law casts upon an arbitrator no obligation to stamp an award and an award is complete though it is unstamped, and, therefore, inadmissible in evidence. *Anantram* v. *Murlidhar, supra.* Arbitrators cannot be said to be *functus officio* until the pronouncement of the award is actually made, even if they have signed the award. *Harphool* v. *Prabhu,* A.I.R. 1950 E.P. 265=52 P.L.R. 128. The presumption is that the arbitrator intended to dispose finally of all the matters in difference ; and his award will be held final, if by any intendment it can be made so, since the award states, that is made of and concerning all the matters in dispute referred to the arbitrator, there is a presumption that the award is incomplete. *Sm. Santasila* v. *Dhirendra Nath* A.I.R. 1963 S.C. 1677.

1283. Filing of award.—The filing of an award is a purely ministerial act and can be legally performed by any one of the arbitrators appointed. *Shamdas* v. *Khimanmal,* 29 Ind.Cas. 692=8 S.L.R. 302. A court cannot take action on an award unless it is properly placed before it by the arbitrators. *Ram Narain* v. *Lalji Ram,* A.I.R. 1929 Pat 178=118 Ind. Cas. 606.

1284. Where arbitrator receives evidence and papers from one side without the knowledge of the other.—An arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without (if he does) giving the other side affected by such evidence the opportunity of meeting and answering it. This proposition is, however, subjected to the qualification that the parties may agree that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration,

and they may also expressly or by their conduct waive their objection to an irregular course of conduct on the part of the arbitrator. When the arbitrator received certain papers and documents from the defendants in a suit referred to his arbitration, together with a letter from the defendants containing certain comments on the document sent to him and made his award without giving the plaintiffs an opportunity of seeing the said papers and documents, and of meeting the inference deducible from them, held that there was such a breach of duty on the part of the arbitrator as entitled the plaintiffs to have the award set aside. *Cursetji* v. *Crowder*, 18 Bom. 299. In the above case *Farran J.* observed : "Now it is well-established principle of law that an arbitrator ought not to hear or receive evidence from one side in the absence of the other side without giving the side affected by such evidence the opportunity of meeting and answering it. In *Russell* on *Awards* (7th Edn., page 191) the proposition is put thus :—'Neither side can be allowed to use any means of influencing his (arbitrator's) mind, which are not known to, and capable of being met and resisted by the other. As much as possible the arbitrator should decline to receive private communications from either litigant respecting the subject-matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him without giving information of it to the other side.'" In *Harvey* v. *Shelton*, 7 Bea. 455 (462) *Lord Langdale M.R.* said : "In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not in the administration of justice in whatever form, whether in the regularly constituted court or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side."

1285. Statements of plaintiff and defendant taken separately.—The arbitrators examined and took the statement of the plaintiff and the defendant separately in which both of them stated that they were willing to abide by the decision of the arbitrator on his looking into their plaint and written statement in the suit and he gave his award without taking any evidence. *Held* that though an arbitrator should not hear the evidence of one party behind the back of the other, it cannot in the circumstances be held that by merely taking the statements of the parties separately any evidence was recorded from one party behind the other and to the latter's prejudice. The arbitrator was placed by the parties themselves in a difficult position with authorisation from them both to decide the disputes by a reference to the pleadings and the records. As there was nothing whatever to show that the arbitrator did not make his award within the narrow confines of the pleading, it cannot be said that there was any misconduct either of the arbitrator or of the arbitration proceedings. *Kesanna* v. *Vengamma*, 62 L.W. 276=1949 M.W.N. 224=4 D.L.R. Mad. 129=(1949) 1 M.L.J. 462; *National Electric Supply* v. *Punjab State*, I.L.R. (1962) 2 Punj. 789= A.I.R. 1963 Punj. 56 (parties agreeing to prepare statements for arbitrator, one party preparing statement).

1286. Refusal of an umpire to state a case.—Under the Indian court for an order directing the umpire to state a case and his refusal to so state a case on request of a party does not amount to legal misconduct.

Arunachala v. *Louis Dreyfus,* A.I.R. 1928 Mad. 107=39 M.L.T. 563=27 M.L.W. 267=(1928) M.W.N. 132=107 Ind.Cas. 793 ; *Sewdutrai* v. *Tata Sons Ltd.,* 77 Ind. Cas.769=27 C.W.N. 494 ; *Haji Ebrahim* v. *Northern India Oil,* 85 C.L.J. 176.

1287. Where the word "umpire" has been used.—An agreement to decide certain dispute to arbitration named two persons to act as arbitrators and provided that in case of differences of opinion between the arbitrators or any matter not decided by them it was to be decided by a judge of the High Court mentioned by his name. On difference between the arbitrators, the matter came for disposal before the judge who referred to the clause in the agreement and decided the matters, using the words "I adjudge and award" in each of his findings and signing the awards by his name with the designation as "umpire" and not as judge. It was contended that the decision of the judge was not an award given by an umpire but a decree passed by the judge of the High Court acting *extra cursum curiae* with the consent of all the parties and as such was not liable to be set aside as an award. *Held* that when an agreement for arbitration by one even number of arbitrators provides for any difference between them to be decided by a named person, even if the word umpire is not used in connexion with that person, he can act only in that capacity. *Bengal Silk* v. *Aisha Ariff,* A.I.R. 1947 Cal. 106 ; see also *K. P. Dalal* v. *R. S. Jamadar,* A.I.R. 1945 Bom. 478. *Russell* on *Arbitration,* 13th Edn., page 34 where the learned author said : "The subject-matter of an action may be referred to a judge as arbitrator. The judge in such a case is merely an arbitrator and has no special powers by virtue of the fact that he is a judge and his award is not subject to appeal." But see *Chinna* v. *Venkatasami,* A.I.R. 1920 Mad. 800=42 Mad. 625=51 Ind. Cas. 817 ; *Madan* v. *Munna,* A.I.R. 1928 All. 497=A.I.R. 1928 All. 497 =115 Ind.Cas. 644 ; *Naushad Ali* v. *Mohammad,* 13 Luck. 152=A.I.R. 1937 Oudh 224=166 Ind.Cas. 853.

1288. Whether arbitrators should give reasons for decisions.—An award of arbitrators is not a reasoned judicial decision and the arbitrators need not give reasons for their decisions, and may even ignore any position advanced by the parties. *Purushotama* v. *Jetha Bhai,* 17 Ind.Cas. 33=(1912) M.W.N. 1076 ; *Ramdhari* v. *Ramcharitor,* 38 Cal. 143=7 Ind.Cas. 333 ; *Nanjappa* v. *Nanjappa,* 23 M.L.J. 290=12 M.L.T. 133=16 Ind.Cas. 478. The court in filing an award wherein the arbitrators have failed to give a decision on any matter, the subject of dispute, cannot be deemed to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction vested in it by law *Purushotam* v. *Jetha Bhai, supra, (Per Sadasiva Aiyar J.)* : but see, *contra per Sundar Aiyar J.* in *Ibid.* An arbitrator is not bound by the technical rules of procedure which the court must follow, nor need he record separate findings on the various points on which the parties are at issue or write a reasoned judicial decision. All that he is required to do is to give an intelligible decision which determines the rights of the parties in relation to the subject-matter of the reference. *Raminder* v. *Mohinder* 190 Ind.Cas. 399=A.I.R. 1940 Lah. 186 ; while it is not necessary for an arbitrator to give reasons for his own conclusions or to give separate finding on each and every issue involved in the dispute, every party that appoints an arbitrator has right to expect an intelligible decision which determines the rights of the parties in the various important points which are at issue. *Union of India* v. *Bakshi Ram,* I.L.R. (1957)

Punj. 1210=59 Punj. L.R. 572; see also, *State of Orissa* v. *Chandra P. C.*, I.L.R. (1961) Cut. 467=A.I.R. 1962 Orissa 91; *Rash Behari Sen* v. *Anand Swarup*, A.I.R. 1962 Punj. 51=63 Punj. L.R. 887 (omission to give detailed reasons no ground for setting aside award).

1289. Where parties given opportunity to produce witness—it is no misconduct if no further time is given.—Where the arbitrators held their sittings for about 14 or 15 months and every opportunity was given to the parties to place their case before the arbitrators and to adduce their evidence, the arbitrators are not guilty of misconduct in not giving time to a party to produce their witnesses or in deciding the matter on such evidence as was placed before him. *Bulchand* v. *Thakurdas*, A.I.R. 1933 Sind. 300.

1290. Examination of witness.—An arbitrator is guilty of misconduct when he examines no witness, even though the nature of the dispute is such that it could not be decided without evidence. *Ram Chand* v. *Buta Ram*, A.I.R. 1931 Lah. 65(1)=130 Ind.Cas. 833; but see *Ram Bahadur* v. *Sree Kanta*, A.I.R. 1943 Pat. 285=22 Pat. 108. In *Ganga Sahai* v. *Lekhraj*, 9 All. 253, *Mahmood J.*, citing from *Russell* on *Arbitration*, 4th Edn., p. 646 said: "Thus the award will be set aside if the arbitrator refuses to postpone a meeting for the purpose of allowing a party to get counsel on his part, where the other side unexpectedly appears by counsel; so if he receives affidavits instead of *viva voce* evidence when he is directed to examine witnesses on oath; but not if he omits to swear the witness, and the party at the meeting do not request him to administer by oath, or after objecting, subsequently acquiesce in the mode of examination. The award may be impreached if the arbitrator make his award without having heard all the evidence, or having allowed the party reasonable opportunity of proving his whole case." Whether the arbitrators should or should not hear evidence and the parties by counsel or otherwise, must depend on the particular circumstances in every case; and the arbitrators should exercise their discretion in a judicial manner. And if the reference be such that the arbitrator cannot decide the matter in dispute without hearing evidence the refusal to hear evidence will amount to misconduct. The arbitrators act improperly if they do not take evidence to ascertain who were the parties liable on the contract. *Hurdwary Mull* v. *Ahmed Musaji*, J Ind.Cas. 371=13 C.W.N. 63. Refusal by an arbitrator to call a material witness produced by either party amounts to judicial misconduct. *Raghoobur* v. *Maina*, 12 C.L.R. 656; *Kanai Chand* v. *Ram Chandra* 24 W.R. 81. *Phipps* v. *Ingram*, 3 Dowl. 669. In such a case the affidavit in support should state the arbitrator's reasons for refusal. *Bradley* v *Ibbetson*, (1851) 2 Lo.M. & P. 583; *Re Manndes*, (1883) 49 L.T. 535. It is a misconduct where an arbitrator having promised to hear certain witnesses made his award without hearing them. *Pitt* v. *Darka* cited in *Earl* v. *Stocker*, (1691) 2 Vern. 251. See also, *Haji Ahmed* v. *Essanji* 17 Ind.Cas. 696 (2)=14 Bom.L.R. 1007. In order to make out a case entitling a party to impeach an award on the ground that the arbitrators improperly refused to take the evidence of an important witness, the witness must be distinctly tendered to the arbitrators. *Manindra* v. *Mohanundo*, 13 Ind.Cas. 161=15 C.L.J. 360; *Craven* v. *Craven*, 7 Taunt. 644; *Grazebrook* v. *Davies*, 5 B. & C. 534; *Ma Sein Mya* v. *Swami*, 37 Ind.Cas. 807. The refusal of an arbitrator to summon witnesses cited by a party does not vitiate an award, where there is nothing to show that the arbitrator was not acting within his powers and where

the witness. *Rajendra Nath* v. *Abdul Hakim,* 39 Ind.Cas. 767. Where a party closes his case before an arbitrator and leaves it to his discretion to call any further evidence and the arbitrator gives his award on the material at hand. the party is estopped from contending that there was insufficient inquiry. *Narpat Rai* v. *Devi Das,* 14 Ind.Cas. 371=13 P.W.R. 1911. The refusal by the arbitrators to admit evidence which was unnecessary and which would not have in any way influenced their decision, does not amount to misconduct. *Louis Dreyfus* v. *Araromal* 1 Ind.Cas. 1151=3 S.L.R. 164. Where a reference to arbitration in a case provided that the arbitrator should determine the case after hearing the evidence and that if one of the parties failed to appear before him, he should have power to proceed to hear the reference *ex parte* held that on the plaintiff's failure to appear before the arbitrator on the day fixed for trial the arbitrator could not make an award without taking any evidence but should have proceeded to hear the evidence of the other side. *Gopal Chandra* v. *Kshetra Mohun,* 46 Ind.Cas. 195=22 C.W.N. 933. The arbitrator in exercise of his discretion left out certain question which he considered were not relevant to the matter. *Held* that the award cannot be set aside nor can it be held that there had been judicial misconduct. *National Electric* v. *Punjab State,* I.L.R. (1962) 2 Punj. 789=A.I.R. 1963 Punj. 56.

1291. Rejection of some part of evidence.—Legal misconduct would consist in the arbitrator acting on information not disclosed to the party affected thereby, i.e., when he acts contrary to natural justice. A.I.R. 1953 S.C. 21. The same cannot be said when he rejects some part of the evidence, since this does not infringe any rules of natural justice. Arbitrators are not bound by the strict rules of evidence applicable to law courts and unless they are contrary to natural justice, the court would not be justified in setting aside their awards. *Municipal Commr. v. Jasrup,* 1959 M.P.L. (Notes) 231.

1292. Removal of arbitrator for misconduct.—Misconduct of an arbitrator may be of such a kind (e.g., fraud) as will justify the removal of the arbitrator. *Re Furst Bras,* (1951) I Lloyd's Rep. 429, *Russell* 15th Edn., 283.

1293. Perversity is misconduct.—Perversity is misconduct within the meaning of this section and a court would be justified in setting the award aside on this ground. *Nga Tok* v. *Nga Kasim,* 14 Ind.Cas. 978=5 Bur.L.T. 55. An arbitrator who was asked to decide a suit was authorized to deal with costs as they would be dealt with by court. The arbitrators dismissed the plaintiff's suit but under the circumstance of the case allowed Rs. 2,000 even though the ordinary costs in the suit were only about Rs. 100 and even though the plaintiff had not claimed any special costs either in the suit or before arbitrator. The award in that case was set aside. *Bholanshah* v. *Hussein,* A.I.R. 1933 Sind 295=27 S.L.R. 327=143 Ind.Cas. 439. The court observed : "Whatever be the motive of the arbitrator it is abundantly clear that the award as it stands cannot possibly be maintained."

CLAUSE (*b*).

1294. Award made after the issue of an order by the court superseding an arbitration.—Section 19 sets out the grounds where the court is empowered to supersede an arbitrator. Section 19 enacts as follows:

"Where an award has become void under sub-section (3) of section 16 or has been set aside, the court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred." Under sub-section (3) of section 16 "an award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed." Apart from section 19 of the parties agree that a reference be withdrawn and if the arbitrator also agrees, the court should supersede the arbitration. *Hari Chand* v. *Inder Sen*, A.I.R. 1934 All. 95=(1934) A.L.J. 473=150 Ind.Cas. 222. In *Ibrahim Ali* v. *Mohsin* Ali, 18 All. 422 at page 427 (F.B.), *Edge, C.J.* observed: "If the power of the arbitrators is revoked, as for example, by the court passing an order superseding the arbitration under Chapter XXXVII of the Code, or if the period fixed for making the award has expired before the award is made, the arbitrators have no longer seisin of the reference, and they are *functus officio* and cease to have any more power to make an award than the man in the street. In such a case any award which they might purport to make would be void *ab initio*. It would in fact be no award in the arbitration." See also, *Suryanarain* v. *Surabaya*, 9 Ind.Cas. 173=9 M.L.T. 251=21 M.L.J. 263=2 M.W.N. 151 (F.B.); *Raghunath* v. *Ahmad*, 4 Lah.L.J. 48=A.I.R. 1922 Lah. 194. "Made" in this clause does not mean delivery, because "making" and "delivery" indicate different stages. *Akshay K. Nandi* v. *S. C. Das & Co.*, 38 C.W.N. 784.

As regards power of court to enlarge time *vide* section 28, *supra*, and notes under it. Before the issue of an order by the court superseding the arbitration, the award must be completed and signed by the arbitrators, otherwise, it would be set aside under clause (*b*) of this section. It is not necessary to the validity of such award that it should actually reach the hands of the court within such period. *Asad-ul-lah* v. *Muhammad*, 27 All. 459. See also, *Arumugam* v. *Arunachalam*, 22 Mal. 22; *Umersy Premji* v. *Shanji Kanji*, 13 Bom. 119; *Debendra* v. *Sarbamongola*, 8 C.W.N. 916; *Sewdatrai* v. *Tata Sons Ltd.*, A.I.R. 1921 Cal. 576=77 Ind.Cas. 769; *Akshay Kumar* v. *S. C. Dass*, A.I.R. 1935 Cal. 359=38 C.W.N. 784=156 Ind.Cas. 165. The order of supersession cannot be passed where an award has already been made and completed or, in other words, signed and delivered by arbitrators within the time fixed by the court, though it may reach the court afterwards. *Lala* v. *Abdus*, 17 Ind. Cas. 320. This section does not render an award made out of time *per se* a nullity; the award is merely voidable and not sought to be set aside within the time prescribed for it, it is binding upon the parties. *Patto* v. *Upendra*, 50 Ind.Cas. 52=4 P.L.J. 265; *Kahan Singh* v. *Mohan Lal*, 34 Ind.Cas. 177=44 P.W.R. 1916; *Shib Kristo* v. *Satish*, 18 Ind.Cas. 69=39 Cal. 822; *Kallepalli* v. *Kuzza Venkatadri*, A.I.R. 1941 Mad. 921=(1941) M.W.N. 780=(1941) 2 M.L.J. 395. *Ibrahim* v. *Mohari Ali*, 18 All. 422.

1295. Award after arbitration proceedings have become invalid under section 35.—Section 35 relates to the effect of subsequent legal proceedings on a pending reference. Such proceedings will not affect the reference unless (*a*) they relate to the whole of the referred matter and (*b*) all the parties to the reference are impleaded in the proceedings. Where such conditions are fulfilled the legal proceedings will nullify the arbitration proceedings on the expiry of the time within which an application to stay the legal proceedings may be made or on the refusal of such an application. *Vide* notes under section 35, *infra*.

CLAUSE (*c*).

1296. Award improperly procured.—An award is to be set aside if it is procured improperly. It has been held in *Shephard* v. *Brana,* (1734) 2 Barnard 463, that where arbitrators took money from one side, although in payment of their charges and expenses, this was sufficient to set aside the award. But see, *In re Kenworthy and the Queen Insurance,* (1893) 9 T.L.R. 181, where the above case was distinguished. Treating the arbitrator may be a form of procurement or may amount to a mere indiscretion, and the court will not, it would seem, set aside the award on that ground unless either there was an intention to corrupt or influence the arbitrator or he was in fact corrupted or influenced. *Russell,* 13th Edn., page 185, citing *Hopper, In re,* (1867) 36 L.J.Q.B. 97 ; *Maunder, In re,* (1883) 49 L.T. 535 ; *Moseley* v. *Simpson,* 1873) 42 L.J.Ch. 739=L.R. 16 Eq. 226. "The court has jurisdiction to set aside an arbitration on the ground of corruption subsequently proved." *Per Sir G. Jessel, M.R.* in *The Malmesbury Railway Co.* v. *Buddo,* 45 L.J.Ch. 271. Where arbitrators take money from one of the parties singly as fees for charges or anything else before making the award, that is sufficient cause to set aside the award. *Akshoy Kumar Nanday* v. *S. C. Dass,* A.I.R. 1935 Cal. 359=38 C.W.N. 784=156 Ind.Cas. 165. It is imperative that the arbitrators should always scrupulously avoid any course of action which even remotely bears the complexion of thus having put themselves into a position where it might be said against them that they had received a pecuniary inducement which might had some effect on their determination of the matters admitted to their adjudication. *Ibid. ; Kalicharan* v. *Sarat Chunder,* 30 Cal. 397. But where the arbitrators took money as fees from one of the parties and it was done by way of mutual arrangement between the contending parties, the award is not vitiated by reason of any misconduct on the part of the arbitrators. *Akshoy Kumar* v. *S. C. Das, supra.* An award is improperly made, when it is made by collusion or in consequence of a bribe. *In re Whitely and Robert's Arbitration,* (1891) 1 Ch. 558. An agreement between the parties to a building contract that the valuations, certificates, orders, and awards of the architect shall be final and binding, and shall not be set aside or attempted to be set aside on any insinuation of fraud, collusion, or confederacy, is, in the absence of fraud on the part of the either party, a valid agreement, and not void as being against public policy. It is competent for the parties to agree that the question of fraud on the part of the arbitrator shall not be raised by either of them. *Tullis* v. *Jacson,* (1892) 3 Ch. 441. The above case was decided by *Chitty, J,* following the principle laid down by *Sir G. Jessel, M.R.* in *Printing and Numerical Registering Co.* v. *Sampson,* L.R. 19 Eq. 462 (465), where he observed : "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider —that you are not lightly to interfere with this freedom of contract." Fraud or dishonesty on the part of arbitrator is not sufficient to vitiate his award as a nullity. Such conduct amounts to misconduct and may afford good cause for a competent court to set aside the award. *Khanchand* v. *Kadumal,* 15 Ind.Cas. 819=S.L.R. 240. In *Amarnath* v. *Eichholz,* A.I.R. 1932 Lah. 378=33 P.L.R. 365=137 Ind.Cas. 846, it has been held that the words "an arbitration has been improperly procured" include

the case of an arbitrator who has been illegally and improperly appointed. The jurisdiction of the court is not ousted by an arbitration clause in a written agreement. The position of the defendant after institution of the suit is that he can either sue for damages for breach of contract to refer or indirectly enforce specific performance of the contract by obtaining an order staying the proceedings under S. 34. But he must not after suit, and before stay of proceedings, attempt to oust the jurisdiction of the court by appointing arbitrators. If he does so and an award is made, he would be guilty of improperly obtaining an award within the meaning of this section. *Sawyer* v. *Louis Dreyfus,* 20 Ind. Cas. 504=7 S.L.R. 1. Where an agreement for reference to arbitration is impeached in a suit, an injunction may be issued to stay arbitration proceedings. Where an injunction is issued to restrain arbitrators from proceeding, their award, if they ignored the injunction, would be considered to have been procured improperly. *Macdonald* v. *George D' Emden,* 4 S.L.R. 187=9 Ind.Cas. 707. One of the parties to an arbitration agreement is entitled to apply to have the award set aside (or not) enforced on the ground that it had been improperly procured on account of want of jurisdiction in the arbitrators. *People's Bank* v. *Kanhya Lal,* A.I.R. 1935 Lah. 602=16 Lah. 1000. In *Motumal* v. *Haji Ibrahim,* A.I.R. 1944 Sind 80=I.L.R. 1943 Kar. 390=212 Ind.Cas. 287, *Davis, C.J.* observed : "Section 30 by implication gives the court power to set aside an award that has been improperly procured or is otherwise invalid. Section 30 of the Act 1940 corresponds to S. 14, Arbitration Act of 1899, which expressly gives the court power to set aside an award that has been improperly procured.....The court is not a dummy where the parties to a reference may use for their own colourable purposes." So a reference is invalid and the award followed is inoperative where the reference is the result of an understanding between the parties to abandon the prosecution of a non-compoundable offence. *Ibid.;* see also, *Kamini Kumar* v. *Birendranath.* A.I.R. 1930 P.C. 100=123 Ind.Cas. 187=57 Cal. 1302=57 I.A. 117 (P.C.). Where the parties to the reference clothe the arbitrators with authority to make one award concerning all of them and they act within the four corners of that authority it is not open to some of the parties to contend that the arbitrators have misconducted themselves in making one award. In such a case neither the arbitration nor the award is improperly procured. *Dattaram* v. *Harjimal,* A.I.R. 1930 Sind 170=24 S.L.R. 145=121 Ind.Cas. 161. The words of S. 14 of the Arbitration Act of 1899 are sufficiently wide to cover an enquiry into and a decision on the question of the validity of the submission. As the basis of an arbitration is the submission, the improper procuring of an arbitration, which is covered by S. 14 must include the question of validity of the submission. *Rochanbai* v. *Motumal,* A.I.R. 1937 Sind 110 =160 Ind.Cas. 623=31 S.L.R. 55. *Pokarlas* v. *Forbes,* 6 S.L.R. 127=19 Ind.Cas. 363 ; *Arunachala* v. *Louis Dreyfus,* A.I.R. 1928 Mad. 107=39 M.L.T. 563=27 M.L.W. 267=(1928) M.W.N. 132=107 Ind.Cas. 793. ; *A.I.R.* 1960 Cal. 180.

1297. "Or otherwise invalid".—These words were intriduced for the first time in para. 15 of the Second Schedule of Civil Procedure Code of 1908 on which this section is based according to the recommendation of their Lordship of the Judicial Committee of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan,* 29 Cal. 167=29 I.A. 51=12 M.L.J. 77=4 Bom. 161=6 C.W.N. 226=25 P.R. 1902. *Vide Lutawan* v. *Lachiya,* 21 Ind.Cas. 689=12 A.L.J. 57 (F.B.), *per Banerjee, J.* An award made otherwise than in accordance with the authority conferred on the arbitrators is an award which is "otherwise invalid" and may accordingly

be set aside by the court. *Ram Protap* v. *Durga Prosad,* 92 Ind.Cas. 633 (P.C.)=A.I.R. 1925 P.C. 293=28 Bom.L.R, 217=49 M.L.J. 812=24 A.L.J. 13=43 C.L.J. 14=(1926) M.W.N. 96=3 Pat. L.R. 33=53 I.A. 1=53 Cal. 258 (P.C.). The grounds of invalidity of an award contemplated in para. 15 (*c*) refer to matters which apparently go to the root of the award and matters which merely pertain to procedure and have not been agitated before the arbitrator are covered by it. *Sardar Singh* v. *Nawal Kishore,* 40 P.L.R. 972=A.I.R. 1928 Lah. 604. Section 30 (*c*) is wide enough to cover an award which is sought to be challenged on the ground that the subject-matter of the reference was not capable of being referred to arbitration. *Musafir* v. *Md. Roysul,* A.I.R. 1950 Assam 114. In *Penn Konlu* v. *Balasubramania.* A.I.R. 1949 Mad. 559, *Mack, J.* observed : "No hard and fast rule can be laid down as to the type of cases in which an award may be remitted under S. 16 (*c*) or set aside under S. 30 (*c*)."

The expression in clause (*c*) of section 30 "or is otherwise invalid" is not *ejusdem generis* it extends the jurisdiction of the court to set aside an award on grounds other than those mentioned in clause (*a*), (*b*) and (*c*) of section 30. *Savkar* v. *Amritlal,* A.I.R. 1954 Bom. 293=I.L.R. (1954) Bom. 686=56 Bom. L.R. 89. It is then urged under s. 30 that the only ground on which an award can be set aside are the grounds mentioned in clauses (a), (b) and (c) and it is stated that the expression in clause (c) or is otherwise invalid is *ejusdem generis* and it does not extend the jurisdiction of the court to set aside an award on grounds other than those mentioned in clauses (a), (b) and (c) of s. 30. It is therefore, pointed out that if an award is challenged on the ground that an arbitration agreement which led up to the award was invalid, that award cannot be set aside under S. 30 but can only be declared to be invalid under S. 33. For this purpose reliance is paced on the decision of the Privy Council in *Chhabba Lal* v. *Kalu Ram,* A.I.R. 1946 (P.C.) 72=I.L.R. (1946) All. 193 (P.C.)=73 I.A. 52=223 Ind.Cas. 567=1946 A.L.J. 254=48 Bom.L.R. 452=50 C.W.N. 465 (1946) 1 M.L.J. 339 (P.C.).

"In that case the Privy Council was considering the provisions with regard to arbitration in the Second Schedule to the Civil Procedure Code and it was construing para. 15 which also used the expression 'an award being otherwise invalid ; and the Privy Council accepted the dissenting judgment of Mr. Justice *Iqbal Ahmad* who took the view that the expression must be construed *ejusdem* and *Sir John Beaumont* delivered the judgment of the Board stated at p. 75 : .....In their opinion all the powers conferred upon the court in relation to an award on a reference made in a suit presuppose a valid reference on which an award has been made which may be open to question. If there is an invalid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding.' Therefore, what is urged is that here also the appropriate proceeding contemplated is a proceeding under S. 33 by which an award is being challenged on the ground that the reference made to arbitration was not a valid reference.

"Now, in the first place, there was no provision of the law in the second schedule to the Civil Procedure Code corresponding to section 33, and section 33 deals with all proceedings which have got to be taken when an arbitration agreement or an award is being challenged, and S. 32 bars all suits in respect of the existence, effect or validity of an arbitration agreement or award, and it also provides that no arbitration agreement or award be set aside, amended, modified, or in any way affected otherwise than as provided in this Act. Therefore, whether as the Privy Council could contemplate a suit, for the purpose of a declara-

tion that a particular award was a nullity, as far as the Arbitration Act is concerned all proceedings with regard to arbitration, arbitration agreements, and award can only be taken as laid down in the Arbitration Act itself. The Arbitration Act now constitutes a self-contained code with regard to the law of arbitration. That is the first ground on which the decision of the Privy Council can be distinguished. The other ground is, as in our opinion rightly pointed out by the learned judge below, that one must look to the history of the judicial decisions antecedent to the passing of the Arbitration Act (Act X of 1940), and a review of judicial decisions clearly shows that the High Courts of Bombay, Allahabad, Madras, Lahore, Patna, Rangoon and the Chief Courts of Lucknow and Sind, all took the view that the expression 'otherwise invalid' in para 15 was not to be construed *ejusdem generis.*

"The only discordant note was struck by the Calcutta High Court.* It would only be right to assume that the Legislature had knowledge of the view taken by the High Courts as to the true meaning of the expression as occurring in para. 15 of the Second Schedule to the Code. Therefore, with that knowledge, if the Legislature in enacting S. 30 used the same expression, we would be entitled to assume that the Legislature gave to that expression the connotation, which had been accepted by a large volume of judicial opinion. The decision of the Privy Council came much later ; it came in 1946. The position might have been different if the Legislature had the decision of the Privy Council before it."

So the expression "otherwise invalid" should not be read *ejusdem generis* with the grounds given in the preceding clause, but is wide enough to embrace all grounds of attack regarding the validity of an award. *Arjuna* v. *Nakula Choudhury,* A.I.R. 1953 Orissa 75=19 Cut.L.T. 135. The expression "or is otherwise invalid" in S. 30 (*c*) covers all objections to an award on the ground of invalidity from any cause whatsoever, and does not refer to the invalidity of the kind referred to in the preceding clauses of the section. *Ismail* v. *Hansraj,* A.I.R. 1955 Raj. 153. See also A.I.R. 1914 All. 446 (F.B.) ; A.I.R. 1919 Mad. 1029=34 M.L.J. 71 ; A.I.R. 1939 Lah. 69 ; A.I.R. 1935 Rang. 94 ; A.I.R. 1936 Oudh 1 and A.I.R. 1939 Sind 241 (F.B.). See also the majority judgment of Calcutta Full Bench in *Shah & Co.* v. *Ishar Singh,* A.I.R. 1956 Cal. 321=60 C.W.N. 471. In the dissenting judgment *Bachawat, J.* said : "The Arbitration Act 1940, distinguishes between an application for setting aside an award and an application for a decision that the award is a nullity and consequently, does not legally exist and contemplates that an application of the former kind may be made under S. 30 and an application of the latter kind under S. 33. Non-existence and invalidity of arbitration agreement and an order of reference to arbitration are not grounds for setting aside the award under S. 30." In the Full Bench case of *Sah & Co.* v. *Ishar Singh,* A.I.R. 1956 Cal. 321=60 C.W.N. 471 (E.B.). *P. B. Mukherji, J.* made a review of the provision of the Arbitration Act, 1940, in paras. 76 to 78 and in paras. 87 to 101 of the judgment gave legislative history of the law of arbitration in India with reference to decided cases. In the above case majority of the Full Bench said : "The Indian Arbitration Act 1940, does not distinguish between an application for setting aside an award and an application for the adjustment of an award to be a nullity and does not contemplate that an application of the former kind should be made under S. 30 of the Act and an application of the

Vide A.I.R. 1931 Cal. 109=34 C.W.N. 813 and A.I.R. 1931 Cal. 211=52 C.L.J. 298=35 C.W.N. 298=58 Cal. 628. But now see A.I.R. 1956 Cal. 321 (F. B.).

latter kind under S. 33". See *Basant Lal* v. *Surendra Prasad*, I.L.R. 36 Pat. 35=1957 B.L.J. 94=A.I.R. 1957 Pat. 417. In the Patna case it has been held that an award made otherwise than in accordance with the authority, by the order conferred upon an arbitrator or an award beyond the scope of reference, are some of the instances, out of many, of an award which is "otherwise invalid" even if the existence, or validity, of the arbitration agreement or the reference is not challenged, an award made on such a valid reference, can be impeached by an application under S. 23, for any of the reasons given in Ss. 15, 16 or 30 of the Act.

When there was no inherent lack of jurisdiction in a particular court to try the suit but its jurisdiction was challenged by the defendant by pleading a question of fact, namely, that no part of cause of action had arisen within the jurisdiction of that court, and later on the defendant joined in the petition for reference to arbitration and further took part in the proceedings before the arbitrator, it is not open to him to turn round and say, after the award was filed in the court, that the court had no jurisdiction to try the suit and that the reference made by it was void and that the award given was a nullity. *Ram Chandra* v. *Kailashpati*, A.I.R. 1960 Pat. 416. The expression used in clause (*c*) of s. 30 "or is otherwise invalid" is a very wide expression and can not be limited to the invalidity of the award on the ground mentioned in clauses (a) and (b). An award will also be otherwise invalid if it has not been submitted after its remission to the Arbitrator under sub. s. (1) of S. 16 read with Sub-sec. (3). It will be further void if the arbitration agreement contains a clause of enlarging the time for making the award except with the consent of all the parties to the agreement under S. 28(2). *Chandulal* v. *Ram Autar*, A.I.R. 1962 All. 357; *Mongol Singh* v. *Nawab* A. I.R. 1962 All. 219 (s. 33 is the only section under which an application can be made challenging the existence or validity of the arbitration agreement). *Om Prakash* v. *Union of India*, I.L.R. (1963) 1 All. 86= A.I.R. 1963 All. 242 (wide enough to include invalid an account of defective reference).

1298. Privy Council decision in Chhabba Lal v. Kalu Lal.— In *Moriam* v. *Amina*, A.I.R. 1937 All. 65=1936 A.L.J. 1333=167 Ind. Cas. 99=I.L.R. (1937) All. 317 (F.B.), it was held by the dissentient judgment of *Iqbal Ahmed, J.* that the words "otherwise invalid" in clause (c) of para. 15 have a reference to the invalidity of the award itself as distinct from invalidity attaching to the procedure of the Court. They refer to the invalidity of the award based on any ground unconnected with the proceedings of the court.....But according to the majority view an objection to the validity of the reference to arbitration on the ground that the reference was illegal because of the absence of leave falls within the purview of para.15, Sch. II Civil Procedure Code of 1908. In *Chhabba Lal* v. *Kallu Lal*, A.I.R. 1946 P.C 72=73 I.A. 52= I.L.R. (1946) All. 193=50 C.W.N. 465. *Sir John Beaumont* in delivering the judgment of the Judicial Committee of the Privy Council observed: "A further question referred to the Full Bench [A.I.R. 1937 All. 65 (F.B.)] was 'whether an objection to the validity of reference to arbitration comes within the provisions of para. 15 of Sch. II, Civil Procedure Code.' The learned Chief Justice and *Harries, J.* considered it did, relying on the words 'being otherwise invalid' in para. 15; *Iqbal Ahmed, J.* considered that it did not. Upon this question their Lordships agree with the view of *Sir Iqbal Ahmed.*" So all the previous decisions on para. 15(*c*) of Schedule II of the C. P. Code in contravention of the

interpretation given by *Iqbal Ahmed, J.* in A.I.R. 1937 All. 65 (F.B.) have been overruled by the Privy Council in *Chhaba Lal* v. *Kalu Lal,* A.I.R. 1946 P.C. 72. But in view of the fact that before delivery of the judgment by the Privy Council, the Legislature reproduced clause (*c*) in section 30 of the New Act, it may be taken that the Legislature have accepted the interpretation of this clause by the majority of the High Court. *Vide* A.I.R. 1954 Bom. 293.

1299. Latest Calcutta High Court decision.—In *Shah & Co.* v. *Ishar Singh,* A.I.R. 1956 Cal. 321=60 C.W.N. 471 (F.B.) the majority of the Full Bench said : "The rule of *ejusdem generis* cannot be applied in construing the expression "is otherwise invalid" in S. 30(*c*) of the Act. The words are perfectly general and intended to be so. They cover all forms of invalidity, including invalidities which amount to nullities. Such construction of the expression appears to be legitimate and indeed necessary, not only because it is wholly unqualified by any restrictive words of any kind but also because nullities and illegalities less than nullities, both occur in other clauses of the section." See also, *N. F. G. Insurance* v. *Union,* A.I.R. 1956 Cal. 11 for the meaning of the expression "is otherwise invalid." Where an error, whether of fact or of law appears on the face of an award, the award will be remitted or set aside unless the error is immaterial to the decision. The rule will not, however be applied where the parties have specifically referred a question of law to arbitrator. *Union* v. *Alliel Trading,* A.I.R. 1956 Punj. 7.

1300. Otherwise invalid—other cases.—An award which does not decide all matters in dispute is invalid and cannot be filed and enforced. *Gaja Sinha* v. *Sujat Ali,* I.L.R. (1951) Hyd. 887=A.I.R. 1952 Hyd. 46. Where some of the properties included in arbitration was held by a person *benami* for the joint family and the decision of the arbitrators required that person to make a conveyance in favour of all the parties in the reference, the mere fact that a person was not a party in the reference did not vitiate the award. *Ramtaran* v. *Adhar* 91 C.L.J. 287= A.I.R. 1953 Cal. 646. In preliminary decree in a partition suit, defendant was not made liable for general accounting but only for money traced into his hands and not spent for family purpose. Reference was made to arbitrators subsequent to the decree. Final award directed defendant to pay on account of mismanagement. Interim award containing findings of mismanagement signed by defendant, held that the final award did not contravene findings of Court in preliminary decree. *Held* also that defendants consented to award and cannot challenge it. *Chidambaran* v. *Subramian,* A.I.R. 1953 Mad. 492=(1952) 2 M.L.J. 524=A.I.R. 1953 Mad. 492. In a dispute relating to partition of joint family property, arbitrators appointed to effect division made defendants liable for taxes until accounts were taken and directed the defendants to execute indemnity bond in respect of liability. *Held* that the arbitrator did not exceed his authority. *Ibid.*

The arbitrator dismissed the entire claim of the plaintiff although the defendant admitted before him a part of the claim. *Held* that the award could not be set aside. The mistake was due to inadvertence and was made honestly. There was nothing to infer misconduct on the part of the arbitrator. *Rajnarain Misra* v. *Union of India,* 91 C.L.J. 145 Where arbitrators awarded damages for breach of contract considering several facts of the case, award cannot be set aside on the ground that *prima facie* the damages violated certain principle. *Gulzarilal* v. *Busi,* A.I.R. 1953 Cal. 621.

1301. Arbitration—absence of difference between the parties.—The legal basis of the proceedings in arbitrator is the existence of a difference or dispute between the parties to the arbitration proceedings. Where it appears to the Court that there is no genuine reference to arbitrator, an award based on such reference is inoperative. *Motumal* v. *Haji Ibrahim*, I.L.R. (1943) Kar. 390.

1302. Objections as to validity of reference—old cases.—In *Durga Charan* v. *Debendra Nath*, A.I.R. 1931 Cal. 109=34 C.W.N. 813 =130 Ind.Cas. 137, *Mitter, J.* observed : "An examination of clause (*c*), sub-para. 1 para. 15 will show that the words "or being otherwise invalid' must refer to invalidity of the kind referred to in preceding sentences of the said clause, as for instance of the award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the court. As has been pointed out by *Sir Lancelot Sanderson, J.* (now of His Majesty's Privy Council) that all the grounds for setting aside the award mentioned in para. 15 show that the Act contemplates in the first instance a valid reference : See *Dulichand* v. *Mamuji Musaji*, 41 Ind.Cas. 295." In *Golnur Bibi* v. *Abdus Samad*, A.I.R. 1931 Cal. 211=52 C.L.J. 298=35 C.W.N. 238=130 Ind.Cas. 209=58 Cal. 628, *Mukherjee, J.* observed : "The matter upon which I must fully concur with my learned brother *Mitter. J.* is the meaning that he has placed upon the expression 'on being otherwise invalid' in clause (*c*), sub-paras. 1, 15. He has held that the words must refer to invalidity of the kind referred to in the preceding sentences of the said clause.....When the provision begins with the restrictive words, 'but no award shall be set aside except on one of the following grounds' to hold that the words 'or being otherwise invalid' may let in any ground of invalidity, in my judgment, would be entirely wrong. I would, therefore, respectfully dissent from such decisions as have taken a contrary view. A ground of objection, which challenge the validity of the reference, is not a ground which may be put forward when under para. 15 the court is asked to set aside the award : the objections to be taken at the stage are objections to the proceedings as were had before the arbitrators. I am of opinion that the legislature has deliberately restricted para. 15 in this way, leaving to the parties to challenge the reference which is an order of the court and not act of the arbitrator, by appropriate proceedings. It is true that those proceedings are not specifically defined in the Code, but the fact that no appeal is allowed from the decree by no means suggests that there are no other means available to an aggrieved party to get the order of reference quashed. Two such means may at once be pointed out by way of an application for review, or by way of revision." But the decisions of the Allahabad, Lahore, Rangoon and Bombay High Courts and other courts have taken contrary view. They have held that the words "otherwise invalid" in para. 15, clause (1), sub-clause (*c*), Schedule 2, Civil Procedure Code, includes invalidity of any kind. *Sarkur* v. *Amrit*, A.I.R. 1954 Bom. 293. But now see the majority decision of the Full Bench of the Calcutta High Court in *Shah & Co.* v. *Ishar Singh*, A.I.R. 1956 Cal. 321=60 C.W.N. 471 (F.B.).

In *Kishinchand* v. *Takhitram*, A.I.R. 1939 Sind 231=183 Ind.Cas. 724=I.L.R. (1940) Kar 22 (F.B.) the question referred to the Full Bench was "whether it is open to the trial court in considering objections to an award under para. 15 of the Schedule aforesaid to consider and decide objections raised as to the validity of the reference." In answer-

ing the question in the affirmative *Davis J.C.* observed : "The applicants' case may be summarized in the argument that the words 'or being otherwise invalid' must be construed on the principle of *ejusdem generis,* and the learned advocate relies strongly on the ruling of the Calcutta High Court in *Golnur Bibi* v. *Abdus Samad,* A.I.R. 1931 Cal. 211=130 Ind.Cas. 209=58 Cal. 628=35 C.W.N. 238=52 C.L.J. 298. There are, however, we think, not only reason and convenience but the preponderance of judicial opinion against him on the narrow construction of para. 15 for which he argues, quite apart from the very wide meaning of the words 'otherwise invalid' themselves.....In *Golnur Bibi* v. *Abdus Samad, supra,* the question before the court was the question so frequently raised whether despite the provisions of para. 16 of Schedule 2. Civil Procedure Code an appeal will lie against a decree based on an award on the ground that the reference itself was invalid and in that case *Mitter J.* was of opinion that an appeal would lie contrary, it would appear. and as *Mukerji J.* pointed out, to decision of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan,* 29 Cal. 167=29 I.A. 51=6 C.W.N. 226, and to his own opinion. and *Mitter J.* differed from *Mukerjee J.* on that point so that the judgment has not the virtue of unanimity. Both learned Judges, however, were of opinion that the words 'or being otherwise invalid' must be construed *ejusdem generis* and that this construction prevented the trial court from considering and deciding under para. 15 questions relating to the validity of the reference which were not questions which could be argued or considered under that paragraph. This judgment then, on which the learned advocate for the applicant so strongly relies, is not very satisfactory judgment, and in *U Sein Win* v *Central Plumbing,* A.I.R. 1935 Rang. 94=156 Ind.Cas. 414=12 Rang. 675 *Page C.J.* his discussed at length the decisions of the Calcutta High Court on this question and pointed out that one Division Bench has differed from another from himself.....In *U Sein Win* v. *Central Plumbing (supra), Page C.J.* said at page 685 : 'In *Durga Charan Debnath* v *Gangadhar Debnath,* A.I.R. 1931 Cal. 109=130 Ind.Cas. 137=34 C.W.N. 813 and in *Golnur Bibi* v. *Abdus Samad (supra), Mitter J.* (with whose opinion on this point *Mukerjee j.* expressed concurrence) *held* that the words "or being otherwise invalid" in para. 15 (1) (*c*) of Schedule 2, must be construed *ejusdem generis* with the two preceding grounds of invalidity set out in para. 15 (1) (*c*). I am not confident, however, that it could be held that these two grounds form a genus ; but, be that as it may, in my opinion the contention that the words "or being otherwise invalid" must be treated as *ejusdem generis* with the two preceding grounds of invalidity has been satisfactorily answered by *Shadi Lal C.J.* in *Rala Ram Walaiti Ram* v. *Bansi Lal Jaggan Nath,* A.I.R. 1923 Lah. 239=136 Ind. Cas. 11=13 Lah. 528=33 P.L.R. 163. To my mind, with all respect to the learned Judges who have taken the opposite view, it is clear beyond doubt or controversy that the legislature by inserting the words "or being otherwise invalid" in para. 15 (1) (*c*) intended and provided that every ground upon which the validity of the award in law could be challenged should fall within the ambit of para. 15 (1) of Schedule 2 and could be relied on as a ground for setting aside the award ; thus obviating the difficulty that had arisen by reason of the rule in *Ghulam Khan* v. *Muhammad Hassan,* 29 Cal. 167=29 I.A. 51 (P.C.), and the decisions in the earlier cases in which it had been held that an award could only be set aside upon the grounds specifically set out in c. 521 of the Code of 1882.

In *Rala Ram Walaiti Ram* v. *Bansi Lal Jagan (supra), Shadi Lal C.J.* said : "The doctrine of *ejusdem generis* cannot, in my opinion, be invoked

to restrict the full and natural meaning of the phrase 'or being otherwise invalid.' Ordinarily, a general word receive its natural meaning, but general word, which follows particular and specific words of the same nature as itself, may take its meaning from them and may be presumed to be restricted to the same genus as those words. It is, however, clear that this rule of construction is used only for the purpose of ascertaining the intention of the legislature, and, as observed by *Maxwell* in his book *On the Interpretation of Statutes,* Edn., 7, at page 288 the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in this limited order of ideas to which its predecessor belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the legislature as gathered from the 'larger survey." **Not,** the history of the law on the subject of appeal in cases of arbitration under the supervision of the court points to the conclusion that the Legislature intended to give finality to the decision of the court, on all objections to the award, and to restrict the appeal to the solitary case in which the decree is at variance, or not in accordance with the award, and, even, then to confine its scope to that part of the decree which differs from the award." So the words "or otherwise invalid" are comprehensive enough to include all kinds of objection. *Madho Ram* v. *Sita Ram,* A.I.R. 1939 Lah. 69=41 P.L.R. 380=183 Ind.Cas. 79.

An objection to the validity of the reference to arbitration on the ground that the reference was illegal because of the absence of leave, falls within the purview of para. 15, Schedule 2, Civil Procedure Code. *Mariam* v. *Amina,* A.I.R. 1937 All. 65=Ind.Cas. 99=I.L.R. (1937) All. 317=(1936) A.L.J. 1333 (F.B.), *Per Sulaiman C.J.* and *Harris J. ; Iqbal Ahmed J. contra.* In the above case *Iqbal Ahmed J.* observed : "I cannot assent to the proposition that the words 'or being otherwise invalid' in clause (*c*) of para. 15, Schedule 2, do not refer to the invalidity of the kind referred to in preceding sentences of the said clause and embrace an objection which challenges the validity of the order of reference itself. If the legislature has, by the addition of these words, intended to let in objections to the invalidity of the order of reference itself or to some irregularity of the procedure of the court antecedent to the order of reference or subsequent to the delivery of the award, nothing would have been easier for the legislature than to say so in clear and unambiguous language. *At any rate I would have in that event, expected the legislature to enact such a rule in a separate clause.* The context in which those words occur leave an impression on the mind that these words have been used *ejusdem generis* with the preceding sentences in clause (*c*). *In any case it appears fairly clear to me that those words have reference to the invalidity of the award itself as distinct from some invalidity attaching to the procedure of the court.* Clauses (*a*) (*b*) and (*c*) of para. 15 are preceded by the words that 'no award shall be set aside except on one of the following grounds.' These words coupled with the contents of clauses (*a*), (*b*) and (*c*) lead to the conclusion that the grounds set forth in that paragraph have reference to proceedings before the arbitrator alone and not the proceedings of the court. The words 'being otherwise invalid' must, therefore, refer only to the invalidity of the award based on any ground unconnected with the proceedings of the court. Their Lordships of the Judicial Committee of the Privy Council in *Chhabba Lal* v. *Kallu,* 73 I.A. 52=I.L.R. (1946) All. 193=223 Ind.Cas. 567=1946 A.L.J. 254=48 Bom.L.R. 452=50 C.W.

N. 465=A.I.R. 1946 P.C. 72=(1946) 1 M.L.J. 339 (P.C.) accepted the minority view of *Iqbal Ahmed.* This was the view taken in *Vijaya Ramayya* v. *Venkatasubba Rao,* A.I.R. 1917 Mad. 672=32 Ind.Cas. 881=39 Mad. 853=30 M.L.J. 465 and *Golnur Bibi* v. *Abdus Samad,* A.I.R. 1931 Cal.211=130 Ind.Cas. 209=37 C.W.N. 238=58 Cal. 628. The question then arises as to how is a party to the suit to challenge the validity of the award on any ground unconnected with the proceedings before the arbitrator, i.e., on the ground of the invalidity of the order of reference itself. According to the view that I take, an objection impugning the validity of the order of reference does not come within the purview of para. 15, but it does not follow from this that objections to the validity of an award not contemplated by that paragraph can, in no circumstances, be entertained by the court. Para 15 is exhaustible only so far as objections to the validity of the award based on the irregularity or illegality of the proceedings before the arbitrator are concerned, but it does not, in any way affect the inherent jurisdiction of the court to recall and cancel its invalid order, if it is brought to its notice before the litigation has terminated by the passing of a decree. It is in the exercise of the inherent jurisdiction that the court has to entertain an objection to the invalidity of the order of reference and to give effect to the same if it is well founded." But *Sulaiman C.J.* in delivering the majority judgment of the Full Bench observed : "The question of the binding character of a reference to the arbitration and an award against a minor came up for consideration before a Full Bench of the court in *Lutaman* v. *Lachya,* A.I.R. 1914 All. 446=21 Ind.Cas. 989=36 All. 69=12 A.L.J. 57 (F.B.).....They (*Richards C.J.* and *Ryves J.*) pointed out that Schedule 2, para. 15, has been amended and the words 'or otherwise invalid' have been introduced which widened the scope of that paragraph, and made it possible to take all objections against the award including the objection that the reference itself was invalid. No exception can be taken to this view and we must accept the ruling of the Full Bench as laying down that even where an objection is taken to the validity of the award on the ground that the original reference itself was invalid, and such an objection is decided against the objector and a decree is passed in terms of the award, the decree is final and is not appealable." *Hari Chand* v. *Inder Sen,* (1934) A.L.J. 473=A.I.R. 1934 All. 95. See also, *Mahomed Valli* v. *Valli Asmal,* A.I.R. 1924 Bom. 324=79 Ind.Cas. 723=26 Bom.L.R. 171 ; *Raoji* v. *Ratansi,* A.I.R. 1930 Bom. 431=126 Ind.Cas. 305=54 Bom. 696=32 Bom.L.R. 389 ; *Balakram* v. *Ramjiwan Lal,* A.I.R. 1936 Oudh 1=158 Ind.Cas. 11=1935 O.W.N. 1036.

In *Mahadeo Prasad* v. *Badri Das,* A.I.R. 1928 All. 740=26 A.L.J. 1009=110 Ind.Cas. 881=50 All. 955, *Mukherjee J.* observed : "On this preliminary point the latest cases in this court seem to have held that where the award is impeached on the ground that the very reference was incompetent, this court can revise the proceedings and if necessary, set aside the order of reference with the necessary result that the award will fall through. An argument to the contrary is based on the last four words of clause(*c*),sub-clause (1), para. 15, Schedule 2, Civil Procedure Code, viz., 'or being otherwise invalid.' Para. 15, Schedule 2, which, deals with arbitrators lays down that no award shall be set aside except on one of the grounds mentioned in sub-clauses (*a*) to (*c*). The question whether the grounds of objection to an award that it is bad on account of a bad reference comes within the words 'or being otherwise invalid' has been sometimes debated in this court. We are of opinion that on principle and on authority, the four words quoted do not and cannot cover an award

where the reference itself is bad. The court is required to consider whether an award is good or bad. The finding of the Judge on the point is final and cannot be impeached in appeal. The examination of the grounds on which an award may be set aside will show that they all *relate to something which has been done either by the parties or by the arbitrators.* There is nothing, if we omit the words 'or.....invalid' for a moment, to suggest that the court is called upon to examine its own procedure and to pronounce whether its own procedure was good or bad. If a reference to arbitration is bad, it is so because the Judge's order was not justified in the circumstances of the case. If a court has to pronounce as opinion as to whether its own act, in making the reference, was justified or not, it is not to be expected, ordinarily speaking, that its own opinion on its own conduct should be allowed to have the finality which, for good reasons, are allowed to an award. On principle, therefore, the words 'or being otherwise invalid' should not be taken as including the question whether there was a valid reference to the arbitrator.

"Coming to the authorities in this court, while the case of *Ajudhiya Prasad* v. *Badurul Hussain,* 39 All. 489=41 Ind.Cas. 357=15 A.L.J. 427, *per Piggot J.* and *Hari Shankar* v. *Ram Pyari,* A.I.R. 1923 All. 502=45 All. 441, support the view that the question of the validity of the reference is one of the matters to be enquired into by the Judge under para. 15, clause (1), Schedule 2, Civil Procedure Code, and his opinion should be final on the point, the following cases established the contrary view. (i) *Kanhya Lal* v. *Jagannath Pershad,* A.I.R. 1921 All. 16=43 All. 305=60 Ind.Cas. 857 ; (ii) *Gopal Das* v. *Baijnath,* A.I.R. 1926 All. 238=48 All 239=91 Ind.Cas. 930 . and (iii) *Tej Singh* v. *Ghasi Ram,* A.I.R. 1927 All. 563=49 All. 812." See also *Smyam Lall* v. *Parshottam,* 58 Ind.Cas. 585= 18 A.L.J. 241=42 All. 277 ; *Ganga Singh* v. *Jitwar,* A.I.R. 1935 All. 1014 =159 Ind.Cas. 441.

According to Madras High Court an award that is invalid under the law governing minors, as where it is passed on a reference out of court without the minor being duly represented, comes within the expression "or otherwise invalid" in para. 15 (*c*) of Schedule II, Civil Procedure Code, and the court can, for that reason, set aside the award. *Lakshminarayan* v. *Ramchandra,* 45 Ind.Cas. 763=34 M.L.J. 71=23 M.L.T. 89. Paras 14 and 15 of the Schedule II of Civil Procedure Code enable the court to which an award is submitted to reference to give effect to the award if in its opinion it is either void, or invalid or illegal. *Radhey Lal* v. *Kanhai Lal,* 18 Pat. 193=(1939) P.W.N. 581=A.I.R. 1939 Pat. 526. Now it seems that legislature in accepting the majority view have rearranged the clause. Clause (*c*) states that an award may be set aside on the ground that an award has been improperly procured or is otherwise invalid.

1303. **Party to award can challenge validity of reference in appropriate proceedings.**— Where there is no valid reference to arbitration the award passed would itself be a nullity. Consequently a party to an award can challenge the validity of the reference in any appropriate proceedings apart from the provisions of s. 30, Arbitration Act, which has no application to such a case. *Shekrullah* v. *Rahamat,* A.I.R. 1947 All. 304. See also, *Chhaslal Ali* v. *Kallu Lal,* 1946 A.L.J. 254=A.I.R. 1946 All. 72=73 I.A. 52=I.L.R. (1946) All. 193=223 Ind.Cas. 567 ; *Mariam* v. *Amiva,* 1936 A.L.J. 1333=A.I.R. 1937 All 65=I.L.R. (1937) All. 317=167 Ind.Cas. 99 (F.B.). In the above case it has been held that the word "suit" in s. 2 has the more technical

and restricted meaning of a proceedings instituted in a court of first instance by a plaint or in such other manner as may be prescribed. In other words "Court" for the purpose of Arbitration Act means a Civil Court having jurisdiction to decide, as a suit, the question forming the subject-matter of the suit. This is not a power possessed by an appellate court as such, and therefore, an appellate court is not competent to make a reference to arbitration under s. 23. *Shuk Rulla* v. *Rahamat Bibi, supra.* Where there is no contrary intention expressed relying on which, it is not open to the party to resile from or revoke the reference, the reference is irrevokable unless the bear of the court is taken. *Dulan* v. *Rajendra,* A.I.R. 1959 All. 710.

1304. Sections 30 and 32.—Whereas s. 30 deals with the grounds on which an award can be set aside, section 33 is the procedural section which lays down the procedure to be followed in taking an application either for the purpose of setting aside an award or for purpose of setting aside an arbitration agreement. It is futile to attach importance to the fact that s. 33 does not in terms refer to an application to set aside an award. But when a party makes an application challenging an award the result of the challenging if successful must be the setting aside of the award. *Savkur* v. *Amritlal,* A.I.R. 1954 Bom. 293. Section 30 does not deal with applications to set aside an award at all. It deals with powers of the court when an application is made to set aside an award. But when a court wants to decide what is the right of a party to apply to set aside an award and what procedure he should follow, then the court has got to turn to s. 33. Thus the Arbitration Act, contemplates only to one application to set aside an award and to such an application Art. 158 of the Limitation Act applies. *Ibid.* ; see also *Hartimal* v. *Hiralal,* A.I.R. 1954 Bom. 243. A court has no jurisdiction to condone delay which a party may make in filing an application under s. 33, as section 5 of the Limitation Act has not been made applicable. A.I.R. 1954 Bom. 243. If the award directs a party to do an act which is prohibited by law or if it is otherwise patently illegal or void it would be open to the court to consider this patent defect in the award *suo motu,* and when the court acts *suo motu* no question of limitation prescribed by Art. 158 can arise, *Ibid.* see also *Russell* 15th Edn., p. 263. But see *Umadutt* v. *Chandrao,* A.I.R. 1957 Bom. 94=48 Bom.L.R. 675. An application under s. 30 is not maintainable on the ground that there is no valid reference or no reference at all and consequently the arbitrators had no jurisdiction to make the award. The proper application to make in such a case would be an application under s. 33. The award in such a case cannot be said to be "otherwise invalid" or "improperly procured." *Shah* v. *Ishar,* A.I.R. 1954 Cal. 164 referred to Full Bench reported in A.I.R. 1956 Cal 321=60 C.W.N. 471 (F.B.) ; but see *Nenuram* v. *Ram Chander,* 9 D.L.R. Ajmer. 11 ; *Gaja Sinva* v. *Sujat* Ali, 9 D.L.R. Hyder 15.

1305. Award not executable for want of registration—Setting aside of.—Failure to register an award which requires to be registered under s. 17 (1) (*b*) of the Registration Act, is not a ground upon which it can be set aside. As execution cannot be proved upon the unregistered award, the court has power to order its removal from its file. *Anandi Lal* v. *Keshadeo,* I.L.R. (1945) 2 Cal. 526=A.I.R. 1949 Cal. 459.

1306. Portion of award void.—If notwithstanding some portion of an award is void, the remaining part contains a final and certain determination of every question submitted, the valid portion may frequently

be maintained and void part rejected, *Anandilal* v. *Keshabdeo*, A.I.R. 1949 Cal. 549 ; *Stone* v. *Philips*, (1837) 4 Bing. N.C. 37=7 L.L.J. N.S. C.P, 54=44 R.R. 645=6 Dowl. 247 ; *Russell*, 15th Edn., 268. The bad portion, however, must be clearly separable in their nature in order that the award may be good for the residue. *Anandilal* v. *Keshablal, supra ; Thirumalai* v. *Nanjappa*, A.I.R. 1947 Mad. 266, *Tandy* v. *Tandy*, (1841) 9 Dowl. 1044=61 R.R. 845 ; *Auriol* v. *Smith*, (1829) 1 *Turn* & R. 121 When it is so separable only the faulty direction will alone be set aside. *Caledonian Ry.* v. *Lockhart*, (1860) 3 Maq. 808. *Prestige & Cor., Ltd.* v. *Brettel*, (1938) 4 All. E.R. 346=55 T.L.R. 59. If the bad portion of the award is not separable from the valid portion in that case the award will be altogether avoided. *Bowes* v. *Fernie* ,1938) 9 My. & Co. 150 ; *Bucclench* v. *Metropolitan Board Works* (1870) L. S. Ex. 221 ; *Chiman Lal* v. *Dayabhai*, A.I.R. 1938 Bom. 422=177 Ind.Cas. 211 ; *Anandilal* v. *Keshab Deo, supra ; Ch. Bachchanlal* v. *Norottam Dutt*, A.I.R. 1933 All. 59=143 Ind.Cas. 423. It does not appear why if the reference and the award consists of distinct and several parts, the valid portion should not be upheld. *Chidambaram* v. *Subramanian*, A.I.R. 1953 Mad. 492=(1952) 2 M.L.J. 524.

1307. Two separate awards as contemplated by the bye-laws of the Association.—A seller and buyer under certain contracts who were members of Yarn Merchants' Association referred five contracts to arbitration of two arbitrators. The arbitrators agreed regarding two contracts but disagreed regarding the remaining three contracts. The arbitrators made two awards, (1) with respect to the two contracts on which they agreed and (2) respecting the three contracts on which they disagreed. The matters relating to the three contracts where there had been disagreement were referred for decision to the umpire. The terms upon which the reference to arbitration was made were contained in the Associations' arbitration bye-laws one of which provided that the arbitrators or umpire should have power to make an interim award or awards. The umpire made an award regarding the three contracts referred to him. An application was made under S. 30 for setting aside the award on the ground that the umpire was wrong in taking up the reference with regard to the three contracts alone and should have taken cognizance of the whole of the matters of the arbitration including the other two contracts. *Held*, that the award which the arbitrators made relating to the subjects upon which they disagreed was an interim award as contemplated by the bye-law of the Association. That having been made, the arbitrator proceeded to make another award reflecting their differences which required consideration by the umpire. In these circumstances it is quite unnecessary for the matters upon which the arbitrators had agreed to be referred to the umpire. Hence the award could not be set aside on the ground that the umpire did not take up all matters. *Ratha Krishna Murty* v. *Chengalraya*, 1948 M.L.J. 164=A.I.R. 1948 Mad. 365=61 L.W. 157.

1308. Dismissal of application for revision—Bar of fresh application under this section.—From a decree passed on an award, an application in revision is filed. This application was dismissed. The applicant then filed an application in the lower Court purporting to be one under Ss. 30 and 31. In this application he sought to reagitate the matters which he had raised in the revision application. *Held*, that he could not do so. *Mahideen* v. *Pathuma*, A.I.R. 1947 Mad. 410.

1309. Objection to award—Question of fact raised in High Court.—The question whether a person was or was not allowed

inspection of the books of account and that the arbitrators did not take into consideration the alleged false entries made by the respondent or that the arbitrators did not allow the applicant to place his case properly are questions of fact. *United Printing* v. *Kishore Lal,* A.I.R. 1956 Cal. 593=97 Cal.L.J. 267 ; 98 Cal.L.J. 73.

1310. Misconduct—Commercial arbitration—Award in violation of natural justice.—Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted. An award obtained in violation of the rules of natural justice even where there is no breach of the agreed procedure would be set aside on the grounds of public policy, as for instance, where an arbitrator manifested obvious bias too late for an application for his removal to be effective before he made his award.

If there is an express term in the arbitration agreement authorising the particular procedure impugned the court will not set aside the award except upon the grounds of public policy, which may include violation of the rules of natural justice. Where there is no express written term relating to the point of procedure impugned, the court has to ascertain the term to be implied, which it does from the language the parties have used, in their written agreement, the provisions of the Arbitration Act, the surrounding circumstances, and particularly any custom or trade practice which must be taken to be incorporated in their agreement. A custom or trade practice is not, however, to be incorporated in an agreement if it is unreasonable.

It is misconduct for an arbitrator to hear evidence or receive argument on behalf of one party in the absence of the other ; the court will not imply a term permitting him to do so ; and where evidence or argument is so received it is immaterial whether it in fact affected the arbitrator's decision. The rule that an arbitrator must not receive evidence or argument in the absence of one of the parties, whether it be regarded as misconduct or as a term to be implied in the arbitration agreement, applies even to evidence or agreement given, not on behalf of either of the parties but by a disinterested stranger.

If parties or their arbitrators have selected an umpire, presumably because they have confidence in his expert knowledge and independence, there is nothing unreasonable, in their agreeing that the tribunal to whom they appeal for his decision may consult him without the parties being present, thus in effect making him an advisory but non-voting member of the tribunal of appeal.

A custom or trade practice may be excluded by the express terms of the contract or by necessary implication from those express terms. *London Export Corporation* v. *Jubilee Coffee,* (1958) 1 W.L.R. 271 digested in *Madras Law Journal, Digest* 1958 pp. 44, 45.

1311. Misconduct or not—Illustrative cases.—Normally the court is not concerned with the merits of the decision given by the arbitrators (1861) 5 L.T. 507. It is open to them to accept the story of plaintiff or defendant and on that ground an award cannot be set aside as being perverse. *Tikaram* v. *Hansraj,* I.L.R. (1954) Nag. 589=1954 Nag.L.J. 204=A.I.R. 1954 Nag. 241. An arbitrator who has given notice of the

proceeding to the parties is entitled to proceed *ex parte* if one does not choose to appear. A second notice that he would proceed *ex parte* is not necessary. *Dovilal* v. *Lall,* A.I.R. 1954 All. 244=1953 A.L.J. 670. It is the fundamental principle of natural justice that arbitrators who are enjoined to act jointly must act together. *Chagan Lal* v. *Weevan Lal,* A.I.R. 1954 Nag. 263=I.L.R. (1954) Nag. 581=1954 Nag.L.J. 556. Because under the terms of the arbitration agreement it is open to the arbitrators to decide the case without examining any it does not follow that when they consider it necessary to take the statements of parties or witnesses for the disposal of the case, they are free to take statements in the absence of any of the parties. Taking evidence of parties or their witnesses behind the back of the other parties amounts to misconduct. *Tikaram* v. *Hansraj,* I.L.R. (1954) Nag. 589. While the arbitrator must give a specific finding on each of the separate claims referred to him, he need not give a specific finding on each of the issues necessary for the just decision of a particular claim. Failure to do so will not, therefore, amount to misconduct. *Gulab Chand* v. *Chamber,* A.I.R. 1954 Ajmir 21. Arbitrators occupying a *quasi-judicial* position, which they do, ask for information during the conduct of the proceeding from third parties without any reference to the parties before them, and if they do so, such a conduct on their part would amount to misconduct, even apart from any other consideration. Though the strict rules of evidence are not applicable to arbitration proceedings ; there is a thing known as natural justice and it would be repugnant to the fundamental conception of natural justice that evidence should be allowed to go in without calling the person whose evidence is admitted, and without allowing the parties to test such evidence by cross-examination. *Hysein* v. *Kisardeo,* A.I.R. 1954 Cal. 111=92 C.L.J. 224. Verbal notice by arbitrators to party of the arbitrations of proceeding before them is sufficient. *Gorumurthy* v. *Narasimha,* A.I.R. 1954 Orissa 234.

If an award is given in regard to the subject-matter of the suit itself, which is clearly separate and severable from the other matters decided in the award, there is no reason why the award shall not be upheld to the extent that it relates to the subject-matter of the suit. If, however, the pronouncement of the arbitrators is such that matters beyond the scope of suit are inextricably bound up with matters falling within the purview of the litigation, the court would be unable to give effect to the award. *Dasuram* v. *Balchand,* A.I.R. 1957. Assam 165 ; see also, A.I.R. 1914 P.C. 105=27 M.L.J. 181. A valid award made by an arbitrator on reference under S. 86 of Bengal Co-operative Societies Act operates to extinguish and merge the claims and dispute referred to arbitration and is final and binding upon the parties. On the making of the award the arbitrator becomes *functus officio* and has no jurisdiction to entertain a second reference thereon. The second award made on such a reference is without jurisdiction and is a nullity. *Nalini Mohan* v. *Malda Co-operative,* 60 C.W.N. 572=97 C.L.J. 146=A.I.R. 1957 Cal. 23.

The partiality of one of the two arbitrators cannot vitiate the award when the award is not made by the arbitrators at all but is made by an independent umpire to whom the matter has been referred for decision on a difference of opinion between two arbitrators who did not express any view in writing except stating that they have disagreed. *N. F. Insurance* v. *Union of India,* A.I.R. 1956 Cal. 11.

Order 7, Rule 7, Civil Procedure enjoins that where the plaintiff seeks recovery of money, the plaintiff must state the precise amount claimed. The Arbitrators however, are not bound by this technical rule of pleading. But where no specific sum is claimed and the particulars of the claim are not given in statement the arbitrators may be guilty of misconduct if they make an award for a definite sum of money without calling for particulars of the claim and without giving opportunity to the other party to meet the specific case. *Jukgilal* v. *International,* 59 C.W.N. 730=A.I.R. 1955 Cal. 65.

Even if a party to an arbitration agreement does not succeed in establishing personal turpitude on the part of the arbitrators, yet if he establishes that there was such a "mishandling of the arbitration" as to result in substantial miscarriage of justice the court shall set aside the award. *Sheodutt* v. *Pandit,* A.I.R. 1955 Nag. 116=I.L.R. (1955) Nag. 224=1955 Nag.L.J. 258 (D.B.) relying on (1914) 2 K.B. 478 (485). Even though the arbitrators are not bound to meticulously copy the procedure of a court, yet they are not free to depart from the rule that no enquiry into the case should be undertaken behind the back of the party. *Sheodutt* v. *Pandit, supra.* Where one out of the five arbitrators dominates the proceeding and takes undue advantage of the two illiterate arbitrators, and all the arbitrators do not jointly deliberate in the proceedings or in the making of the award, the whole award becomes vitiated. *Ibid.* When award is jointly given by all the arbitrators but after it some only altered it by addition of material portion, the award is void if the addition is material and inseparable portion of the award. *Ibid.*

It is no misconduct on the part of arbitrators appointed to make partition of the properties of the parties where they did not decide the *thika* rights in the village held jointly by the parties. *Misri Lal* v. *Bhagwati Prosad,* A.I.R. 1955 All. 573.

Merely calling upon one of the parties to appear on any date, so that he may be informed about what he has to do next time would not constitute that misconduct which would entitle a court to throw out he entire award. *Chouthmal* v. *Ram Chandra,* A.I.R. 1955 Nag. 126=I.L.R (1955) Nag. 100.

A court will not set aside an award merely because the arbitrator have taken advice from a counsel where there is nothing to show that it was irregular. Advice from counsel can certainly be taken on matters on which the arbitrators find themselve at a loss in view of the complexities of the law. *Ibid.* See also, A.I.R. 1931 P.C. 289; 3 I.A. 209; (1888) 13 A.C. 770. Where the arbitrators were putting up at the house of one of the parties to the arbitration which enabled them to enter a private conference on an important topic with that party to the exclusion of the others, it has been held that this constituted misconduct which would entitle the court to refuse to accept the award. *Chouthmal* v. *Ram Chandra, (supra).*

Where parties to a dispute have chosen an arbitrator and have agreed to refer the matter in dispute to him. Whether on facts or law any award given by him is binding on the parties provided he has applied his mind to the matters in dispute and has applied the principles of natural justice in arriving at his conclusion. The court will not interfere with any finding of an arbitrator merely because they would

have come to a different conclusion upon the materials on record or because the arbitrator has taken an erroneous view of the law with respect to any point referred to him for adjudication. But where an arbitrator has been chosen by reason of his skill or technical knowledge for the determination of disputes, which require from him the exercise of that skill and technical knowledge which he as a technical man is expected to give, it will be incumbent upon the arbitrator to arrive at a conclusion after reasonable exercise of that skill and ability. *Amar Chand* v. *Mooshabhai,* I.L.R. (1954) Hyd. 677=A.I.R. 1955 Hyd. 213.

It is true that the Arbitration Act does not provide for the procedure to be followed by the arbitrators. Even so it is well settled that the arbitrators are bound to apply the principles of natural justice. One of those principles is that nothing prejudicial to a party shall be done behind his book or without notice to that party. Therefore, by accepting entries in the account books which were disputed by a party, after examining the account books behind his back, the arbitrators contravenes the principle of natural justice and are guilty of legal misconduct. *Sahasrabudhe* v. *Gadre,* 1958 Nag.L.J. 333=A.I.R. 1959 Bom. 39. In deciding as to the admissibility of evidence tendered, the arbitrator must act honestly and judicially, and, if while so acting, he decides erroneously that evidence is or not admissible, that is not in itself a misconduct, and, as with other mistakes, his award will not be set aside on that ground, unless the error appears on its face. *Velore Electric* v. *State,* 72 M.L.W. 307=(1959) 1 M.L.J. 318.

It is judicial misconduct on the part of the arbitrators where they give direction in their award touching the persons who are not parties before them or on subject-matter not referred to them. But if there are portions in the award which are within the jurisdiction and which are beyond its jurisdiction and they are separate, then the court can ignore the portion which was without jurisdiction and pass a decree in terms of the award which is within the jurisdiction of the arbitrators. *Dulari* v. *Rajendra,* A.I.R. 1958 All. 711. When the price is fixed for the goods by agreement between the parties is superseded by a notification issued by the Central Government fixing a ceiling price lower than the contract price. *Held,* that the controlled price would govern the contract and it would be a misconduct on the part of the arbitrator to award damages at the contract rate to the party supplying goods. *Devikanandan & Co.* v. *Union of India,* A.I.R. 1961 Punj. 136=63 Punj. L.R. 134.

1312. Clause (c)—Illustrative cases.—The principle of proper representation has been applied by courts to arbitration proceedings though there is no definite rule or provision compelling such representation. On an insolvency the entire property vests in the Receiver. It is therefore incumbent upon the parties before the arbitrator to give notice to the Official Receiver, when one of the parties is adjudged an insolvent pending the arbitration. Where in an arbitration upon reference in suit admittedly the plaintiff has knowledge of the insolvency of one of the defendants but does not take any steps to bring the Official Receiver on record and allows the award to be made behind his book the award cannot bind the Official Receiver. This is specially so in a partnership action. The argument that the Official Receiver would not be prejudiced as he could raise all the contentions open to him before the court made a decree on the award has no merits because it does not take into consideration the scope of enquiry before the court after the award is filed. The

Official Receiver can seek to set aside the award only on specified grounds. He cannot either plead or attempt to prove that the award was wrong on facts and was not supported by the evidence in the case. *Thonapaau* v. *Kothamsan,* I.L.R. (1954) Mad. 65=67 Mad.L.W. 79=1954 Mad. W.N. 70 =(1954) 1 M.L.J. 287, (D.B.) In contracts with Military Department agreement to refer disputes to arbitration of military officer, the arbitrator cannot be said to have secret interest in subject-matter of submission or in any party. *Commander* v. *Armugam,* I.L.R. (1953) Mys. 480= A.I.R. 1954 Mys. 46.

Where an error, whether of fact or law appears on the face of an award, the award will be remitted or set aside unless the error is immaterial to the decision. The rule will not, however, be applied where the parties have specifically referred the question of law to arbitrators. Thus where an umpire reopens a matter which had been concluded between the parties by the award of the previous umpire which the party had accepted without challenge, and coming to the conclusion that the previous umpire was wrong, bases his own award on his own contrary conclusion, the umpire commits an error patent on the face of the record which justifies setting of the award. *Union of India* v. *Allied Trading,* A.I.R. 1956 Punj. 7.

An appointment of arbitrator or arbitrators according to the Rule VI of the Tribunal of Arbitration of the Bengal Chamber of Commerce is not an invalid appointment and an award given by them is not invalid. *Rajputana Trading* v. *Jute and Gunny Brokers,* 94 Cal. L.J. 123=A.I.R. 1955 Cal. 335.

Where a party to an arbitration having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on and allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself it is too late for him after the award has made, and on the application to file the award, to insist on that objection to the filing of the award. *Chouthmal* v. *Ramchandra,* I.L.R. (1955) Nag. 100=A.I.R. 1955 Nag. 126.

The arbitration agreement furnishes as the source and prescribe the limits of authority of the arbitrator, and the award, both in substance and form must conform with the submission. Manifestly, therefore, where the arbitrator misdirects himself and exceeds the scope of his authority, the award cannot be sustained. Anything done by the arbitrator beyond the terms of reference would be without jurisdiction whether it be called misconduct or not. He is not at liberty to proceed to arbitrate on something not covered by the agreement or terms of reference. *Indian Mineral* v. *Northern India Lime,* A.I.R. 1958 All. 692. Where arbitrators decide matters outside the reference, the award is invalid. *Srimar Chemical* v. *Union,* A.I.R. 1958 Him.Pra. 20.

Where the parties have imported into this contract the arbitration clause as provided for the members of the Hyderabad Stock Exchange, the rules of the Stock Exchange are as much binding on the contracting non-member as they are on a member and equally binding on those who derive authority thereunder. They cannot be therefore contravened without affecting the binding authority of the arbitration. An award is not valid if an arbitrator has been appointed in contravention of these Rules.

Chinoy v. *Aujiah,* (1958) 2 Andh.W.R. 69=I.L.R. (1958) Andh.Pra. 243 =A.I.R. 1958 Andh.Pra. 384.

The mere fact that the arbitrators had erred in law can be no ground for interference. An arbitrator is regarded as the sole and final judge on all matters whether of fact or of law and it may be taken to be settled law that the error of law, if any should be apparent on the face of the award to justify any interference by court. *Venkata Raw* v. *Rao,* I.L.R. (1957) Andh.Pra. 418=A.I.R. 1958 Andhra Pra. 740. Whether the arbitrators through an error of judgment allotted a large portion to one of the parties without considering the value of the land it cannot be a ground for setting aside an award under S. 30. *Ibid.* It is not open to a court to go into the ground which are taken into consideration by the arbitrator in partitioning the property. It is always open to an arbitrator to compensate one party by awarding him compensation if he finds that immovable property cannot be properly divided without inconvenience to them. *Bhagwandin* v. *Bisheswar,* 1958 All.L.J. 307=A.I.R. 1958 All. 568= (1958) All.W.R. (H.C.) 479. If the parties to whom notice to produce evidence was given do not choose to give evidence, it is not the fault of the arbitrators; nor can it be said then that the proceedings were misconducted when the arbitrators gave their award on the finding they arrived at on the material on record. *Ram Krishnamma* v. *Lakshmibayamma,* 1958 Andh.L.T. 338=I.L.R. (1958) Andh.Pra. 166=A.I.R. 1958 Andh.Pra. 497=(1958) 2 Adh.W.R. 90.

Where there is an express term in the agreement for arbitration to the effect that the arbitrators should appoint an umpire before entering upon the reference, the provisions of cl. 2 of the First Schedule will not be attracted and the matter would be governed by that term. If the condition is not satisfied the award given by the arbitrators is invalid. *Sahashrabudhe* v. *Gadre,* 1958 Nag.L.J. 333=1959 Bom. 39. Section 48 of the Partnership Act lays down the rules for the settlement of accounts between the partners. The right of partner to have the partnership assets applied in payment of the debts and liabilities is provided for in S. 46 of the Act. This right of a partner is as against the other partners. If there is any violation of this right, the aggrieved partner is entitled to complain and not other. The aggrieved partner may not insist on this right and agree to the allotment of all the assets of the partnership to the other partner before the debts due to the third partner are paid off. The right may be waived by the aggrieved partner. It is not open to any party other than the aggrieved party, far less the party to whom the entire assets have been allotted, to challenge a decree or award as being otherwise invalid, on the ground that the decree or award does not provide for payment of the partnership debt out of the partnership assets. *Padmabati* v. *Pannalal,* A.I.R. 1959 Cal. 156.

A rule which merely enables a dispute to be settled in a particular way (*e.g.,* by arbitration) does not itself, restrain any one. It is not until the award is made that any one can be restrained and possibly neither party may be. If anything restrains any one it is the award, and not the contract or rule which merely prescribe arbitration as the means of obtaining it. *Co-operative Society* v. *Windy,* (1959) 2 W.L.R. 415.

Where two previous awards not filed in court by respondent nor judgment obtained thereon and where the present award determines liability of the parties, there is no ground for setting aside the award in dispute. *Pushraj* v. *Clive Mills,* A.I.R. 1960 Cal. 180.

1313. Objection to award—Limitation.—Act 158 requires that any application for the setting aside of an award or for having it remitted for reconsideration should be made with 30 days of the service of notice of the filing of the award. *Mahomed* v. *Subramanyam,* A.I.R. 1957 Mys. 78. The circumstance that on the date on which the counsel filed a *vakalatnama,* the court granted time to file objection would not save limitation, if the objection were filed beyond limitation. *Ibid.*; see also *Basanta Lal* v. *Surendra Prosad,* 1957 B.L.J.R. 94=A.I.R. 1957 Pat. 417=I.L.R. 36 Pat. 57. If a party wishes to avoid the effect of the agreement or award, he must strictly comply with the provisions of law. *Kawal Singh* v. *Baldeo,* 1957 M.P.L.J. 387 and 713=I.L.R. (1956) Nag. 680=A.I.R. 1957 Nag. 57.

1314. S. 30, Sch. 1, cl. 2.—Under cl. 2 of Schedule I of the Arbitration Act an umpire can only be appointed if there are even number of arbitrators and the arbitrators themselves would appoint him as an umpire. Where the reference is to three arbitrators, actually appointed by the parties and one of them is called the *Sarpanch* who is in the position of a chairman, he is not an umpire as contemplated under the Schedule I of the Act. *Dulari* v. *Rajendra,* A.I.R. 1959 All. 711.

31. (*1*) *Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.*

Jurisdiction.

(2) *Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.*

(3) *All applications regarding the conduct of arbitration proccedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.*

(4) *Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.*

1315. N.B.—This section is new and has been enacted according to the recommendation of the Civil Justice Committee's Report which runs as follows : "What seems to be most required is that in the case of every arbitration one court and one only should be the forum in which all questions relating to the validity of the award should be finally determined."—*Report of the Civil Justice Committee,* para. 13.

1316. Scope of the section.—This section deals with jurisdiction.

It provides that all matters relating to a single reference shall be before the same court, and that where there is a choice of forum *it shall be determined by the first application* made to a court in relation to a reference.—*Notes on Clauses* ; see also *Bengal Jute Mills* v. *Jewraj*, I.L.R. (1943) 2 Cal. 392 = A.I.R. 1944 Cal. 304 ; *Deoki Nandan* v. *Basant Lal*, A.I.R. 1941 Cal. 257 = I L.R. (1941) 2 Cal. 12 = 196 Ind.Cas. 351 ; *Rashid* v. *Moolchand*, A.I.R. 1945 Mad. 271 ; *Satyanarain* v. *Venkata*, A.I.R. 1948 Mad.436. This section is not an enabling section. *Ibid.* This section provides a special procedure for filing awards in matters referred to arbitration without the intervention of courts and to have decrees passed according to the award. Filing awards under para. 20 of Schedule II, Civil Procedure Code was only an extra and special statutory right conferred on parties under particular conditions imposed by that paragraph. The provisions in para. 20 did not constitute any bar to a regular suit to enforce the right created by an award. *Krishna Iyer* v. *Subbamal Iyer*, A.I.R. 1932 Mad. 462 = (1932) M.W.N. 234 = 62 M.L.J. 550 = 35 M.L.W. 565 = 55 Mad. 689 = 139 Ind.Cas. 877. "Section 31 deals with jurisdiction. Sub-section (1) deals with the forum for filing awards. Sub-section (2) provides that all questions relating to the validity, effect or existence of an award or an arbitration agreement shall be decided by the court in which an award under the agreement has been or may be filed and by no other court. Sub-section (3) states that an application relating to the conduct of the arbitration proceeding shall be made to such court. Sub-section (4) makes it clear that that court alone shall have jurisdiction over the arbitration proceedings and all subsequent application arising out of a reference and the arbitration proceedings shall be made in that court and in no other." *Per Chatterjee, J.* in *Bajrang* v. *Agarwal*, A.I.R. 1950 Cal. 267. See also *Pratab* v. *Bechan*, (1940) R.D. 20 = (1940) A.W.R. (B.P.) 16. Sub-section (4) refers to arbitration made under the express provision of the Act and does not refer to application made under Civil Procedure Code and S. 43 (1) of the Act, so an application by arbitrator that parties be informed that the arbitrators will enquire into the disputes on certain date and that parties if advised may summon witnesses on certain date is not an application under the Act. *Fatehchand* v. *Motiram*, 55 P.L.R. 65 = A.I.R. 1953 Punj. 105. So now under this Act an award must be filed in court (*Vide* S. 14) and the court is to pronounce judgment according to the award if not objected and upon the judgment so pronounced a decree shall follow (*Vide* S. 17). A simple award is not enforceable either by suit or by execution. *The old cases to this effect have been made obsolete by the new Act. It is now very important that an award should be filed.* Findings of arbitrator not controverted by evidence on behalf of the party challenging must be taken to be correct. *Chidambaran* v. *Subramania*, (1952) 2 M.L.J. 524 = 65 Mad.L.W. 980 = A.I.R. 1953 Mad. 492.

1317. Section 14 and 13—Scope of—Supreme Court's decision. —In *Kumbha Mawji* v. *Dominion of India*, A.I.R. 1953 S.C. 313 = (1953) S.C.J. 438 = (1953) 1 M.L.J. 841 = 1953 M.W.N. 609 = 1953 S.C.R. 878, the the awards were filed in the Gauhati Court as well as in the original side of the Calcutta High Court. In the above case the following 3 questions were decided by their Lordships of the Supreme Court, namely : (1) Whether the appellant had the authority of the umpire to file the award on his behalf into court in terms of S. 14 (2) the Arbitration Act ; (2) whether in view of Sub-section (3) of S. 31 of the Act it can be said that

the awards were filed in the Calcutta High Court earlier than in the Gauhati Court and (3) whether the scope of S. 31, sub-section (4) of the Act is limited to applications under the Act during the pendency of the Arbitration proceedings only. As regards the first point the Supreme Court *held* that under S. 14 (2), the actual filing by the umpire is not essential, it is sufficient if the umpire causes the award to be filed. Where in response to a notice issued to him by the court, the umpire forwards to the court the award by post, there is sufficient compliance with S. 14(2). Section 14 (2) clearly implies that where the award or a signed copy thereof is in fact filed into court by a party he should have the authority of the umpire for doing so. Where the copies of the award are handed over by the umpire to both the parties, it cannot be assumed that the mere handing over the awards necessarily implies the authority of the umpire to file the same into court on his behalf. The authority is to be specifically alleged and proved. In the absence of such an authority, filing of the award by the party cannot be the filing by the umpire.

As regards second question the Supreme Court observed : "As regards the second question, namely, as to whether with reference to the terms of S 31, sub-section (3) the awards should be held to have been filed earlier in Calcutta Court or in Gauhati Court, the view taken by the learned Commercial Judge was that the filing in the Calcutta Court must be taken to have been earlier. For the purpose of the consideration of this question it may be assumed that that filing was under the authority of the umpire. The learned judge was of the opinion that filing of the awards in the Gauhati Court, must be taken to have been made on 3rd September when in pursuance of the prior order of the Subordinate Judge dated 24th August, 1940, the present respondent filed into Court the original awards with him. In coming to this conclusion the learned Judge ignored the fact that on 18th August, 1949 the umpire in response to the notice previously issued to him forwarded to the court signed copies of the awards and that the same were in that court on or before 24th August, 1949. This seems in terms, to be sufficient compliance with the provisions of S. 14, subsection (2) which only requires that on the directions of the court the original award or the copy thereof should be caused by the umpire to be filed into it. The learned Judge stated that he was not aware whether the copies sent to the subordinate Judge were signed copies or not. The learned Judge failed unfortunately to notice that the umpire himself in his letter dated 18th August, 1949 stated clearly as follows : 'As directed by you I am sending herewith copies of the same (awards) signed by me.' The learned Judge was also inclined to think that the mere forwarding of the awards does not amount to the filing of them. Here again, the learned Judge has overlooked that under S. 14, sub-section (2) the actual filing by the umpire is not essential, but that it is sufficient if the umpire causes the awards to be filed. It is not suggested that sending by post in complaince with the notice is not such 'causing.'

"It appears to us, therefore, clear that the filing of the awards in the Gauhati Court must be taken to be on 24th August, 1949. So far as the Calcutta Court is concerned, though no doubt the awards were put into that court by the appellant's solicitor on 17th August, 1949, it appears clearly from the notes issued by the Registrar dated 30th August, 1949, that the awards were treated as filed only on 29th August, 1949. Paragraphs 8 and 9 of the respondents' affidavit filed in the Calcutta Court on 24th November, 1949, contain categorical assertions that so

far as the Gauhati Court is concerned, the copies of the awards were filed by the umpire on 24th August 1949, while as regards the Calcutta High Court the awards were filed on 29th August, 1949. These assertions have not been contradicted on behalf of the appellant in the counter affidavit filed on the same day. From these facts it is clear that the earlier filing for this purpose of S. 31 (3) is in Gauhati Court and not in Calcutta High Court as *held* by the learned Judge under an erroneous impression as to facts.....

"The third question which remains for consideration is whether sub-section (4) of S. 31, Arbitration Act of 1940, applies only where the first application under the Act was made during the course of pendency of a reference to arbitration or also to a case like the present one where such first application is made after the completion of the arbitration and on the making of an award. As already stated, the learned Judge on appeal did not deal with the question. The trial Judge, however, considered the matter, and *held* that the above provision related only to an application made during the pendency of a reference to arbitration.....Apparently the learned Judge construed the phrase 'in a reference' in S. 31, sub-section (4) as meaning 'in the course of reference' and that is also the contention before us of the counsel for the appellant, which requires close examination.....

"Sub-section (1) relates to the question as to where a completed award has to be filed, and prescribes the local jurisdiction for that purpose. Sub-section (2) deals with the ambit of the exercise of that jurisdiction and declares it to be exclusive.....Sub-section (3) is intended to provide that all applications regarding the conduct of the arbitration proceedings or otherwise arising out of such proceedings are to be made only in one court, and lays on the concerned party the obligation to do so. Then comes sub-section (4), the object of which apparently is to go further than sub-section (3), that is, not merely casting on the party concerned an obligation to file all applications in one court but vesting exclusive jurisdiction for such application in the court in which the first application has already been made.

"Thus it will be seen on a comprehensive view of S. 31 that while the sub-section determines the jurisdiction of the court in which an award can be filed, sub-sections (2), (3) and (4) are intended to make that jurisdiction effective in three different ways, (1) by vesting in one court the authority to deal with all questions regarding the validity, effect or existence of an award or an arbitration agreement, (2) by casting on the persons concerned the obligation to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in one court and (3) by vesting exclusive jurisdiction in the court in which the first application relating to the matter is filed. *The context therefore of sub-section (4) would seem to indicate that the sub-section was not meant to be confined to applications made during the pendency of an arbitration.* The necessity for clothing a single court with effective and exclusive jurisdiction and to bring about by the combined operation of these three provisions the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced. There is no conceivable reason why the Legislature should have intended to confine the operation of sub-section (4) only to applications made during the pendency of an arbitration, if as it contended, the phrase 'in any reference' is to be taken as meaning 'in the course of a reference.'

"It may be noticed that the Arbitration Act deals with arbitration of three different categories (1) arbitration without intervention of the court, dealt with in Ss. 3 to 19 comprising Chapter II. (2) an arbitration with the intervention of the court where there is no suit pending provided in S. 20 which is a separate Chapter III ; and (3) arbitration in suits dealt with in Ss. 21 to 25 comprising Chapter IV. The jurisdiction as regards the latter two classes of arbitrations in respect of certain matter is provided in the very provisions relating to those two classes of arbitrations, that is S. 20, sub-section (1) and section 21. Sub-section (1) of S. 31 appears to refer only to the first class. It may, therefore, have been possibly suggested that sub-sections (2), (3) and (4) refer only to this class. But no such position has been taken before us. Indeed, having regard to the wide language employed in these sub-sections it has been assumed that sub-sections (2) and (3) cover all three classes in all thier stages. If so, is there any sufficient reason to think that sub-section (4) was meant to have a very restricted operation ? On the view of this sub-section suggested for the appellant, not only would an application made after the award was pronounced be excluded from sub-section (4) but also an application made before the commencement of the arbitration *i.e.*, for the filing of an agreement of reference and for a direction thereupon. It must be remembered that S. 31 is one of the group of sections headed 'General' which by virtue of S. 26 are applicable to all arbitrations. Unless therefore the wording in sub-section (4) of section 31 is so compelling as to confine the scope thereof to applications during the pendency of an arbitratin, such a limited construction must be rejected.

"As already stated, the entire basis of the limited construction is the meaning of the phrase 'in any reference' used in sub-section (4) as meaning 'in the course of any reference.' But such a connotation thereof is not in any ordinary sense compelling. The preposition 'in' is used in various contexts and is capable of conveying various shades of meaning. In the Oxford English Dictionary one of the shades of meaning of this preposition is :

Expressing reference or relation to something ; in reference or regard to : in the case of, in the matter, affairs, or province of..

Used especially with the sphere or department in relation or reference to which an attribute or quality is predicated.

'In the context of S. 31, sub-section (4), it is resonable to think that the phrase "in any reference' means 'in the matter of a reference.' The word 'reference' having been defined in the Act as 'reference to arbitration,' the phrase 'in a reference' would mean 'in the matter of a reference to arbitration.' The phrase 'in a reference' is therefore, comprehensive enough to cover also an application first made after the arbitration is completed and a final award is made, and in our opinion that is the correct construction thereof in the context. We are, therefore, of the opinion that S. 31 (4) would vest exclusive jurisdiction in the court in which an application for the filing of an award has been first made under S. 14 of the Act."

Where instead of asking for intervention of the court to direct the arbitrators to file the award as required by S. 14 the petitioner files it along with the plaint then, the question whether the award has been properly filed within the meaning of S. 31 read with S. 14 depends upon whether the petitioner is authorised by the arbitrators or by the umpire

to file it in court. If the necessary authority is given to him, his remedy is to apply for amendment of the plaint, to the court where the suit is filed, having regard to its jurisdiction under S. 31 of the Act. *Dad Khan* v. *Abdul Samad,* A.I.R. 1960 Madh. Pra. 65 ; see also A.I.R. 1953 S, C. 313. Such a suit cannot be filed in small cause court in as much the jurisdiction of the small cause court is barred under S. 40 read with s. 2 (c) of the Act. *Ibid.*

1318. Award meaning of.— "It appears, however, in s. 31 and the subsequent sections which are, for the most part new matters, introduced by the 1940 Act that the word "award" includes bougs award. Section 31 provides for the filing of an award in a court having jurisdiction in the matter to which the reference relates, and then proceeds by sub-section 2 to say ; 'Notwithstanding anything.....Court'. In that sub-section it is, to my mind, obvious that the 'award' includes a bogus award, that an 'agreement' includes a sham agreement and the word parties includes persons alleged to be parties. Interpreting it otherwise makes complete nonsense I do not think I need for the moment trouble to read the rest of that section, and I now turn to section 32 which provides..... 'Notwithstanding.....Act.' Again the word 'agreement' must include a sham agreement, and the word 'award' must include bogus award if the section is to make any sense. But I think the section which most clearly of all shows that Legislature could not have meant the word 'agreement' to be taken in its grammatical or ordinary sense is S. 33". *Uma Dutt* v. *Chandra,* A.I.R. 1947 Bom. 94. It is doubtful if the provision of the new Arbitration Act can be invoked in aid of or against the validity of an award which was pronounced before this Act came into force. *Sukhdeo* v. *Radhika,* A.I.R. 1950 Pat. 77. Award not made rule of court has no legal existence. *Wali* v. *Pano,* A.I.R. 1960 Pat. 128. But unfiled award is not a nullity. *Pushraj* v. *Clive Mills,* A.I.R. 1960 Cal. 180. One arbitration agreement can produce one or more awards. Same point cannot be decided by different awards. *Ibid.* An award is not compulsorily registrable. *Wali* v. *Pano,* A.I.R. 1960 Pat. 128.

1319. Decree on award—res judicata.—The contention that a decree passed not in a suit but in proceedings under Schedule II, Civil Procedure Code, does not operate as *res judicata,* has no force. *Hans Raj* v. *Amar Chand,* 42 P.L.R. 77=A.I.R. 1940 Lah. 107 . *vide* S. 41 *infra ; Guru Charan* v. *Uma,* 70 Ind.Cas. 985=26 C.W.N. 940 ; *Wazir* v. *Chuni,* 7 Cal. 727 ; *Chintamallayya* v. *Thadi,* 20 Mad. 89 ; *Sashi* v. *Lalit,* 29 C.W.N. 633 (P.C.)=86 Ind.Cas. 245=52 Cal. 314 (P.C.).

1320. Valuation fixed for jurisdiction.—When in an application under para. 20, Schedule II, Civil Procedure Code, the value for the purpose of jurisdiction is fixed, the valuation cannot be questioned in execution proceedings when the objection is not taken in proceedings under para. 20, Schedule II or in appeal arising therefrom. *Basanti* v. *Amirchand,* A.I.R. 1936 Lah. 63.

1321. Award partitioning joint family property—Reference by only some members.—An award partitioning joint family property made on reference by only some members of the joint-family is valid award which can be filed under para. 20, Schedule II, Civil Procedure Code, and is binding on those members who actually join the reference and can be enforced against them. The mere fact that some members of the joint-family do not join, does not make the award invalid. *Daila Ram* v. *Nihali Ram,* A.I.R. 1936 Pesh. 96. See also, *Jadunath* v. *Kailash*

Chandra, 37 Cal. 63=2 Ind.Cas. 414 ; *Dharanidhar* v. *Sakharam,* A.I.R. 1921 Nag. 176=71 Ind.Cas. 860 ; but see, *Chhotey Lal* v. *Madho Bibi,* A.I.R. 1918 Pat. 132=48 Ind.Cas. 953.

1322. Sub-section (1).—Where a reference has been made by a court under section 21 or where an agreement has been filed in court under S. 20, the award is required to be filed in that court. In case of arbitration without the intervention of court, an award may be filed in any court having jurisdiction in the matter to which the reference relates. Para. 20(1) of the Second Schedule of the Civil Procedure Code enacts : "Where any matter has been referred to arbitration without the intervention of a court, and an award has been made thereon, any person interested in the award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court." "Court" means a civil court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court. *Vide* section 2 (*c*), *supra.* So a court has jurisdiction to entertain an application to file an award or to enforce it as a decree only if it has jurisdiction to entertain a suit the subject of which is the subject-matter submitted to arbitration. *In re Sri Krishna, Khanna* A.I.R. 1934 Sind 29=148 Ind.Cas. 977 ; *Venkatasaminiappa* v. *Srinidhi,* 63 L.W. 468=5 D.L.R. (Mad.) 268=1950 M.W.N. 320=(1950) 1 M.L.J. 709. In the last named case *Horwill, J.* said : "If we have regard to S. 31 (1) to ascertain in which court, as the word is defined in section 2(1) the award has to be filed, we find that it is the court that has jurisdiction over the subject-matter of the award, the omission of any reference to residence being presumably for the reason that in filing an award there is no plaintiff and defendant." In order to determine which the court having jurisdiction in the matter, you would first of all ascertain what the questions are, which form the subject-matter of the reference to arbitration. You then proceed to ask . Supposing these questions had arisen in a suit which is the court which would have jurisdiction to entertain the suit ? That court would be the court having jurisdiction under the Arbitration Act also. The court which have jurisdiction would be not the court at the place in which the agreement was entered into or the defendant resides, but the court which would have jurisdiction in respect of the questions forming the subject-matter of the reference. *Venkatasaminiappa* v. *Srinidhi, supra.* The question of residence would become relevant only should it arise out of or in connection with the subject-matter of the dispute ; and the reference. *Ibid ;* see also, A.I.R. 1937 All. 208. *Bachubhai* v. *Mohanlal,* A.I.R. 1953 Sau. 163. But see *Cursetji* v. *Shivlal,* A.I.R. 1943 Bom. 32=44 Bom.L.R. 859. The words "court having jurisdiction in the matter to which the reference relates" do not mean that the court must have jurisdiction over the whole of the matter to which the reference relates and the question whether the court has jurisdiction over the matter to which the reference relates or not should be decided in accordance with the general provisions in the Civil Procedure Code. In the result, if a suit to enforce the award would lie, then the application for the award to be filed will lie also and there will be no difficulty in a case where the property is situated in different parts of India. *Yeswant Rao* v. *Dattatrya,* A.I.R. 1940 Nag 191=(1940) N.L.J. 71=I.L.R. 1940 Nag. 225. In the above case the court observed : "It is clear that the Khandwa court in British India can have no jurisdiction

at all over property situated in the Gwalior State. As regards property situated in another district in British India it is clear that jurisdiction can be exercised in suits in view of the provisions of S. 17 Civil Procedure Code, and the same applies to property situated in another province as is impliedly decided in *Nisar Ali* v. *Muhammad Ali,* A.I.R. 1932 P.C. 172 =137 Ind.Cas. 539=7 Luck. 324=59 I.A. 268 (P.C.)." So where property is situated within the jurisdiction of two or more courts, the award may be filed in any one of these courts. *Vide Kelli* v. *Frazer,* 2 Cal. 445 (463, 465)=2 Ind.Jur. 101 ; *Venkata* v. *Suryanarayana,* A.I.R. 1941 Mad. 129=(1940) 2 M.L.J. 520=(1940) M.W.N. 1083 ; *Jethanand* v. *Mirabai,* I.L.R. (1942) Kar. 36=A.I.R. 1942 Sind 79=202 IndCas. 152. Here the selection of forum is given to the applicant who wants to file ths award. *Vide Zamiram* v. *Fateh Ali,* 32 Cal. 146 (150) ; *Ratnagiri* v. *Syed Vava Rowthan,* 19 Mad. 477 (478). So this section was devised for the purpose enabling any court having jurisdiction where the matter to which the reference relate lies within more than one jurisdiction, to direct that the award be filed. *Raghavendra* v. *Guru Rao,* 19 Ind.Cas. 882=15 Bom.L.R. 362=37 Bom. 442 ; but see, *Upendranath Basu* v. *Hit Lal,* A.I.R. 1933 All. 380=143 Ind.Cas. 571=(1933) A.L.J. 741=55 All. 542 ; *V. N. Krishna Iyar* v. *V. N. Subbarama,* A.I.R. 1932 Mad. 462=139 Ind.Cas. 877=55 Mad. 689 ; *Gangadhar* v. *Lakshman,* A.I.R. 1937 Bom. 211. In the first-named case the court observed ; "It was argued for the respondents that the question of jurisdiction must be decided with reference to provisions of clauses 16 to 20, Civil Procedure Code. That contention seems to us to be sound. In order to decide whether the court has jurisdiction.....it is necessary to determine whether the court would have jurisdiction to try a regular suit between the parties in which the reliefs claimed were the reliefs granted by the award." The court in India has no jurisdiction over the matter to which reference relates, where it is admittedly situated outside India. *Murli Mal* v. *Sant Ram,* A.I.R. 1929 Lah. 24=10 L.L.J. 500=113 Ind.Cas. 899. There is no provision either under Civil Procedure Code or the Arbitration Act empowering a court to make part of an award a rule of court. The award should be looked into as a whole. *Nemi Chand* v. *Kesarimull,* A.I.R. 1929 Mad. 31=56 M.L.J. 35=29 M.L.W. 227=114 Ind.Cas. 818. Where parties live in a Presidency town and one of the properties is situate in it, a suit for partition can be filed in that Presidency town, although other properties are outside India. Arbitration Act is, therefore, applicable with regard to award regarding such property *Ibid.*

The above rule is also applicable in cases under this section *vide Section* 41, *infra.* See also, *Vishindas* v. *Tejumal,* A.I.R. 1938 Sind 59=174 Ind.Cas. 334. Where part of an award made in arbitration without the intervention of court deals with property outside the jurisdiction of the court which is requested to file it, if that part is separable without distributing the basis and equilibrium of the award as a whole, the court may delete that part of it and order the rest to be filed. *Gangadhar* v. *Dattaraya,* A.I.R. 1937 Bom. 211=I.L.R. (1937) Bom. 338=169 Ind. Cas. 301=39 Bom.L.R. 159. See also, *Ramlal* v. *Krishna Chandra,* A.I.R. 1924 P.C. 462=83 Ind.Cas. 531=51 I.A. 72=51 Cal 361 (P.C.) ; *Amir Begam* v. *Badruddin,* A.I.R. 1914 P.C. 105=23 Ind.Cas. 625 ; *Raghavendra* v. *Gururao,* 37 Bom. 442=19 Ind.Cas. 882 ; *Nathan* v.

Samson, A.I.R. 1931 Rang. 252. *Kashinath* v. *Gangabai,* A.I.R. 1929 Bom. 193; *Hit Lal* v. *Upendra,* A.I.R. 1937 Pat. 214; *Ratan Kuar* v. *Sobha Ram,* A.I.R. 1936 Lah. 794; *Sangat Ram* v. *Sital Proshad,* 164 Ind.Cas. 543=38 P.L.R. 86=A.I.R. 1936 Lah. 682; *Manghan Mal* v. *Thakuadas,* 158 Ind.Cas. 60=A.I.R. 1935 Sind 184; *Sripad* v. *Dattatraya,* A.I.R. 1939 Bom. 296=41 Bom.L.R. 485=183 Ind.Cas. 753. Under para. 20 of the Second Schedule it was held that the jurisdiction of a court to file an award depended on the reliefs awarded by the award, it was not open to a party to confer jurisdiction on a court by asking for only one relief granted by the award and getting the award filed under para. 20, where the other reliefs granted were beyond the competence of the court. *Rethnamal* v. *Ramaswami,* 51 Ind.Cas. 53. But under this section the jurisprudence depends on "the matter to which the reference relates" as such the parties can regulate jurisdiction by choosing the matter under reference. Where the dispute submitted to arbitration involves the determination of right to or interest in immovable properties situated outside the jurisdiction of the court, the court would have no jurisdiction to file the award. *Firm Assandas* v. *Aildas,* A.I.R. 1934 Sind 183 (2)=158 Ind.Cas. 300; *Asmatulla* v. *Forbes,* A.I.R. 1934 Lah. 652; *Dakumal* v. *Khajumal,* A.I.R. 1931 Sind 47=131 Ind.Cas. 182=25 S.L.R. 204. Where the mortgaged property which was involved in the award is situated at Sialkot, the court of the District Judge at Amritsar has no jurisdiction to make an order filing the award, inasmuch as if the subject-matter submitted to arbitration were the subject of a suit, the suit cannot be instituted at Amritsar. *Gopichand* v. *Khazanchand* A.I.R. 1938 Lah. 226=40 P.L.R. 598=178 Ind.Cas. 240.

Where all the immovable property dealt with by the award is within the jurisdiction of the court and so also the parties to the award, the mere fact that the business which is one of the subject-matter of the award is carried on by the parties at a place not within the jurisdiction of the court is not sufficient to oust the jurisdiction to entertain an application under para. 20 of Schedule 2. *Vishindas* v. *Tejumal,* A.I.R. 1938 Sind 59=174 Ind.Cas. 334. A Karachi court has jurisdiction to entertain a suit to file an award, based on a contract, entered into outside Karachi, under which the goods purchased are examined and passed as to quality, weight, condition and admixture in Karachi. *Louis Dreyfus* v. *Aroomal,* 4 Ind.Cas. 1151=3 S.L.R. 164. An agreement was entered into in Amritsar between the defendant, who resided at Amritsar, and plaintiffs, who carried on business at Karachi. The defendant agreed to sell to the plaintiffs a certain quantity of grain not ascertained at the time and it was stipulated that the defendant would despatch the goods from Amritsar to the plaintiff, consigning them at his own risk, in the name of plaintiffs' firm at Karachi, that the defendant will receive 90 per cent. of the contract price, as an advance, in exchange for railway receipts; but the goods will be examined and weighed, and rejected or accepted after arrival at Karachi, and the balance, if any, due will be paid after the plaintiffs had reported on the goods. *Held,* that as the goods were unascertained at the time of the agreement to sell, the sale could not be completed until the buyers had passed and accepted the goods at Karachi and that, therefore, the performance of the contract was to be completed at Karachi. Consequently, the Karachi court had jurisdiction to entertain an application to file an award relating to

disputes arising out of the agreement. *Louis Dreyfus* v. *Doulatram*, 3 S.L.R. 156=4 Ind.Cas. 147.

1323. Court.—"Court" means a civil court having jurisdiction to decide the question forming the subject-matter of reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a small cause court. *Vide* section 2(*c*), *supra*. So where an award partitioning joint property including agricultural land by metes and bounds is made, the civil court has no jurisdiction to entertain an application to file the award and pass a decree in accordance therewith. *Lachman Das* v. *Jaimini Das*, A.I.R. 1933 Lah. 732. See also, *Fazal Din* v. *Shah Nawaz*, A.I.R. 1914 Lah. 296= 22 Ind.Cas. 381. So also an agreement to refer the dispute to arbitration authorising the arbitrators to partition revenue paying land cannot be filed in court under this section, inasmuch as a civil court has no jurisdiction in a matter of that nature. *Jawala Shah* v. *Nihal Chand*, 42 Ind.Cas. 261 (1)=91 P.L.R. 1917=166. P.W.R. 1917 See also, *Jhuri Singh* v. *Dwarka Singh*, 50 Ind.Cas. 193=6 O.L.J. 84. *Raghavendra* v. *Gururao*, 19 Ind.Cas. 882=15 Bom.L.R. 362=37 Bom. 427. Having regard to the definition of the word "Court" as defined in clause (*c*) of section 2 and the terms of section 31 the jurisdiction of a court for passing a decree in terms of the award depends upon the questions which forms the subject-matter of reference to the arbitration, and not the terms of an award. The term "Civil Court" in S. 2 (*c*) does not include revenue court. Where an award was in the nature of a family settlement given in an arbitration without the intervention of the court, and the part of the subject-matter of the reference, *viz.*, the decision of Houses, was within the jurisdiction of the Civil Court and as regards the reference about the part which was not within its jurisdiction, namely, the division of Zamindary, the arbitrator was only required to make the partition, village-wise between the parties, the Civil Judge is competent to entertain the award in respect of the Zamindari property and declare the title of the parties. In such a case the fact that the award is given in two instalments, one in respect of house-property and the other in respect of zamindari property, does not make the award two distinct awards. Section 233 (*k*) of the U. P. Land Revenue Act (II of 1901) is no bar to the entertainment by the Civil Court. *Bithal Das* v. *Sri Nath*, A.I.R. 1949 All. 360=1947 A.L.J. 594.

An award which does not partition agricultural land but merely settles the shares of the parties therein, may be filed in court. *Jotindra* v. *Muni Lal*, 45 Ind.Cas. 166=81 P.W.R. 1918; *Ram Jawaya Mal* v. *Devi Ditta Mal*, 34 Ind.Cas. 192=117 P.R. 1916=107 P.W.R. 1916=70 P.L.R. 1917: *Asa Nand* v. *Ganesha*, A.I.R. 1930 Lah. 836=122 Ind.Cas. 724=11 Lah. 470=31 P.L.R. 789=12 L.L.J. 297. In the last-named case *Jailal*, *J.* observed: "It is conceded that the civil courts have jurisdiction to try the questions of disputes as to title in such land and the court was consequently competent to refer such a question to arbitration. It is further to be noted that the arbitrators in their award did not deal with the question of the mode of division of the agricultural land, but merely declared the shares of the parties therein. This also shows that there was a dispute between the parties as to title. I am unable to see that under the circumstances any valid objection could be raised to jurisdiction of the court to make a reference to the arbitrators and to the power of the arbitrators to make the award that they have given in this case.....The learned counsel places reliance is support

of his contention on *Partab Singh* v. *Din Singh*, 5 P.R. 1883. In that case the parties had referred to the arbitrators the question of (1) partition of ancestral land by whole villages, and (2) the allotment of the office of *lambardar*. So far as No. 1 was concerned it was conceded that the arbitrators and the civil courts deal with the matter but it was contended that the question or allotment of the office of *lambardar* was wholly outside the jurisdiction of the civil courts and maintaining this last objection the Chief Court of the Punjab *held* that 'the civil courts were not competent to make a reference and further that it was not permissible to strike out the portion of the agreement which was in excess of the court's jurisdiction simply in order to give itself jurisdiction unless the parties agreed to this being done with the view of the court proceeding with the reference.' In my opinion this case does not help the respondent. The question of allotment of the office of *lambardar* was wholly outside the jurisdiction of the civil courts. In the present case though the question of the mode of the partition of revenue paying land was outside the jurisdiction of the civil courts, the question of determination of the shares of the parties therein was not so. *Partab Singh* v. *Debi Singh* (*supra*), was followed in *Fazl Din* v. *Shah Nawaz*, 22 Ind.Cas. 381, which was decided by a single Judge of the Chief Court of the Punjab. In that case it is to be observed that there was no dispute between the parties as to their respective shares in the agricultural land and the express object of the parties was to secure partition which had not yet been carried out.

"The two cases cited above, therefore, do not really help the respondent in the present case and it is not consequently necessary for me to consider whether the law laid down therein with regard to the jurisdiction of the civil courts to refer to arbitration disputes relating to matters which are partially cognizable by the civil courts is or not sound. In *Sardar Gurdarshan Singh* v. *Sardar Lal Singh*, Misc. Civil Appeal No. 1879 of 1925, decided by me on the 17th April, 1927, I ventured to doubt the soundness the view taken in *Pratap Singh* v. *Debi Singh* (*supra*) and *Fazal Din* v. *Shah Nawaz* (*supra*) and expressed the opinion that in view of the law laid down in *Amir Begam* v. *Badruddin*, A.I.R. 1914 P.C. 105=29 Ind. Cas. 625=17 O.C. 120=36 All. 326 (P.C.), *Mahomed Khalil* v. *Abdul Rahim*, A.I.R. 1925 Pat. 810=4 Pat. 670 and *Buta* v. *Municipal Committee of Lahore*, 29 Cal. 854=87 P.R. 1902, and other cases cited that in the case of an award of the arbitrators on a reference made by the parties without the intervention of the court it is open to the court to order the filing of the award so far as it relates to the matters which are covered by the reference after excluding matters decided by the arbitrators which are not so covered, I did not see any distinction between the case of filing an agreement to refer to arbitrators a dispute about matters which are partially outside the jurisdiction of the civil courts and an award made in respect of such matters by the arbitrators on a private reference without the intervention of the court, though it must be conceded that in all the cases cited the objection was that the arbitrator had exceeded the authority conferred on him by the agreement and no question of the jurisdiction of the court was involved. I also observe that in *Mangha Ram* v. *Johar Das*, Civil Appeal No. 2069 of 1928 decided by *Dalip Sing, J.* on 16th January, 1930 that learned Judge also questioned the correctness of the view taken in the cases mentioned above."

The court which made the reference to arbitration is alone competent to decide the validity or otherwise of the award and the arbitration proceedings including the validity of reference. *Hanumal* v. *Bahulal* 1960 Raj.L.W. 662=I.L.R. 1960 (10) Raj. 1138.

1324. Unregistered award.—A decree passed under para. 20 of Schedule II, Civil Procedure Code, on an unregistered award given on a reference to arbitration made out of court is not a nulity, although such award requires to be registered under S. 17 of the Registration Act. After the decree has been passed the award has no separate existence. It is merged in the decree itself. The proper stage for raising the question of registration is after the application under para. 20 of Schedule II, Civil Procedure Code, has been filed and before the decree is passed. *Lal Behari* v. *Jagat Jiban*, 43 C.W.N. 602. See also, *Sheo Ram* v. *Dutt*, 175 Ind.Cas. 397=(1937) A.L.J. 1303=A.I.R. 1938 All. 88. Failure to register an award which requires to be registered under section 17 (1) (*b*) of the Registration Act is not a ground upon which it can be set aside. An execution cannot be ordered upon the unregistered award, the court has power to order its removal from its file. *Anand Lal* v. *Keshabdeo*, I.L.R. (1945) 2 Cal. 526=A.I.R. 1949 Cal. 549.

1325. Application to set aside award—Jurisdiction of Labour Court or Industrial Court.—Under the Arbitration Act an award has to be filed as provided by S. 14 and then an application to set aside an award has to be made to a court having jurisdiction under S. 31. Under the Bombay Industrial Relations Act, the award has to be filed as provided by S. 74, but once the award has been filed there seems to be no principle which could justify the contention that the Labour Court or the Industrial Court, which are courts upon which jurisdiction has been conferred by S. 68, cannot deal with an application to set aside the award. *Textile Labour* v. *Labour Appellate*, 58 Bom.L.R. 26=I.L.R. (1956) Bom. 247=A.I.R. 1956 Bom. 746.

1326. Who can file an award.—The right to agree to refer to an arbitration and to file an award under para 20 is not confined to persons who are not parties to any litigation. Where persons who are parties to a suit pending in a Revenue Court go to arbitration without the intervention of any court, one of the terms of the agreement of reference being that the award would be effective whatever might be the decision of the Revenue Court in the suit before it, the award may be filed in a civil court under para. 20 of Schedule II, *Ganga Prasad* v. *Bindeshwari Singh*, 127 Ind.Cas. 967=(1937) A.L.J. 1133=A.I.R. 1938 All, 46; but see, *Amar Chand* v. *Banwari Lal*, A.I.R. 1922 Cal. 404=69 Ind.Cas. 808=49 Cal. 608. Where a reference is made outside court in respect of matters which are the subject of a pending suit and an award follows, such award cannot be filed under this section. *Maghan Mal* v. *Thawerdas*, 158 Ind. Cas. 60=A.I.R. 1935 Sind 184.

1327. Award effective from what date.—An award made out of court becomes effective from the date when it is made and not from the date when the court orders it to be filed in court. *Karransing* v. *Gambi*, 166 Ind.Cas. 947=A.I.R. 1937 Sind 7.

1328. Sub-section (2).—Sub-section (2) merely states which court shall decide questions regarding the validity, effect or existence of an award; in terms it does not bar a suit. *Lachhuman Singh* v. *Makar Singh*, 32 Pat. 604=A.I.R. 1954 Pat. 27. All questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them must be decided by the court having jurisdiction in the matter to which the reference relates. So matters heard and decided in proceedings under this section cannot be re-opened in a subsequent suit between the same parties. *Guru Charan* v. *Uma Charan*, 70 Ind.Cas. 985=26 C.W.N. 940.

Under this sub-section even the existence of the award shall not be determined by any court except the court in which the award may be filed. This provisions indicate that even a successful party to whom the relief is given under the award must seek to enforce it in the court in which the award may be filed, that is by proceeding under S. 14 of the Act. No separate suit lies for the purpose. *Rashid* v. *Mul Chand,* A.I.R. 1945 Mad. 371=(1945) 2 M.L.J. 98 on appeal (1946) Mad. 348 ; but see *Nanhelal* v. *Singhai,* A.I.R. 1944 Nag. 24=I.L.R. (1944) Nag. 340=210 Ind.Cas. 473. The words "may be" in this sub-section merely relate to, and bear the same meaning as, the like words in sub-section (1) and those words in no way provide for futurity. It is often probable, in an arbitration outside the court, that two courts might conceivably have jurisdiction, and jurisdiction is given to one of those courts at the choice of one or other of the parties by providing that the award may be filed in any court having jurisdiction. As long as no award has been filed either court might have jurisdiction but as soon as it is filed in a court, that court is the one which has jurisdiction. *Bengal Silk Mill* v. *Aisha Ariff,* A.I.R. 1947 Cal. 106. Such court is competent to decide all questions as regards the validity of an arbitration agreement. This sub-section sets at rest the conflicting views as regards court's jurisdiction to decide matters as regards validity of reference. *Vide* notes under clause (*c*) of section 30, *supra.*

1329 Maintainability of such application before filing of award.—An application raising a question as to the validity, effect or existence of an arbitration agreement is maintainable in the court where the award may be filed even though the award has not been actually filed at the date of the application. Further, the defect, if any, due to the non-filing of the award at the date of the application can be cured by the filing thereof before the disposal of the application, and the court may direct that the award be filed *rume pro tunc. Ariff* v. *Bengal Silk,* I.L.R. (1949) 2 Cal. 70=A.I.R. 1949 Cal. 350 distinguishing *Ratanji* v. *Dhirajlal,* I.L.R. (1942) Bom. 452=A.I.R. 1942 Bom. 101 and *Bengal Jute Mills Co.* v. *Jewraj,* I.L.R. (1943) 2 Cal. 392=A.I.R. 1944 Cal. 304.

1330. Agreement of reference.—Though an agreement of reference to arbitration must be in writing it need not be signed by the parties. What is necessary is that the terms must be reduced to writing and the fact that the parties had agreed to the reference should be established. *Government* v. *Jumunadhar,* A.I.R. 1960 Pat. 19 ; *Jugal Kishore* v. *Goolbai,* A.I.R. 1955 S.C. 812=(1955) 2 S.C.R. 857.

1331. Questions relating to agreement.—To pronounce an arbitration agreement to be invalid as an attempt to stifle criminal prosecution it must be established that the withdrawal of criminal case was the consideration for the agreement and not the motive for the same. *Gurumurty* v. *Narasimha,* A.I.R. 1954 Orissa 234 ; A.I.R. 1941 P.C. 95=(1941) 2 M.L.J. 726.

1332. Award—Opportunity of being heard.—A party who though repatedly written to, will not appear before the arbitrator and allows the proceedings to go *ex parte* cannot later on say that he was not given an opportunity of being heard. *Gurumurty* v. *Narasimha,* 1954 Orissa 234 ; A.I.R. 1914 Cal. 868.

1333. Sub-section (3).—All applications regarding the conduct of the arbitration proceedings or otherwise arising out of such proceedings are to be made to the court where the award has been filed, or may be filed under sub-section (1) and to no other court. See also A.I.R. 1953 S.C. 313 noted *supra.*

1334. Scope of sub-section (3).—Sub-section (3) of section 31 must be read in conjunction with sub-section (2) of that section which provides that notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in that Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the court in which the award under the agreement has been or may be, filed, and by no other court. It is clear that under sub-section (2) the phrase 'the court in which the award under the agreement may be filed' has reference only to proceedings in connexion with the arbitration agreement. If a question arises with regard to the validity, effect or existence of an arbitration agreement, then the question has got to be decided by the court in which the award which may result from the arbitration agreement may be filed. If the question is with regard to the award itself, then the question has got to be determined by the court in which the award has been filed. Further, under the present Act no proceedings can be taken on the award till after it has been filed, and I fail to see how a party can possibly be prejudiced by the existence of an award which has not been filed in court. Under the old Arbitration Act it was competent to a party who obtained an award without filing it to file a suit thereon. Further, the award becomes enforceable as a decree as soon as it was filed. But under the present Act all proceedings with regard to the arbitration agreement or the award have to be taken as provided by the Act and before the tribunal indicated by the Act. Section 32 specifically provides that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in the said Act and under S. 17 of the Act the court has to pronounce judgment according to the award and a decree follows. It is only this decree that can be executed.....I therefore hold that it is not competent to file a petition for setting aside an award till the award has been filed." *Per Chagla, J.* in *Ratanji* v. *Dhirajlal,* A.I.R. 1942 Bom. 101=44 Bom.L.R. 175; but see A.I.R. 1949 Cal. 350 *supra.* The amended Art. 158 of the Indian Limitation Act, also supports this view. *Ibid.* A party who thinks his right has been affected by the award can take proceedings under S. 14 (2) of the Act. *Ibid.*

1335. Sub-section. (4).—In the context of this sub-section, it is reasonable to think that the phrase "in any reference" means "in the matter of." The word "reference" having been defined in the Act as reference to arbitration, the phrase "in a reference" would mean "in the matter of a reference to arbitration." The phrase "in a reference" is therefore comprehensive enough to cover also an application first made after arbitration is completed and final award is made. *Khumbha* v. *Dominion,* A.I.R. 1953 S.C. 313=1953 S.C.R. 878=(1953) S.C.J. 438. The application must be under the express provision of the Act. A.I.R. 1953 Punj. 105. Section 31 provides that all matters relating to a single reference shall be before the same court, and where there is a choice of forum, this sub-section provides that, it shall be determined by the first application made to a court in relation to a reference. Where a reference has been made by the High Court, in view of the explicit terms of this sub-section no court other than the High Court, which has made the reference had the power to hear the objections to the award and to pass a decree in terms thereof. The High Court could not delegate that power to the Civil Judge and consequently the proceedings before the Civil Judge

were *ultra vires* and the decree passed in terms of the award was invalid. *Shukrullah* v. *Rahamat,* A.I.R. 1947 All. 304=I.L.R. (1947) All. 227= 1947 A.L.J. 445 ; *Re Charu Chandra,* 50 C.W.N. 547. Where application has been made under S. 34 to Ambala Court that court has jurisdiction. *Swastika* v. *Union of India,* A.I.R. 1953 Punj. 129. Section 31 (4) confers jurisdiction to the particular court out of the many which may have jurisdiction in the matter under sub-section (1), in which the award has actually been filed. *Serajuddin* v. *Michael,* A.I.R. 1960 Cal. 47. Section 31 (4) must be confined to a question of territorial jurisdiction alone in that if an application under the Act is made in a court of competent jurisdiction at one place than all proceedings under the Act have to take place in the court at that place and not to any other court at any other place. *Firm Napu* v. *Raj Kumar,* A.I.R. 1955 Punj. 235 ; A.I.R. 1953 S.C. 313. *Ferro Alloys* v. *A.K. Ghosh & Bros.,* A.I.R. 1960 Cal, 421 (once an application is made with reference to arbitration in one court, no matter whether before or after filing of the award, the court will have the exclusive jurisdiction to deal with all matters in connection with the reference including the filing of the award and passing judgment in term of the award) ; 50 C.W.N. 547 ; *Harbans* v. *Union of India,* 65 C.W.N. 913=A.I.R. 1961 Cal. 659.

1336. Sections 31, 32 and 33—Scope of.—The intention of the framers of the Arbitration Act was that the rights and liabilities of the parties in respect of arbitration agreement or an award such as are mentioned in Ss. 31 and 32 of the Act should be litigated only in court having jurisdiction under S. 31 and on application made under S. 33 of the Act and not by way of suit. The intention of the legislature must be taken to take away the remedy by way of suit which the parties to an arbitration agreement or an award had before the passing of the Act and to relegate them to the remedies as provided in that Act. *Chaturbhuj* v. *Bicamchand,* 53 C.W.N. 410 ; *Lachhuman* v. *Makar Singh,* A.I.R. 1954 Pat. 27=32 Pat. 604 ; *Sia Kishore* v. *Bhairavi,* A.I.R. 1953 Pat. 42=31 Pat. 886 ; *Mool Chand* v. *Rashid,* A.I.R. 1946 Mad. 346=I.L.R. (1946) Mad. 840 ; *Seethamna* v. *Annapuranama,* A.I.R. 1953 Mad. 544, but see *Suryanaruyana* v. *Venkata,* A.I.R. 1948 Mad. 436=I.L.R. (1949) Mad. 111 ; *Surayya* v. *Anandayya,* A.I.R. 1951 Mad. 525=(1950) 2 M.L.J. 313 ; *Sher Bahadur* v. *Ramnarain,* A.I.R. 1946 Oudh. I. The Arbitration Act, 1940, has no retrospective effect and does not apply to awards made long before the coming into force of that Act. *Lachhuman* v. *Makar, supra.* A suit in which the existence and validity of the reference to arbitration and award passed in pursuance of such arbitration is agitated is not maintainable. *Seethamma* v. *Annapurnamma,* (1952) 2 M.L.J. 744=1952 M.W.N. 871=A.I.R. 1953 Mad. 544 ; (1945) 2 M.L.J. 98 ; I.L.R. (1945) Mad. 840 ; I.L.R. (1949) Mad. 111 ; (1950) 2 M.L.J. 313 ; *Nathumal* v. *Beharilal,* I.L.R. (1951) Nag.=A.I.R. 1952 Nag. 65= 1952 N.L.J. 229 ; *Kamal Singh* v. *Sankar Chand,* A.I.R. 1952 Cal. 447.

The scheme of the Arbitration Act appears to be to bring all arbitrations under the control of the court and treat them as effective only if a decree were obtained on the award in accordance with the Act and to prevent the parties from agitating any question relating to existence, validity or effect of an arbitration agreement or award in any manner other than that provided by the Act. Ss. 31, 32 and 33 do not, by express language or by implication provide that a suit on the original cause of action after an abortive or incomplete arbitration would not lie. *Sadasiva* v. *Bhikamchand,* A.I.R. 1959 Bom. 549=61 Bom.L.R. 364=I.L.R. (1959)

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Bom 838=1959 NagL.L. 167 ; *Shyamsingh* v. *Pralhad*, 1961 M.P.C. 262= A.I.R. 1962 M.P. 66=1961 Jab.L.J. 75.

1337. Sections 31 and 4—Object of Avoidence of conflict.— Both ss. 31 and 34 of the Arbitration Act are enacted to avoid conflict and scramble. But the nature of conflict and scramble intended to be avoided in the two sections. *Harbans Singh* v. *Union of India*, 65 Cal. W.N. 913=A.I.R. 1961 Cal. 659.

32. *Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.*

Bar to suits contesting arbitration agreement or award.

1338. N.B.—This section is new. Sections 32 and 33 private that an arbitration agreement or award shall be contested only by application and not by suit. This proposal was made by the Civil Justice Committee and is in consonance with the general principle that the law of arbitration should provide simple, speedy and cheap settlement of difference.—*Notes on Clauses*. As regards recommendation of the Civil Justice Committee *vide* para. 18 of Chapter XIII of the *Civil Justice Committee's Report*, given in Appendix, *supra*.

1339. Applicability of the section.—This section can be invoked in regard only to a suit in which an award, which may be filed in court under S. 14, forms the basis of the relief claimed. The prohibition enacted in S. 32 cannot be invoked particularly where, on the allegations made in the plaint, the plaintiff's right to relief is not to any extent dependent upon the validity of the alleged arbitration agreement or award. *Duraiswamy* v. *Kishtappa*, 71 Mad.L.W. 130=(1958) 1 Mad.L.J. 324= A.I.R. 1958 Mad. 420. If a successful party brings a suit to obtain the relief that is granted to him by the award it cannot be gainsaid that the plaintiff must prove the fact of the award, that is its existence, before he can get relief. This he is debarred from doing under S. 32. *Chhedi* v. *Kirra*, A.I.R. 1956 Vind.Pra. 8 : see also, A.I.R. 1941 Cal. 527 ; A.I.R. 1945 Mad. 345 ; A.I.R. 1950 Pat. 48 ; A.I.R. 1953 Pat. 42.

It is not open to a defendant to set up an award as a bar to a suit filed on the original cause of action, where the award has not been filed and all proceedings relating thereto had not been gone through as required by the Arbitration Act. A party to an award cannot afford to lie by and not take steps to get the award filed in court and get it declared valid and binding and after the lapse of a considerable period of time, produce the award in answer to a suit that may be filed against him. It would amount to circumventing the provisions of law. The Arbitration Act requires that the process of making an award a rule of court and a decree passed thereon should be gone through. If, therefore, a defendant has not taken steps to have an award filed and gone through the formalities enjoined by the specific provisions of the Arbitration Act, it is not open to him to set up an award as a bar to an action that may be brought against him. No party can be prejudiced by the mere existence of the award. It does not become operative and enforceable until it has been filed in court and the court adjudicates its validity. The law was otherwise before

the passing of the Arbitration Act of 1940. *Pamandass* v. *Nagappa,* 1959 Andh.L.T. 639=(1959) 2 Andh.W.R. 187 (F.B.)

Clause (a) of this section prevents the plaintiff alone from bringing a suit and does not affect the rights of the defendant to raise a defence on the basis of an award. *Prahlad* v. *Shyam Singh,* 1959 M.P.L.J. (Notes) 120.

An arbitration agreement or an award can neither be challenged or enforced by a suit. No proceeding or action may be taken which shall, affect in any way an arbitration agreement or award otherwise than as provided in the Arbitration Act. The existence of an arbitration agreement or award may be set up as a bar in defence to a suit based on the original cause of action arising out of rights and title which forward the subject-matter of such an agreement or award. Even if no such defence has been taken but if at any stage of a suit before a court of law, it comes to its notice that the subject-matter of the suit has been adjudicated upon by arbitration in pursuance of an agreement between the parties according to law and the parties have accepted the award and have acted upon it, or, the prescribed period of challenging the award has elapsed, it is the duty of such a court to refuse to give any relief to the plaintiff or plaintiffs of such a suit. *Govt. of India* v. *Jamunadhar,* A.I.R. 1960 Pat. 19.

1340. Scope of the section.—The Arbitration Act of 1940 was intended to consolidate and amend the law of India relating to arbitration matters. The scheme of the Act is to prevent the parties to an arbitration agitating question relating to the arbitration in any manner other than that provided by the Act. So a suit where any question may be raised with regard to the existence and validity of an award is expressly barred by this section. Section 30 of the Specific Relief Act, does not override the provisions of this section, which applies "notwithstanding any law for the time being in force." The governing section is this section. *Moolchand* v. *Rashid,* A.I.R. 1946 Mad. 346=I.L.R. (1946) Mad. 840 affirming *Rashid* v. *Moolchand,* A.I.R. 1945 Mad. 371 ; see also *Rattanji* v. *Bhisajilal,* A.I.R. 1942 Bom. 101=I.L.R. (1942) Bom. 452=200 Ind.Cas 32 ; *Nanhalal* v. *Singhai,* A.I.R. 1944 Nag. 24=I.L.R. (1944) Nag. 340= 210 Ind.Cas. 473 *contra.* A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand. *Latufulla* v. *Muhammad,* A.I.R. 1946 Sind 117. An award is binding between parties in all matters which it professes to decide. The fact that parties to the award have not carried out its terms is not in law sufficient to deprive the award of its binding effect. *Ibid.* *Deokinandan Dalmia* v. *Basanthlal Ghanshyamdas,* A.I.R. 1941 Cal. 527 =45 C.W.N. 881 ; see also, *Chhedi* v. *Kirra,* A.I.R. 1956 Vind.Pra. 8. Under the Arbitration Act a party to an award is not entitled to enforce it by way of suit. Such a suit is expressly barred by this section. Section 30 of the Specific Relief Act is subordinate to this section. *Moolchand* v *Rashid,* 59 L.W. 143=(1946) M.W.N. 136=A.I.R. 1946 Mad. 346= (1946) 1 M.L.J. 185. Before the coming into force of the Arbitration Act of 1940, a valid award was an operative award by itself. There were two ways in which it could be enforced ; (1) it might be made a rule of the court by an application under the Civil Procedure Code or under the Arbitration Act, 1889, as the case might be, or the party might

be, or (2) the party might treat it as an independent source of title and enforce it by suit. In either case it was open to the opposite party to challenge the validity of the award. After the coming into force of the Arbitration Act, 1940, the remedy by suit is taken away by this section. Further the Act insists that within the time limited by Art. 178, Limitation Act of 1908, an application must be made in court for filing the award. And the award becomes operative only when it is made a rule of the court. Thus, the legal effect of the award as a decree finally determining the rights of the parties does not remain unless the procedure prescribed by the Act is followed and a judgment is pronounced followed by a decree of the court under section 17. *Sia Kishore* v. *Bihari*, 31 Pat. 886 = A.I.R. 1953 Pat. 42 ; see also 28 Pat. 569 ; I.L.R. (1942) Bom. 452. The first part of S. 32 prevents a substantive right to challenge the existence of an arbitration agreement. The second part of that section prevents the setting aside, amending or modifying or in any way affecting an arbitration agreement otherwise than as provided by the Act. *Bajranglal v. Agarwal,* A.I.R. 1950 Cal. 267 ; see also, *Pamudurthi* v. *Pamudurthi,* A.I.R. 1948 Mad. 436 ; *Bengal Silk* v. *Jewaraj,* A.I.R. 1944 Cal. 304. The first part of this section prevents a substantial suit to challenge the existence of an arbitration agreement. The second part of this section prevents the setting aside, amending, modifying or in any way affecting an arbitration agreement, otherwise than as provided by the Act. *Bhagwandas* v. *Atmasing,* A.I.R. 1945 Bom. 494. Where the defendant who is relying upon an award as a bar to the plaintiff's suit did not take the steps to have it filed and dealt with under the appropriate provisions of the Arbitration Act, it is not competent to him to rely upon it in answer to the action. That, he might be entitled to do so if the award happened to be acted upon by the parties and if the part of it which had to be performed by the defendant was actually performed. *Venkatasubbarayya* v. *Bapadu,* (1950) 2 M.L.J. 627. A suit to enforce an award in which the defendant denies the existence and validity of the award, is barred by S. 32. *Ramchander* v. *Munshi* A.I.R. 1950 Pat. 48. A suit to challenge the existence or validity of an arbitration clause in a contract or for determining the effect of an arbitration, agreement or award is not maintainable by reason of S. 33 of the Arbitration Act which provides that such a challenge must be made by means of an application and not by means of a suit. *Bajranglal* v. *Agarwal,* A.I.R. 1950 Cal. 267 : see also I.L.R. (1941) 2 Cal. 123 ; *Govt. of India* v. *Rungta,* 1959 B.L.J.R. 527 = A.I.R. 1960 Pat. 19.

Section 32 of the Arbitration Act must be read with S. 33 and the two sections read together mean that where a person admits having entered into an arbitration agreement but contends that it is not operative, section 32 applies and bars any suit by such a person to challenge the existence, validity or effect of the arbitration agreement and his only remedy is to apply under S. 33. *Manicklal* v. *Shiva Jute,* 52 C.W.N. 389. Where an arbitration in particular proceedings is left incomplete and no award was made, one of the parties withdrawing from arbitration filed suit. In plaint reference is made to arbitration agreement but none of the reliefs envisaged in S. 32 were asked for, held that S. 32 had no application and jurisdiction of court was not ousted. *Gopal* v. *Baiju,* A.I.R. 1958 Pat. 647 = 1958 B.L.J R. 236. Arbitration agreement or award cannot be challenged by suit. *Govt.* v. *Jumnadhar,* A.I.R. 1960 Pat. 19. Where an award has not been filed it does not bar a suit on original cause of action. *Pamandas* v. *Manokyam,* A.I.R. 1960 Andh.Pra.

59 (F.B.). A suit to exclude an award is not maintainable. *Kanhayalal* v. *Ram Chandra,* A.I.R. 1959 Andh.Pra. 418 ; A.I.R. 1952 Nag. 65 ; A.I. R. 1953 Bom. 586. Section 32 of the Arbitration Act is concluded in very general terms and deals with all sorts of applications including applications not only under S. 33 of the Act by way of challenging the existence or validity of an agreement of arbitration or an award, but also applications which may be made by a party to have an arbitration agreement confirmed or declared as subsisting between the parties. It is therefore open to a party who is thwarted in his attempt to have the disputes settled by the process of arbitration, if there is an arbitration agreement between the parties, to come to the court and have the question of the existence, effect or validity of the arbitration agreement adjudicated upon by the court, so that on such adjudication had by him from the court he can proceed further with the arbitration proceedings as contemplated by the arbitration agreement. He is entitled to apply to the court for a declaration that there is a subsisting contract between the parties and that the respondent is bound to have all the disputes in connection with it decided by arbitrators as contemplated in the arbitration agreement, which is disputed by the respondent. The mere fact that it is open to the applicant to file a substantive suit on the original cause of action, would not deprive him of his right to have the question of the existence or validity of the arbitration agreement decided upon by the court by taking proceedings under S. 32 of the Arbitration Act. He is not bound to persue his remedy by suit, merely because the other party denies the existence or dispute the validity of the arbitration agreement. *Vishambarlal* v. *Gulamally,* 4 D.L.R. (Bom.) 9 Where the subject-matter of dispute between the parties has culminated in an award, the original cause of action is extinguished and becomes merged in the award. *Gulzarimal* v. *Ramesh Chandra,* A.I.R. 1959 Raj. 162. An arbitration agreement or an award can neither be challenged nor enforced by a suit. No proceeding or action may be taken which shall affect in any way arbitration agreement or award otherwise than as provided in the Arbitration Act. The existence or an arbitration agreement or award may be set up as a bar in defence to a suit based on the original cause of action arising out of rights and title which formed the subject matter of such an agreement. *Govt. of India* v. *Jamunadhar* 1959 B.L.T.R. 527 = A.I.R. 1960 Pat. 19.

1341. Existence—meaning of.—In *State of Bombay* v. *Adamjee Haji,* A.I.R. 1951 Cal. 147, *Banerjee, J.* said : "*Sarkar, J.* has referred to three cases of this court. *Manick Lal* v. *Shiva Jute Bailing Ltd.,* 52 C.W.N. 389 decided by *Das, J., Baijnath Narseria* v. *Chhotulal Sethia,* 52 C.W.N. 397, judgment of *Clough, J.* which has taken the view of *Das, J. Chaturbhuj Mohanlal* v. *Bhicamchand,* 53 C.W.N. 410, a judgment of *Sinha, J.* in which the learned Judge takes a different view from the other two learned Judges as to the meaning of the word 'existence' in S. 32 of the Act. We, in this case, having regard to the view we have taken, are not called upon to express our opinion as to the meaning of the word 'existence' in S. 32, namely, whether it means actual existence or legal existence." In *Manicklal* v. *Shiva Jute Bailing Ltd., supra,* it has been held by *Das. J,* that the word 'existence' in both the sections means legal existence as opposed to merely factual or apparent existence. Where however, the arbitration agreement is denied in the sense that the person never entered into it, there is in fact and in law no arbitration agreement in existence at any time and a suit by such a person is not hit by S. 32

But in *Chaturbhuj* v. *Mohanlal*, 53 C.W.N. 410, it has been held by *Sinha, J*, following *Bhagwan Das* v. *Atma Singh*, 47 Bom.L.R. 716 = A.I.R. 1945 Bom. 494, that the word "existence" should not be read in a restricted sense but in its ordinary and natural meaning, namely, existence either in fact or in law. An application by a party who denies the factum of the arbitration agreement is therefore, maintainable under S. 33 of the Arbitration Act. *Ibid.*

1342. Effect of the award.—The expression "effect of the award" is wide enough to cover a suit to enforce an award. Although the party may not in terms ask for a decision of the court to give effect to the award the fact that he asks the court to enforce the award must result in the court giving a decision upon its effect and therefore such a suit is not maintainable. *Normadabai* v. *Natvarlal*, 55 Bom.L.R. 408 = I.L.R. (1963) Bom. 851 = A.I.R. 1953 Bom. 386 : see also A.I.R. 1945 Mad. 346, A.I.R. 1950 Pat. 48 ; A.I.R. 1951 Punj. 121. The second part of this section is in very wide terms, and where the effect of decreeing a partition suit will be to set aside an award, will be a bar to such a suit. *Lachhuman* v. *Makar Singh*, A.I.R. 1954 Pat. 27 = 32 Pat. 604. If an award is a bar to a suit, it is also bar to the defence and its bar cannot be pleaded by way of defence either *Durgabijai* v. *Rambilas*, 1959 A.L.J.R. 251 ; *Gutte* v. *Punnoo*, A.I.R. 1963 Madh. Pra. 96. *Dhama Gundas* v. *Ganapati*, I.L.R. (1963) Cutt. 354 = A.I.R. 1964 Orissa 21. Where an award has not been acted upon and the defendant has not taken steps to have an award filed and gone through the formalities enjoined by the specific provisions of the Arbitration Act, it is not open to him to set up the award as bar to an action that may be brought against him and it is not open to the courts to dismiss a suit on the basis of an award which has not been filed into court and in respect of which a decree has not been passed. *Seth Pamandas* v. *T. S. Manikyam*, A.I.R. 1963 Andh. Pra. 28 ; *O. Mohamed* v. *S. Hajee*, 76 Mad. L.W. 482 = (1963) 2 Mad. L.J. 282 = I.L.R. (1963) Mad. 922 = A.I.R. 1964 Mad. 1 (F.B.).

1343. Validity of award.—In proceedings before arbitrators the law of evidence need not by very strictly applied. Thus where owing to the non-co-operative attitude of a party the arbitrator has to admit and rely on hearsay evidence, the award may not be treated as invalid. *Gurumurty* v. *Narasimha*, A.I.R. 1954 Orissa 234 ; see also A.I.R. 1941 Mad. 129 = (1940) 2 Mad.I.J. 520 ; A.I.R. 1922 Lah. 480 ; A.I.R. 1930 Mad. 723.

It cannot be disputed that the expression "arising out of" or "concerning" or 'in connection' or 'relating to this contract' occuring in an arbitration clause in an agreement to purchase goods are of sufficient amplitude to take in a dispute as to the validity of the agreement. But the arbitration clause cannot be enforced when the agreement of which it forms an integral part is held to be illegal. *Khardah Co. Ltd.* v. *Rayman & Co.*, (1963) 1 S.C. A. 314 = (1963) 3 S.C. R. 184 = A.I.R. 1962 S.C. 1810.

1344. Award affirmed in Letters Patent appeal—Finality.—The award cannot be questioned in any other court except in the court in which it was filed under the provisions of the Arbitration Act. The award having been affirmed even in appeal by the Letters Patent Bench of the High Court the decision is binding upon the parties and can no longer be questioned in execution. *Hiralal* v. *Srikali*, A.I.R. 1955 All. 569.

1345. New plea—Question of law—Maintainability of suit to enforce award.—The ground that the suit in question is not maintainable inasmuch as it virtually amounts to a suit to enforce an award is, in the first place, a matter of pure law, and, secondly, it goes to the very root of the case, and hence can be raised in second appeal for the first time. *Guljarimal* v. *Rameshchandra,* A.I.R. 1959 Raj. 162. Once the subject-matter of a dispute between the parties has culminated in award, the original cause of action is extinguished and becomes merged in the award. The existence of the award present an effective bar or impediment in the way of an action on the original cause of action. *Ibid.* It is clear from S. 32 that not only a suit which seeks a decision upon the existence, effect or validity of an arbitration agreement or an award is barred, but even a defence which has such an effect is also barred. That being the true effect of Ss. 32 and 33 where an award is pleaded by the plaintiff, it is not open to him to file a suit to enforce the award, and his only remedy is to file an application under S. 33 of the Act have the award enforced according to the procedure laid down in the Act itself. The object of the legislature clearly is to prevent the parties to an arbitration to agitate questions relating thereto in any manner other than that provided under the Act. *Gulzaimal* v. *Rameshchandra,* A.I.R. 1959 Raj. 162=I.L.R. (1959) 9 Raj. 515=1959 Raj. L.W. 459.

1346. Suit for declaration that contract containing arbitration clause is void—whether maintainable.— Ss. 32 and 33, Arbitration Act, have a very limited application namely, where the existence or validity of an "arbitration agreement" (and not the contract containing the arbitration agreement) is challenged. These sections do not hit a suit which challenges the validity of a contract though it contains an arbitration clause. Therefore a suit for a declaration that a contract containing an arbitration clause was never entered into or that it was void *ab initio* or had become void, is maintainable and is not impliedly barred by Ss. 32 and 33, Arbitration Act. These sections do not by necessary implication repeal S. 9, C. P. Code and S. 39, Specific Relief Act. *State of Bombay* v. *Adamjee Haji,* A.I.R. 1951 Cal. 147=6 D.L.R. (Cal.) 162. In the above case *Banerjee, J.* said : "Every person has a right to bring a suit which is of a civil nature and the court has jurisdiction to try all suits of a civil nature (see S. 9, Civil P. C.). If this right has got to be taken away that must be taken away by express terms or by necessary implication. The plaintiff has a right to sue for having a contract adjudged void under S. 39, Specific Relief Act. Sch. III of the Arbitration Act, 1940 sets out the enactments which are expressly repealed. There is no mention there of S. 9, Civil P. C. or S. 39 of the Specific Relief Act. Therefore it is quite clear that Arbitration Act does not expressly repeal either S. 9, Civil P. C. or S. 39 of the Specific Relief Act. Apart from Ss. 32 and 33, Arbitration Act, there is no section in the Act which can be said to repeal by implication S. 9. Civil P. C. and S. 39 of the Specific Relief Act.....The words used in the sections is 'agreement' in the expression 'arbitration agreement,' and not 'contract.' Yet where necessary the Act uses the word 'contract,' *e.g.*, in S. 7 (1) of the Act, 'where it is provided by a term in a contract.....' In section 7 (2) the Act uses the words 'arbitration agreement.' The Legislature, though it uses the word 'contract' in S. 7 has purposely refrained from using the word 'contract' in S. 32 and S. 33. Therefore, we have no doubt that the Legislature has advisedly used the words 'arbitration agreement' in these sections. I cannot take the view that S. 32 contemplates the case of suits

challenging the validity of a contract because it contains an arbitration clause. If the intention of the Legislature were that all contracts containing an arbitration clause should come within the purview of S. 32 and 33, and Legislature would have said so in appropriate words." In the same case *Harris, C.J.* said : "Section 33 of the Arbitration Act, is confined to applications challenging the existence or validity of an arbitration agreement or award. There is nothing in the section which would entitle a Court to hold that a contract was never entered into, or that an alleged contract had no existence or that it was void *ab initio* or had become void. The section is confined to arbitration agreement and award. There can be no doubt that no suit would lie by reason of S. 32 for a declaration that an arbitration clause did not exist or that it was invalid because the relief claimed in such a suit is the relief expressly mentioned in S. 33. Section 33 read with S. 32 therefore would bar all suits which fall within the purview of section 33.....I entirely agree with my brother *Banerjee* that Ss. 32 and 33 on their true construction do not purport to deal with suits for declaration that *there never was a contact or that a contract is void.* The section must be confined to attacks on arbitration agreements and awards and the fact that an arbitration agreement may fall with the contract does not prevent the court declaring in a properly constituted suit that there never was a contract at all that the contract was void and of no effect." See also *Baijnath* v. *Chhotumal,* 52 C.W.N. 397. This section does not apply to a case where no relief is sought in respect of an agreement of reference to arbitration or award. If in a suit the plaintiff challenges either the existence or the validity of the contract one of the terms whereof is that any dispute between the parties relating to the execution of that contract must be decided by reference to arbitration the suit cannot be said to offend against the provision of this section. *Banwari Lal* v. *Board,* A.I.R. 1949 East. Punjab 165. See also *Munro* v. *Bagnor Urban District Council,* (1915) 112 L.T. 956=(1915) 3 K.B. 167, where it has been held by *Pickford, L.J.* that an action impugning the validity of an agreement on the ground of fraud, could not be said to involve a question, dispute or difference, upon or in relation to, or, in connection with, a matter which was referable to arbitration under the arbitration clause. In the above case *Pickford, L.J.* said : 'I think the action is with reference to matter wholly outside the powers of the arbitrator and with which he could not possibly deal.' "

But in *Haji Ebrahim* v. *Pannalal,* I.L.R. (1949) 1 Cal. 245, it has been held by *Sinha, J.* that even if an application for setting aside an award under S. 30 is barred by limitation, an application for a declaration that the award is invalid and illegal as there was no valid reference is maintainable under this section and there is no period of limation prescribed for the making of such an application ; see also *Ruby General Insurance* v *Peare Lal,* 53 P.L.R. 191=A.I.R. 1951 Punj. 440.

The true effect of ss. 32 and 33 is that when an award is pleaded by the plaintiff, it is not open to him to file a suit to enforce the award and his only remedy is to file an application under s. 33 of the Act and have the award enforced according to the procedure laid down in the Act itself. *Firm Ghulzari Mal* v. *Firm Ramesh Chandra,* A.I.R. 1959 Raj. 162=I.L.R. (1959) 9 Raj. 515.

1347. Damages given for breach of contract on wrong basis.— If the arbitrators have given damages for breach of contract on a wrong basis, the award is bad on the face of it and is liable to be set aside. ***Bijoy Singh*** **v. *Bilasray,* A.I.R. 1952 Cal. 440.**

1348. Suit to enforce award, whether maintainable.—If it is sought to be filed by a person who is a party to the award for a decision either as to the existence of the award or its effect, then such a suit is totally prohibited. A court proceeding to hear such a suit will be acting without jurisdiction since as a court of general jurisdiction its jurisdiction to hear a cause of this nature is curtailed. The expression "effect of the award" is wide enough to cover a suit to enforce an award. *Kanhyalal* v. *Ramchandra,* 1959 M.P.L.J. 1048=A.I.R. 1959 Madh.Pra. 415 ; see also A.I.R. 1952 Nag. 66 ; A.I.R. 1953 Bom. 386.

1349. Sections 2(c), 32, 33—Jurisdiction of court—Determination of.—In order to determine the question whether the court before which application under S. 32 and 33 are filed has jurisdiction to entertain them, it must be ascertained what the questions are, which form the subject-matter of the reference to arbitration and then supposing the questions had arisen in the suit, which is the court which would have jurisdiction to entertain the suit, whether in fact any part of the cause of action in the suit, which the opposite might have instituted arising out of the subject-matter of reference arose within the jurisdiction of the court before which the applications are filed. *Indar Chand, v. Pooran Chand,* A.I.R. 1959 Punj. 614 ; see also *Venkata* v. *Srinidhi,* (1950) 1 M.L.J. 709=63 Mad.L.W. 468. "Court" means a civil court, having jurisdiction to decide the question forming the subject-matter of reference if the same had been subject-matter of the suit but does except for the purpose of arbitration proceeding under S. 1 include a small cause court. A.I.R. 1959 Punj. 614.

1350. Section 32 whether abrogates s. 17 and 49 of the Registration Act.—Section 32 does not abrogate the provisions of Ss. 17 and 49 of the Registration Act. It merely provides that no Court can entertain any independent suit for a declaration that a certain award exists or is valid or to set aside, amend or modify or affect the award in any way otherwise than as provided in the Arbitration Act. Where an award, in an arbitration without the intervention of the Court purports to create, declare, assign, limit and extinguish in present the right, title or interest to immovable property over the value of Rs. 100, it *prima facie* requires registration ; and if unregistered, it cannot be received in evidence to prove any transaction affecting the property, and hence it cannot be enforced by Court. *Dewaram* v. *Harinarain,* 26 Pat. 437=A.I.R. 1948 Pat. 220

1351. Section 30 of the Specific Relief Act whether controls this section.—Section 30 of the Specific Relief Act cannot override S. 32, Arbitration Act. Section 32 is the governing section in respect of matters which involve questions as to the existence and validity of an arbitration agreement or award. The Act of 1940 was intended to and did alter the law, one of the main objects of the Act being to provide for claims to set aside awards and to challenge agreements of reference being made by application to Court and decide on affidavits or other evidence and not by suits. *Ram Chandra v. Munshi,* 4 D.L.R. (Pat.) 149=A.I.R. 1950 Pat. 267. See also, *Moolchand* v. *Rashid,* A.I.R. 1946 Mad. 346=(1946) 1 M.L.J. 186=(1946) M.W.N. 236=59 Y.W. 143.

1352. Application to set aside an award.—*Merideth, J.* said : "Under section 30 certain grounds are specified as the sole grounds upon which an award can be set aside, but there is no provision anywhere for an application to set aside an award, unless S. 33 be held to provide for

such an application, but section 33 speaks only of challenging the existence of its validity. However I am of opinion that an application to set aside an award can be made under S. 33, and I am further of opinion that in any view the written statement in the present case can be considered as an application under S. 33." *Gauri* v. *Ram Lochan,* 29 P.L.T. 105 = A.I.R. 1948 Pat. 430 = 3 D.L.R. (Pat.) 26. *Sri Ram Autor* v. *District Co-operative Sugarcane* A.I.R. 1960 All 500 (Statutory arbitration under Co-operative societies Act (1912) and U.P. Co-operative Society Rules (1936) Rr. 14, 115 and 134, subject to the right available under the Arbitration Act).

1353. Suits which are filed on the footing of the existence or validity of arbitration agreement whether barred.—Section 32 and 33 of the Arbitration Act only bar suits contesting or challenging the existence or validity of an arbitration agreement or award. These sections do not bar suits which are filed on the footing of the existence and validity of the arbitration agreement and the award and only seek to enforce the award. *Munshi Lal* v. *Modi Bros.,* 51 C.W.N. 563.

1354 Section 32, 14 and 40—whether award can be enforced by suit.—Under s. 14, it is open to a person interested in the award to apply to the Court that the award be filed in Court. It is also open to him to sue for the enforcement of an award. Section 32 bars suits challenging an award, but does not bar a suit to enforce an award. Hence a person interested in an award may sue to enforce it instead of getting the award filed under S. 14. *Nanhelal* v. *Singhai,* A.I.R. 1944 Nag. 24 = I.L.R. (1944) Nag. 340 = 210 Ind.Cas. 473 ; but see *Deoki Nandan* v. *Basantlal,* A.I.R. 1941 Cal. 527 = I.L.R. (1941) 2 Cal. 123 = 45 C.W.N. 881 = 196 Ind. Cas. 851.

1355. Sections 32, 33 and 34— Award given—Scope of.—The suit for cancellation of the sale deed and for possession of the suit land being are affecting and influencing the arbitration agreement and the award was barred under s. 32 of the Arbitration Act. The question whether the award was valid or invalid had no bearing whatsoever in the applicability of ss. 32 and 33. *Mohan Singh* v. *Bhulan,* 1962 M.P.L.J. (notes) 7. See also, *S.P. Bhatnagar* v. *Balmakund Balla,* 1960 All L.J. 384 = 1960 All. W.R. (H.C.) 300.

1356. Contract containing arbitration agreement as of its terms.—This section does not apply to a case where no relief is sought in respect of an agreement of reference to arbitration or award. *Banwari Lal* v. *Board of Trustees,* A.I.R. 1949 E.P. 165.

1357. Suit for decree in terms of award is barred.—A suit for a decree in terms of an award on the ground that it has become final and binding necessarily raises the question with regard to the existence and validity of the award and as such is barred by section 32 of the Arbitration Act, *Radha Kishen* v. *Ganga Ram,* A.I.R. 1951 Punj. 121. See also *Mool Chand* v. *Rashid,* A.I.R. 1946 Mad. 346 = I.L.R. (1946) Mad. 840 ; *Deokinandan* v. *Basant Lal,* 45 C.W.N. 831 = A.I.R. 1941 Cal. 527 ; *Bhagwan Das* v. *Atma Singh, A.I.R.* 1945 Bom 494 = 47 Bom.L.R. 716 ; *Ralanji* v. *Vispal,* A.I.R. 1942 Bom. 101 = I.L.R. (1942) Bom. 452 ; but see *Anandi Lal* v. *Singhal,* A.I.R. 1944 Nag. 24 = I.L.R. (1944) Nag. 340.

1358. Applicability—Suit to enforce right accruing to one of the parties to award against one not party to award.—A entered into an agreement to sell his land to C which was mortgaged to B. Subsequently

A gifted the property to D. C. brought a suit for specific performance of the contract against A and B. The parties referred the matters to arbitration and the arbitrators under the award gave C and D each a portion of the land in dispute. C brought a suit for redemption against B. *Held,* that the suit was not barred by S. 32 as any dispute in regard to matters covered by the award between C and B and cannot cover a right which accrued to one of these parties as against B who was not a party to the award. *Nathuni* v. *Paras,* 1955 B.L.J.R. 408 = A.I.R. 1957 Pat. 129.

Where an award made in arbitration out of court is accepted upon by the parties voluntarily and a suit is thereafter sought to be filed by one of the parties ignoring the acts done in pursuance of the acceptance of the award, the defence that the suit is not maintainable is not founded on the plea that there is an award which bars the suit but that the parties have by mutual agreement settled the dispute and that the subsequent actings of the parties are binding. In such a case by setting up a defence in the partition suit that there has been a division of the property and that parties have entered into possession of the properties allotted the defendant is not seeking to obtain a decision upon the existence, effect or validity of an award. He is marely seeking to set up a plea that the property was divided by consent of parties. Such a plea is not precluded by s. 32. *Kashinath Saw* v. *Narsinga,* A.I.R. 1961 S.C. 1077.

1359. Petition to court seeking declaration of existence of valid arbitration clause whether barred.—When the Legislature enacted s. 32 and barred all suits with regard to the existence, effect or validity of an arbitration agreement, the object of the Legislature was that all questions with regard to these matters should be dealt with under the Arbitration Act, and not by substantive suits, and it is open to a party to make an application with regard to which a suit is barred under section 32. Section 33 is merely an instance of such an application. The Legislature cannot conceivably deal with all possible applications that may arise with regard to which suits are barred under S. 32. The right to make such applications is implied in the very terms of section 32 itself. Hence though there is no provision in the Act to enable a party to establish the existence or validity of arbitration agreement, a suit in respect of which is barred by S. 32, an application for the purpose can be entertained by the Court under the Arbitration Act though not under S. 33 there of. Section 33 enables a party to challenge the existence and validity of an arbitration agreement and it does not enable him to establish its existence and validity. *Gulamali* v. *Bishwambhar,* 51 Bom.L.R. 79 = A.I.R. 1949 Bom. 156. But in *Bajrang Lal* v. *Agar Mal,* A.I.R. 1950 Cal. 267, it has been held that a person who affirms the existence of an arbitration agreement cannot apply to the Court under S. 33 or any other section of the Arbitration Act for an adjudication by the Court that such an agreement exists and is binding on the parties. In dissenting from the judgment of the above-mentioned Bombay case, the Court observed : "In *Manik Lal* v. *Shiva Jute Mills,* 52 C.W.N. 389, *Das. J. held,* that the 'existence of an arbitration agreement which by S. 32, Arbitration Act, 1940 cannot be challenged by a suit is not the factual but the legal existence of an agreement on the grounds like mistake, fraud, illegality, etc., under Ss. 19 to 20, Contract Act. His Lordships further *held* that S. 33 applies only when the applicant admits the factual existence of an agreement but challenges the 'legal' existence thereof on such grounds as misrepresentation, fraud, etc. In *Baijnath* v. *Chhotulal,* 52 C.W.N. 397, *Clough, J.* followed the judgment of *Das J.*

"*Sinha, J.* has differed from the judgments of both these learned Judges in *Chaturbhuj* v. *Bhicamchand Chororia & Sons*, 53 C.W.N. 401. According to the learned Judge the intention of the framers of the Arbitration Act was that the right and liabilities of the parties in respect of an arbitration agreement or an award such as are mentioned in Ss. 31 and 32 of the Act should be litigated only in the Court having jurisdiction under S. 31 and on application made under section 33 and not by way of suit. The intention of the Legislature was to take away the remedy by way of suit which the parties to an arbitration agreement or an award had before the passing of the Act and to relegate them to the remedies as provided in the Act.

"The opening words, 'any party to the arbitration agreement', in S. 31 of the Act should be construed according to *Sinha, J.* to mean a party who is alleged to be a party to an arbitration agreement but who challenges the existence thereof and that there is nothing in the section to restrict the word, 'existence' to 'legal existence' and it should be read in its ordinary and natural meaning, namely, existence either in fact or in law.

"Mr. Barwell, learned counsel appearing on behalf of the respondent relied on the judgment of *Das* and *Clough, J.J.* while Mr. Ganguli for the petitioner relied on the view of *Sinha, J.* In this case it is not necessary for me to come to any decision regarding this conflict of judicial authorities which should really be resolved by the Court of appeal. Even if *Sinha, J.* is right in the view that he has taken, the party who challenges the existence of an arbitration agreement is entitled to apply under S. 33, Arbitration Act. That section provides a remedy to the party who challenges the existence of an agreement to refer to arbitration and he can come to Court and obtain a decision, even when the other sides does not wish to enforce it. *Bhagwandas* v. *Atma Singh*, 47 Bom.L.R. 716 = A.I.R. 1945 Bom. 494.....

"Sections 32 and 33 are the new sections introduced by the Arbitration Act of 1940. They were introduced in accordance with the suggestion of the Civil Justice Committee and were meant to negative the decision in *E. D. Sasson & Co.* v. *Ramdutt Ramkissen*, 50 Cal. 1 = A.I.R. 1922 P.C. 374 and *Mutulal* v. *Ram Kissendas*, 47 Cal. 806 = A.I.R. 1920 Cal. 820, where it had been *held* that a suit must be filed if a party wants to challenge the existence of a submission.....The first part of section 32 prevents a substantive right to challenge the existence of an arbitration award enforced according to the procedure laid down in the Act have the agreement. The second part of that section prevents the setting aside, amending or modifying or in any way affecting an arbitration agreement, otherwise than as provided by the Act. It has been *held* by the Calcutta High Court that suit to challenge the existence or validity of an arbitration clause in a contract or for determining the effect of an arbitration agreement or award is not maintainable by reason of S. 33, Arbitration Act of 1940 which provides that such a challenge must be made by means of an application and not by means of a suit. *Deokinandan* v. *Basantlal*, I.L.R. (1941) 2 Cal. 123 = A.I.R. 1941 Cal. 527. A contrary view has been taken by a Division Bench of the East Punjab High Court in *Banwari Lal* v. *The Board of Trustees*, A.I.R. 1949 E.P. 167. With respect to the learned Judges of the East Punjab in my opinion the correct view was taken by *Lord Williams, J.* in the Calcutta case cited above. The Madras High Court has also taken the same view as the Calcutta High Court adopted. *Rashid Jamshed* v. *Moolchand Jothajee*, (1945) 2 M.L.J. 98 = A.I.R. 1945 Mad. 371.

"Section 33 is a corollary to S. 32. Under s. 33, an arbitration agreement or an award has to be decided by means of an application. Section 33 provides a remedy not to the person who affirms the existence or validity of an arbitration agreement but to the person who challenges the same. *Obviously, the Legislature thought that the person who sets up submission can go to arbitration and have the disputes decided by the arbitrators.* Mr. Ganguli, learned counsel for the applicant, wants me to split up S. 33 and he contends that an application 'can be made to the Court (*a*) by any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or (*b*) by any party to an arbitration agreement desiring to have the effect of either an arbitration or an award determined. Counsel concedes that he cannot come under (*a*) because he is not challenging the existence or validity of the arbitration agreement as he is really asserting the existence of such agreement and is affirming the validity thereof. But he contends that he comes under (*b*) and he desires to have the effect of the arbitration agreement determined by this Court. I cannot accede to this contention. The words "existence, effect or validity of an arbitration agreement or award" are used in S. 32. Under S. 33 if any one challenges the arbitration agreement he can come to Court. If there is any question raised as to whether there is any particular dispute within the ambit of the arbitration agreement or whether it has ceased to be operative on account of frustration or any supervening illegality or impossibility then that can also be determined under this section by means of an application. In my opinion, the word 'effect' does not mean the existence of an arbitration agreement. It connotes in this context the purpot, drift, or tenor of the agreement. What Mr. Ganguli wants me to decide is that there is in fact an existing, valid and binding arbitration agreement. Really there is no question of deciding the effect of that agreement.

"My attention has been drawn to a case decided by the Division Bench of the Bombay High Court in *M. Gulamali Abdul Hussein* v. *Vishwambharlal,* 51 Bom.L.R. 79=A.I.R. 1949 Bom. 158. The learned *Judges Chagla, C.J.* and *Tendolkar, J. held* that an application to establish the existence or validity of arbitration agreement can be entertained by a Court under the Arbitration Act, 1940, though not under S. 33 thereof.....

"With great respect, I cannot agree with the view taken by *Chagla, C.J.* in the above case. When the Legislature enacted S. 32 and barred all suits with regard to the existence, validity or effect of an arbitration agreement or award, it realised that proper procedure or remedies should be prescribed or rights should be conferred on litigants for the determination of such questions and that is why S. 33 was enacted. Section 33 to my mind is to be read as illustrative. It is difficult to follow how a general right to apply may be *held* to exist when the statute makes specific provisions providing for the right of litigant to come to Court with regard to a specific class under specific conditions. The fact that the right of suit is taken away by S. 32 does not confer a general right to the litigants to apply to Court. To my mind, it is not correct to urge that S. 32 has impliedly created a general right to apply to Court under that section. If that was the correct view, then S. 33 would be unnecessary. When the Legislature had its attention directed to the necessity of making provisions in order to provide for the situation created by the enactment of a provision like S. 32, then it must be assumed that

S 33 is exhaustive and not illustrative. Therefore, in my opinion, a person who denies the existence of an arbitration agreement cannot apply under the Arbitration Act. I cannot understand how can there be a general right to apply under an Act although there is no right to apply under any specific section of the Act." See now *Sha & Co.* v. *Ishar Singh,* A.I.R. 1956 Cal. 321=60 C.W.N. 471 (F.B.) (overruling I.L.R. (1949) Cal. 245 and A.I.R. 1951 Cal. 78) given at the beginning of S. 30 under the heading *Sections* 30, 32 *and* 33. The reference to the above Full Bench case has also been given under S. 33 under the heading "Ss. 15, 16, 30 and 33." *Vide* p. 739 *infra.*

1360. Right to set up a defence whether taken away.—Section 33 of the Arbitration Act does not take away the right of a party to set up as a defence to an application for stay the non-existence of any agreement of arbitration when the agreement is propounded under S. 34 by the otherside. It is not necessary that he should take a substantive application for that purpose. Section 33 provides for a case where a party wants to obtain the Court's declaration for non-existence of an agreement for his own use. In such a case he has to make an application to get the judgment. *Bhagwandas* v. *Atma Singh,* 47 Bom.L.R. 716=A.I.R. 1945 Bom. 494. See also *Muthu Kute* v. *Varu Kutty,* A.I.R. 1950 Mad. 64; *Sayyaparaju* v. *Nekkanti,* A.I.R. 1951, Mad. 525. The prohibition in S. 32 is confined merely to a plaint by which a decision, upon the existence, effect or validity of an award is sought. Its provision does not extend to a defence as opposed to the filing of a suit. Consequently a defendant is not precluded from putting forward an award which has been fully performed by him but which was not filed under S. 14 and according to which judgment was not pronounced or decree given under S. 17 of the Act in answer to the plaintiff's claim which was the subject-matter of the reference and award. *Suryanarayana* v. *Venkata Reddi,* 1948 M.W.N. 268=61 L.W. 289=A.I.R. 1948 Mad. 436=3 D.L.R. (Mad.) 23=(1948) 1 M.L.J. 31. In the last named case the Court observed : "There can be no doubt that section 31 merely regulates the forum and we notice that this is the view which found acceptance in *Bengal Jute Mills* v. *Jewraj,* I.L.R. (1943) 2 Cal. 392=A.I.R. 1944 Cal. 188=220 Ind.Cas. 306, where *McNair, J.* pointed out that S. 31 is not an enabling section but a section which merely defines jurisdiction.

"Turning to Ss. 32 and 33 it must first be observed that while S. 33 provides for an application by a person 'desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined,' section 32 uses what may be regarded as somewhat wider language that 'no suit shall be.....for a decision upon the existence, effect or validity of an arbitration agreement or award.' It is fundamental principle of statutory interpretation that when the right of suit is taken away and the remedy by way of an application is substituted for it, the prohibition would ordinarily be presumed to be co-extensive with the new remedy that is provided. An analogical case is where the jurisdiction is taken away from Civil Courts and conferred on revenue Courts, the extent to which it is conferred on the latter being regarded as determining the extent to which the former are deprived of it : *Vide* Ss. 13 and 21 Madras Hereditary Village Officers Act, of 1895, and *Seltharam Naidu* v. *Rami Naidu,* 33 Mad. 208=5 Ind.Cas. 137. It would therefore seem as if S. 32 notwithstanding its apparently wider language,

has to be read only as precluding a suit praying for the relief for which an application is provided under S. 33." See also, *Panchanan* v. *Nani*, I.L.R. (1951) 1 Cal, 438. But see *Lachhuman* v. *Makar*, 32 Pat. 604 = A.I.R. 1954 Pat. 27.

1361. Whether decree passed under section 17 can be challenged by suit.—Section 32 bars a suit for a decision upon the existence, effect or validity of an arbitration agreement or award. Neither a suit can be brought for the amendment, modification or in any way affecting otherwise an arbitration agreement or award. In this section no mention is made of a "decree" passed on the basis of an award under section 17 of the Act. Now the question is whether a suit is maintainable to set aside the decree. According to the old law a judgment and decree based on award was final and as such would constitute *res judicata*. *Vyankatesh* v. *Sakharam*, 21 Bom. 465. For other cases *vide* notes under section 17 *supra*. But even under the old Act the decision of a matter by the arbitrators without jurisdiction does not operate as *res judicata*. *Harasankar* v. *Raghuraj*, 20 All. 519 (P.C.); *Chuma Kunwar* v. *Beharilal*, A.I.R. 1934 All. 117 = 151 Ind.Cas. 338; *Ghora* v. *Mulchand*, 196 Ind.Cas. 151 = A.I.R. 1941 Sind 111. So it seems that a decree and judgment based on such an award is not *res judicata*.

1362. Meaning of the words "award", "agreement".—The word "agreement" must include a sham agreement and the word "award" must include a bogus award. *Umadutt* v. *Chandrao*, A.I.R. 1947 Bom. 94. It is not necessary that an agreement to submit a dispute to arbitration should set forth in full detail every matter which is in dispute. *Ponrmaya* v. *Suphammal*, A.I.R. 1946 Mad. 391.

33. *Any party to an arbitration agreement or any person claiming under him desiring to challange the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :*

Arbitration agreement or award to be contested by an application.

Provided that where the Court deems it just and expedient it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

1363. N.B.—This section is also new.

1364. Nature of procedings under this section—Procedure to be followed.—Where an application under this section is filed challenging the existence or validity of an award, the procedure laid down in ss. 14, 15 and 16 of the Act is not made immediately applicable. Proceedings under this section are entirely different from the proceedings under ss. 14 to 17 of the Act and the court is not bound to pronounce a judgment in accordance with the award merely because it was dismissing the application under this section filed by the other side specially when it had not been moved to pass any such order by the respondent. This section was enacted to provide a speedy remedy to a party objecting to a reference or an award, and instead of having to file a separate suit for the purpose he can now merely move an application which has to be

generally decided on affidavits. *Balwant Singh* v. *Ram Charan,* I.L.R. (1944) All. 375=A.I.R. 1944 All. 188=1944 A.I. J. 241 ; see also A.I.R. Punj. 171 noted below. The provisions of this Act make it abundantly clear that a challenge to the validity of an award is inadmissible without an application. *Mahadeo* v. *Kamala,* A.I.R. 1956 All. 51. Where dispute found to be within scope of arbitration clause, court cannot enter into merits of dispute. *Commander* v. *Arnujan,* I.L.R. (1953) Mys. 480=A.I.R. 1954 Mys. 46. It is clear from s. 32 that not only a suit which seeks a decision upon the existence, effect or validity of an arbitration agreement or an award, is barred, but even a defence which has the same effect is also barred. *Gulzarimal* v. *Ramesh Chandra,* A.I.R. 1959 Raj. 162. The true exect of ss. 32 and 33 is that where an award was pleaded by the plaintiff, it is not open to him to file a suit to enforce an award, and his only remedy is to file an application under s. 33 and have the award enforced according to the procedure laid down in the Act itself *Ibid.* The Civil Court has no jurisdiction to try a suit which is in substance and in effect is a suit to enforce an award as it would be a plain violation of ss. 32 and 33 of the Arbitration Act. A.I.R. 1959 Raj. 162. The language of s. 33 leaves no doubt that when the existence of an arbitration agreement or its validity is challenged in an application under s. 33, the court shall decide the question. *Damodar Shah* v. *Union of India,* A.I.R. 1959 Cal. 526 ; *Shri Vallabh Pitte* v. *Norsinghdas,* 65 Bom. L.R. 29=I.L.R. (1962) Bom. 743=A.I.R. 1963 Bom. 157.

1365. Section 33—Retrospective effect.—The Arbitration Act of 1940 does not apply to awards made before the Act came into force. It only applies to an award made under it. *Debabrata Ghose* v. *Jnanendra N. Ghose,* A.I.R. 1960 Cal. 381.

1366. Ss. 15, 16, 30 and 33.—The validity of an award can be challenged under s. 15 of the Act which provides for its corrections or modification by the court or it may be challenged under s. 16 which provides for its remission for reconsideration or it may be challenged under s. 30 which provides for setting it aside. But none of these sections provides for the making of an application. It is perfectly clear that this authority for making an application in each one of these cases is derived ultimately from the general provisions contemplated in s. 33. *Per Chakravarthi, C.J.,* in *Sat & Co.* v. *Ishar Singh,* A.I.R. 1956 Cal. 321 = 60 C.W.N. 471 (F.B.).

1367. Applications under sections 30 and 33.—The award was filed in Court on the 18th July, 1951. An application under section 33 for challenging the validity of the arbitration agreement was presented on 17th January, 1952 and an application under s. 30 for setting aside of the award was presented on 12th Dec., 1952. Thus the petitioner took advantages of both the remedies available to him under the laws for challenging the validity of the award. The application under s. 30 was held by the Court to be barred by time. The application under section 33 was dismissed on the short ground that only one application lies for securing a declaration that the award was invalid. *Held* that where the Court proceeded to dismiss the application under s. 30 on the ground that the application was barred by time, it was incumbent upon the Court to pronounce judgement upon the application under s. 33 and to decide whether the arbitration agreement, and consequently the award which was given in pursuance of that agreement was or was not invalid. If after hearing the parties, the Court came to the con-

clusion that the award was not invalid, it was perfectly justified in pronouncing judgment in accordance with the award. The action taken by the Court in not proceeding to consider the objection of the petitioner in regard to the validity of the award, was contrary to the express provision of the law. *United India* v. *Bhagat Singh,* A.I.R. 1954 Punj. 171 ; see also *Jugaldas* v. *Pursottam,* 92 C.L.J. 181 = A.I.R. 1953 Cal. 690.

1368. Section 32, 33, 34—Scope of.—The object of the Legislature in enacting s. 32 is that no suit should be allowed to be instituted for a decision upon the existence, effect and the validity of an award and no party to an award shall be allowed to have it set aside, amended or modified or in any way affected otherwise than as provided in that Act. Section 33 provides that the validity of an award can only be contested by an application to the Court and not by independent suit. That section is mandatory, because it says that any party desiring to challenge the validity of an award shall apply to the Court and the Court shall decide the question on affidavits, subject of course to the provision in the proviso for other evidence for the taking of which the Court may pass appropriate orders. *Surayya* v. *Anandayya,* 63 M.L.J. 777 = (1951) 2 M.L.J. 313. See also *Liladhar* v. *Radha Krishna,* A.I.R. 1946 Nag. 5 = I.L.R. (1945) Nag. 634 = 1945 N.L.J. 526. The question whether the arbitration agreement was operative and effective or not, whether it should be enforced or not, or whether it was frustrated or not or whether it fell along with the other clauses of the contract or not, are all questions regarding the effect of arbitration agreement and sections 32 and 33, Arbitration Act bar suits for decision of such questions. The fact must be determined only by means of an application under s. 33. An arbitrator may decide whether he has jurisdiction over the dispute or not but his decision is not binding upon the court because he cannot confer jurisdiction upon himself by a wrong decision. It is for the court to decide exclusively whether he has jurisdiction or not and this is done through an application under s. 33 *Municipal Board* v. *U. P. Electric Supply,* A.I.R. 1958 All. 506.

The proper construction of ss. 30 and 33 would be that all applications challenging an award, irrespective of the ground of challenge, must be made under s. 33. *Basant* v. *Surendra,* I.L.R. 36 Pat. 35 = 1957 B.L.J.R. 94 = A.I.R. 1957 Pat. 417 ; A.I.R. 1956 Cal. 321 (F.B,). If the award only is challenged, because of some infirmity, or invalidity in the award, and not the arbitration agreement, and, the grounds of the challenge are those expressly mentioned, or impliedly included in the "otherwise invalid" clause in clause (*c*) of s. 30, the court is empowered, on an application presented under s. 33, to set aside the award under s. 30 of the Act. If, however, the existence of the arbitration agreement itself is challenged, then the court under s. 33 is empowered to determine the existence, or invalidity of the arbitration agreement, and to declare, if satisfied, that it is non-existent and invalid. On such a declaration, the purported award becomes a nullity and void *ab initio. Basant* v. *Surendra,* A.I.R. 36 Pat. 35 = 1957 B.L.J.R. 94 = A.I.R. 1957 Pat. 417. See also, *Savkur* v. *Amniflal,* I.L.R. (1954) Bom. 686 = 56 Bom.L.R. 89 = A.I.R. 1954 Bom. 393.

1369. Scope of section 33.—*Vide* notes under section 32. Ordinarily the court should decide the question on affidavits. But where such questions cannot be conveniently tried by affidavits, the court is entitled to examine witnesses. *Deokinandan Dalmia* v. *Basantlal,* A.I.R.

1941 Cal. 527=45 C.W.N. 881; *Liladhar* v. *Radhakishan,* I.L.R. (1945) Nag. 634=1945 N.L.J. 526=A.I.R. 1946 Nag. 5; *Sheocharan* v. *Sonichar,* A.I.R. 1948 Pat. 207=26 Pat. 115. In *Sassoon & Co.* v. *Ramdut Ramkissen,* 70 Ind.Cas. 727=A.I.R. 1922 P.C. 374=37 C.L.J. 336=44 M.L.J. 758=27 C.W.N. 660=50 Cal. 1=18 L.W. 537 (P.C.), their Lordships of the Privy Council said: "On the argument before their Lordships it was argued, as a preliminary point, that the suit would not lie, as the only remedy open to the plaintiffs was to move to set aside the awards under section 14 of the Arbitration Act, and this could not be done after the awards had been enforced by execution. In their Lordships' opinion, there is no substance in this point. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award; but where (as here) it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose." By s. 32 such rulings have been made obsolete. Such questions can now be decided by motions. It is only the court which refers the case to arbitration, that should finally decide the question whether the award is invalid, not for the reasons specifically mentioned in clause (*c*) of para. 15(1) but on other grounds also. *Asa* v. *Bhuran,* 163 Ind.Cas. 380=38 P.L.R. 725=A.I.R. 1936 Lah. 466. A provision in an award can be challenged on the ground that it is beyond the scope of the reference only by taking objections in the course of the suit in which the award is made. *Sarafuddin* v. *Jibanessa,* 39 C.W.N. 716. This section provides for a case where a party wants to obtain the court's declaration of the non-existence of an agreement for his own use. In such a case he has to make an application to get a judgment. *Bhagwandas* v. *Atmasing,* 47 Bom.L.R. 716=A.I.R. 1945 Bom. 404. In cases failing under the Bombay Co-operative Societies Act, both the question of the validity of an arbitration agreement and the question of the validity of an award referred to in this section are to be decided by the Special Court set up under the Co-operative Societies Act and not by a Civil Court as provided in this section. *G. I. P. Railway* v. *Bhikaji,* I.L.R. (1943) Bom. 320=209 I.C. 413=A.I.R. 1943 Bom. 341=209 Ind. Cas. 413. A void agreement can be questioned under this Act. A.I.R. 1954 Pat. 6. Section 33 contemplates an application for three purposes namely (i) when it is desired to challenge the existence of an arbitration agreement (ii) when it is desired to challenge its validity and (iii) when it is desired to have its effects determined. *Shiva Jute v. Hindley & Co.* A.I.R. 1959 S.C. 1357=(1960) I.S.C.J. 35=(1960) I.S.C.R. 569; see also *Union of India* v. *N P. Singh,* A.I.R. 1962 Cal. 594=66 C.W.N. 977 (principles on which award can be challenged as "bad on the face of it).

1370. Suit challenging validity of arbitration agreement whether maintainable.—A suit to challenge the existence or validity of an arbitration clause in a contract or for determining the effect of an arbitration agreement or award is not maintainable by reason of section 33 of the Act which provides that such a challenge must be made by means of an application and not by means of a suit. *Bajranglal* v. *Agarwal,* A.I.R. 1950 Cal. 267. A dispute that the contract of which the arbitration clause forms an integral part is illegal and void is not one which the arbitrators are competent to decide under the arbitration clause although it is of sufficient amplitude to take in a dispute as to the validity of the agree-

ment and in consequence a party to the contract is entitled to maintain an application under s. 33 for a declaration that the contract is illegal and that in consequence the proceedings thereunder before the arbitration and the awarr in which they resulted were all void. *Khardah Co. Ltd* v. *Raymon & Co.*, (1963) 1 S.C.A. 314=A.I.R. 1962 S.C. 1810. See also *Waverly Jute Mills Co. Ltd.* v. *Raymon & Co.* (1963) 1 S.C.A. 391=(1963) 3 S.C.R. 209=A.I.R. 1963 S.C. 90 (dispute relating to validity of contract to be decided by court and not by arbitration); *Shree Bajrang Jute Mills* v. *Fulchand,* A.I.R. 1963 Cal. 140; *The Premier Insurance Co.* v. *V. K. Khanna,* (1963) 2 M.L.J. 462.

1371. Suit to declare award invalid for want of valid reference. —Even if an application for setting aside an award under s. 30 of the Arbitration Act is barred by limitation, an application for a declaration that the award is invalid and illegal as there was no valid reference is maintainable under s. 33 of the Act, and there is no period of limitation prescribed for the making of such an application. *Haji Ebrahim* v. *Pannalal,* I.L.R. (1949) 1 Cal. 245; *Gani* v. *Ramlochan,* A.I.R. 1948 Pat. 430; but see A.I.R. 1954 Cal. 64; *Gunavantibai* v. *Official Assignee,* 62 Bom.L.R. 601=1960 Nag.L.J. 644=I.L.R. 1960 Bom. 532=A.I.R. 1961 Bom. 24 (ppwer of court to consider *suo motu* whether the award was collusive)

1372. Power of Court to take evidence under this section.— Where in an application under s. 14(2), Arbitration Act, the pleadings involve serious allegations of fraud, forgery, etc., and of denial of the arbitration, the issues raised are not such as could properly be decided by affidavit. *Jagadish* v. *Sunder,* 27 Pat. 86=A.I.R. 1949 Pat. 393; see also, *Deokinandan* v. *Basanta,* A.I.R. 1941 Cal. 527=I.L.R. (1944) 2 Cal. 123. Section 33 only gives an indication of what the Court would be entitled to do in a fit and proper case. The section does not take away the powers of the Court to take evidence in ordinary cases, apart from petitions strictly falling under that section. It would be open to the Court to make such orders, as are contemplated in s. 33, even in the case of other petitions which may be filed under the Act, if the Court thinks it just and expedient to do so. *Vishambar Lal* v. *Gulamally,* 4 D.L.R. (Bom.) 91.

1373. Question whether contract is gaming and wagering.— In an application under s. 33 the question whether the contracts were gaming and wagering contracts cannot conveniently be tried on affidavits and hence the application should be set down for hearing with witnesses. *Deokinandan* v. *Basantilal,* A.I.R. 1941 Cal. 527=I.L.R. (1941) 2 Cal. 123=45 C.W.N. 881=196 Ind.Cas. 851.

1374. Any party to an arbitration agreement.—The words "any party to the arbitration agreement" should not be read in a sense other than in the strict and literal sense. It should be construed to mean a party who is alleged to be a party to the arbitration agreement but who challenged the existence thereof. The word "existence" should not be read in a restricted sense but in its ordinary and natural meaning, namely, existence either in fact or in law. An application by a party who denies the factum of the arbitration agreement is, therefore, maintainable under s. 33 of the Act. *Chaturbhuj* v. *Bhicum,* 53 C.W.N. 410; see also *Bhagwan Das* v. *Atmasing,* 47 Bom.L.R. 716= A.I.R. 1945 Bom. 494; *Manik Lal* v. *Shiva Jute,* 52 C.W.N. 389; *Baijnath* v. *Chhotulal,* 52 C.W.N. 397; *Bajrang Lal* v. *Agarwal,* A.I.R. 1950 Cal. 261; *State of Bom-*

bay v. *Adamji Hajee,* A.I.R. 1951 Cal. 157. The expression "any party to an arbitration agreement" should be construed so as to cover a person who is claimed to be a party to an agreement of arbitration although he does not admit its execution or the authority of the person executing it. *Lalchand* v. *Basanta Mal,* 49 P.L.R. 245. The expression "any party to an arbitration agreement" in this section taken along with the fact that he is the person who challenges the existence of the agreement must be understood as having reference to a person who is put forward as being a party to an arbitration agreement but who does not admit its existence. It is not necessary to restrict the meaning of the word "existence" as implying the legal existence as opposed to apparent or mere factual existence, *i.e.,* as opposed to a mere semblance of existence, but may be taken as referring in the context to an agreement which is apparent and not real. The expression only describes the applicant and does not assume the truth of the agreement. *Mushu Kutty* v. *Varu Kutty,* A.I.R. 1950 Mad. 64. The words "any party" with which this section opens mean also persons who are not actually parties, but who claim and, who are alleged to have entered into arbitration agreement likewise, the word "agreement" include sham agreement and means factual existence of the agreement, although it may have, or it may turn out to have, no legal existence at all. *Basant* v. *Surendra,* I.L.R. 36 Pat. 35=1957 B.L.J.R. 94=A.I.R. 1957 Pat. 4417; see also A.I.R. 1947 Bom. 94.

1375. Shall apply.—An application filed subsequently to the filing of the award in court, asking for inspection of the record and also contains the objections on which the party challenges the award, can be treated validly as an application under the section. The fact that the details of the objections were not contained in the application but were furnished in the written statement filed by the party in the suit to get a decree passed in terms of the award cannot preclude the court from treating the application as one under s. 33. Where such application was filed within the time allowed under Act 158 of the Limitation Act it would be competent for the court to enquire into the validity of the award on the grounds mentioned in the application and amplified by the party in the written statement. *Sheoramprosad* v. *Gopal Prosad,* 1959 M.P.L.J. 87=1959 M.P.C. 31=1959 Ind.L.J. 24=A.I.R. 1959 Madh. Pra. 102.

1376. Filing of award pending application for declaration that there was no valid award.—When an application is presented to the Court under s. 33 which challenges the existence of an award, no award need, or can be filed in such application. *Kappuswami* v. *Anantharamier,* 1947 M.W.N. 371=60 L.W. 244=(1947) 1 M.L.J. 297=A.I.R. 1948 Mad. 40=I.L.R. (1948) Mad. 83.

1377. Application made before award is filed.—An application under section 33 to have the validity of an award determined by the Court is liable to be thrown out as not maintainable when there is no award in Court. But when once the award is produced in Court, though it may not have been filed before the application was made, it will be deemed to have been made as an application to set aside the award. *Damari* v. *Rampirit,* A.I.R. 1950 Pat. 376; see also *Ariff* v. *Bengal Silk,* A.I.R. 1949 Cal. 350=I.L.R. (1945) 2 Cal. 70; *Lachhmi* v. *Gobordhan,* A.I.R. 1948 Pat. 171, but see *Bengal Jute* v. *Jewraj,* I.L.R. (1943) 2 Cal. 392=A.I.R. 1944 Cal. 304 and *Ratanji* v. *Bhirajlal,* I.L.R. (1942) Bom. 452=A.I.R. 1942 Bom. 101. It has been held by the Allahabad High

Court that an application under this section should be made only after the award has been filed. Any such application before the filing of the award would be premature and may be incompetent. Even if it be not absolutely incompetent it is essential that it should be made either after an application under s. 14 (2) of the Act for the order directing the arbitrator to file an award has been made or it should be accompanied by such an application. *Bishnu Prasad* v. *Gopal Das,* I.L.R. (1950) All. 50. In *Bengal Silk* v. *Aisha Ariff,* A.I.R. 1947 Cal. 106=231 Ind.Cas. 106, *Gentle J.* said : "In my opinion an application to set aside an award being filed in Court ; but directly the award is filed, irrespective whether or not notice has been received of its filing, such application is competent."

1378. Existence or validity of subject-matter of dispute or of transaction which are the subject of arbitration—whether can be enquired.—Normally, in dealing with an application under this section, the Court is concerned with determining the existence, legality or effect of an arbitration agreement at the instance of a party challenging the arbitration agreement ; the Court is not concerned with the existence or validity of the transactions which are the subject-matter of arbitration. The latter question *i.e.,* as to the existence or validity of the subject-matter of dispute cannot fall directly within the scope of the inquiry as to the existence or validity of the arbitration agreement. But where a party applying under s. 33 desires to have the effect of the arbitration agreement determined the court is entitled under s. 33 to consider whether the particular dispute before the Court, is within the scope of the arbitration agreement. If the Court comes to the conclusion that a dispute is within the agreement, the arbitrator is the sole judge of it ; but if it does not fall within the scope of arbitration agreement, the Court is entitled to declare the effect of the arbitration agreement and incidentally upon the validity of the contract.

If the Court, on an application under s. 33, holds that an arbitration agreement does in fact exist or that it is a valid agreement, as it is open to it to so hold in view of ss. 32 and 33 the arbitrator is entitled to decide the dispute on the merits. It cannot be held that once an objection to the existence or legality of an arbitration agreement is taken, the arbitrator loses jurisdiction to decide the dispute on the merits for all time. Nor is it necessary for the party asserting that an arbitration agreement exists in fact and law to make a substantive application for a declaration to that effect when the other party has challlenged the existence or validity of the arbitration agreement and has failed therein. *Gordhandas* v. *Natvarlal,* 54 Bom.L.R. 367=A.I.R. 1952 Bom. 349 ; *Dhanrajmal* v. *Shamji,* A.I.R. 1961 S.C. 1285 (since such a plea can only be raised in bar of an application by the person seeking a reference to arbitration at least that portion of the Act still applies and the power can only be exercised by the court).

1379. Purposes for which section contemplates application.—Section 33 contemplates an application for three purposes, namely (1) when it is desired to challenge the existence of arbitration agreement, (ii) when it is desired to challenge its validity, and (iii) when it is desired to have its effect determined. An arbitration agreement may come into existence in one of two ways ; it may either arise out of an agreement which contains nothing else besides the arbitration agreement, or it may arise out of a term contained in a contract which deals with various other matters relating to the contract. Where one is dealing with an arbitration agreement of the second kind, s. 33 is concerned only with the term relating to arbitration in the contract and not with the terms

of the contract which do not arise for consideration on an application under that section. *Shiva Jute* v. *Hindlay & Co.*, A.I.R. 1959 S.C. 1357=1960 S.C.J. 35.

1380. Act X of 1940 ss. 2(c), 32 and 23—Jurisdiction.—In order to determine the questions whether the court before which application under ss. 32 and 33 are filed has jurisdiction to entertain them, it must be ascertained what the questions are, which form the subject-matters of the reference to arbitration and then supposing those questions had arisen, in a suit, whether in fact any part of the cause of action in the suit, which the opposite party might have instituted arising out of the subject-matter of reference arose within the jurisdiction if the court before which the applications are filed. *Inder Chand* v. *Pooranchand*, (1958) Punj. 232=A.I.R. 1959 Punj. 614; (1950) 1 M.L.J. 709; *Ghulzarimal* v. *Rameshchandra*, A.I.R. 1959 Raj. 162=1959 Raj. L.W. 459=I.L.R. (1959) 9 Raj. 515.

1381. Application whether maintainable.—Illustration.—A policy of motor insurance contained the following arbitration clause: "All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by such of the parties within one month. If the company shall disclaim liability to the insured for any claim thereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained. Then the claim shall for all purposes be deemed to have been abandoned and shall not be recoverable hereunder.' The policy-holder made a claim upon the company for the loss of his car in communal riots. The company repudiated its liability under the policy on three successive occasions, the last of such disclaimer being on 1st August, 1948. On 21st November, 1949, the policy-holder appointed an arbitrator. The company thereupon made an application under s. 33, Arbitration Act praying for a declaration that the reference was illegal and for an injunction to restrain the arbitrator from proceeding in the matter. The company's case was that as the appointment of the arbitrators was made more than 12 months after even the last disclaimer by it, the claim must be demed to have been abandoned. The case of the policy holders, on the other hand, was that there was no valid disclaimer by the company. The question for decision was whether the point in dispute fell to be decided by the arbitrator as being a difference 'arising out of the policy' or by the Court under s. 33, Arbitration Act. *Held* that the test in such cases is whether recourse to the contract by which parties are bound is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction. In the present case both the parties admitted the contract and stated that they were bound by it. In fact each of them relied upon it to support its case. The difference between the parties was therefore a difference arising out of the policy and the arbitrator had jurisdiction to decide it, the parties having made him the sole judge of all differences arising out of the policy. *Ruby General* v. *Pearylal*, A.I.R. 1952 S.C. 119=(1952) S.C.R. 501=(1952) 1 M.L.J. 741=1952 M.W.N. 455=(1952) S.C.J. 156 (S.C. affirming A.I.R. 1951 Punj. 440; see also *A. M. Mair & Co.* v. *Gordhandas*, 1950 S.C.R. 792=A.I.R. 1950 S.C. 9: *Heyman* v. *Darwin*, (1942) 1 All. E.R. 337=111 L.J.K.B. 241; *Macaura* v. *Northern*

Assurance, (1925) A.C. 619=94 L.J.P.C. 154 ; *Steffing* v. *Liverpool,* (1917) 2 K.B. 433=86 L.J.K.B. 115.

In the first named case their Lordships of the Supreme Court observed: "No question of determining the effect of the arbitration agreement arises, because, there is no dispute between the parties as to what it means. The language of the arbitration clause is quite clear, and both parties construe it in the same way. The real question between them is whether respondent No. 1 has or has not complied with the conditions of the agreement. *But this question does not* turn on the effect of arbitration agreement. This is the view which has been taken by the High Court and in our opinion it is correct."

1382. Arbitration clause—knowledge of parties about incapacity of arbitrator—Estoppel.—Even if the plea of estoppel is not properly pleaded the court will not disallow the plea if the facts pleaded in the affidavit clearly make out the plea of estoppel. *Union of India* v. *B. M. Sen,* A.I.R. 1963 Cal. 446.

1383. Application for an order about the existence of arbitration agreement how can be made.—It is not necessary under the Arbiration Act that there should be a written submission in order to sustain a petition to Court seeking to affirm the existence of an arbitration argeement. The law does not require that a submission to arbitration must be singed by both the parties. The only requisite of the law is that there must be a submission in writing. If there is a submission clause in a contract, it is not necessary that the contract must be singed by the other pary before the other party can be bound by the submission clause, the party may accept the contract orally or in writing. If the applicant is in a position to establish that a particular contract, which contains a submission clause, was accepted by the respondent, there would be a written submission. Such acceptance may be proved by conduct. *Gulamali v. Vishwambar Lal,* 51 Bom.L.R. 78=A.I.R. 1949 Bom. 158.

1384. Award existing—Suit based on original title.—A coparcener of a joint family can bring a suit a for partition of joint family property basing has suit on his right to demand such partition inspite of the fact that there exists an award between the coparceners touching the subject of partition. *Sia Kishori* v. *Bairavi,* 31 Pat. 886=A.I.R. 1953 Pat. 42, see *Union of India* v. *B. C. Nawn, & Bros. P. Ltd.* A.I.R. 1961 Cal. 621 (where the original contract containing the arwitration agreement is extinguished by settlement contract *i.e.,* the settlement is a full satisfaction of the original contract, no dispute is left outstanding to be by the arbitration).

1385. When award is void.—When the powers constituting the second court are the same persons who constituted the first Court, under the Rules of the Bengal Chamber of Commerce, the award will be declared void under this section. *Ramnath* v. *Nanju,* A.I.R. 1953 Cal. 787. Award is incomplete and liable to be set aside when the arbitrator fails to renew findings in respect of some matters out of the several matters referd to him. *Lingam* v. *Kanuri* (1964). Andh. W.R. 100=A.I.R. 1964 Andh. P. 148.

1386. Effect of award.—An award is binding between the parties in all matters which it professes to decide, and the fact that parties to the award have not carried out its terms is not in law sufficient to deprive the award of its binding effect. A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the

rights of the parties can be determined and constitute a bar to any action on the original demand. *Lutufallah* v. *Mahomed,* 223 Ind.Cas. 307 = A.I.R. 1946 Sind. 117.

1387. Ss, 14 to 17 and S. 33.—Proceedings under S. 33 are entirely different from the procedings under ss. 14, 16 and 17 of the Arbitration Act. A Court is not bound to pronounce a judgment in accordance within the award merely because it is dismissing the application under s 33 filed by the other side. *Balwant* v. *Ramcharan,* A.I.R. All. 188 = (1944) A.L.J. 241. It is not correct to say that an application under s. 33, is virtually made for the purpose of securing an order that the agreement to refer the matter to arbitration be not filed. An application like this is not provided by the Act and cannot be made. If a person does not want an agreement to be filed, he can keep quiet and oppose the application when one is made by his opposing party to have the agreement filed. *Radha Kishen* v. *Bombay Company Lta.,* A.I.R. 1943 Lah. 295 = 45 P.L.R. 287 = 212 Ind.Cas. 411.

1388. Meaning of "Parties," "arbitration," "agreement" and "award".—The word "parties" include "persons alleged to be parties" and the words "arbitration" and "agreement" and "award" have to be construed in a similar manner. *Unadutt* v. *Chandrao,* A.I.R. 1947 Bom. 94.

1389. Filing of objection where it is in substance an application.—Where after the filing of an award in court one of the parties to the arbitration, being misled by the order of the court posting the suit for objections, files objections instead of an application to set aside the award, and the objections not only are in substance an application to set aside the award, but almost so uniform, the mistake made by the party is nothing more than an irregularity which is not such as to entitle the court to overlook his objections and to pass a decree in terms of the award. *Gadiraju* v. *Gottemukkula,* A.I.R. 1947 Mad. 315 = (1947) 1 M.L.J. 155 = 60 M.W.N. 133 ; see also *Gopalji* v. *Chhagan,* 45 Bom. 1071 = A.I.R. 1921 Bom. 419 = 63 Ind.Cas. 929 ; *Deokinandan* v. *Basantalal,* (1941) 2 Cal. 123 = A.I R. 1941 Cal. 527 ; *Bangaraya* v. *Ramabhudrıraju,* A.I.R. 1947 Mad. 315 = I.L.R. (1948) 123 = (1947) I M.L.J. 155.

1390. Form of Application.—A court may get rid of technicalities and treat a petition for objection as being in substance an application in terms of s. 33. *Panchanan* v. *Nani Gopal,* I.L.R. (1951) 1 Cal. 438.

1391. Scope of subsequent objection raised in appeal—Consideration of.—Under s. 33 it is competent for a party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of the arbitration agreement or an award or to have the effect of the either determined by an application to the court and the court is bound to decide that question, where the objections filed by a party generally said that the award was illegal and on his death during the pendency of appeal, his legal representative raised a further question that the reference was bad because he was not joined as a party to the reference though he was a party to the suit. *Held* that the original objections were wide enough to include the question subsequently raised in appeal. An arbitration agreement if it was invalid in law could not culminate in a valid award. Therefore, the subsequent objection was legitimate though it was not raised in the court of first instance. *Kalka* v. *Indra Deo* A.I.R. 1957 All. 781.

1392. S. 33 and 2(a).— Where the parties are not *ad idem* about the dispute to be decided by the arbitrators, there is no valid arbitration agreement. And if the agreement of reference is bad for indefiniteness

and uncertainty as the exact dispute referred to arbitration, the award is bad. The award on the basis of an invalid reference is a nullity and can be challenged in an appropriate proceedings. *Sheodutt* v. *Pundit,* A.I.R. 1955 Nag. 116=I.L.R. (1955) Nag. 224=1955 Nag. L.J. 258.

1393. Ss. 23, 28 and 20.—Unless a different intention is expressed in the agreement itself an arbitration agreement will be deemed to include the provisions set out in cls. 2 and 3 first Schedule of the Act. However those conditions when deemed to be included in the arbitration agreement become only referable to the action of the parties themselves and to the statute. The parties therefore are free to waive or vary those conditions. The failure of the arbitrators to appoint an umpire as required by clause (2) of the first Schedule will not vitiate the award. That clause is only intended to meet the contingency of the arbitrators being of divided opinion and which difference could not be resolved by the majority of votes. It cannot be said to impose a condition which must be fulfilled in all cases even when the arbitrators are not at variance. As regards delay in filing award that does not automatically take away the authority of the arbitrators. The parties themselves can waive the delay or the Court can excuse it under s. 28 even after the award has been filed. *Sheoramprosad* v. *Gopal Prosad,* 1959 M.P.L.J. 82=1959 M.P.C. 31=1959 Lah.L.J. 24=A.I.R. 1959 Madh Pra. 102.

1394. S. 33 and Specific Relief Act ss. 39 and 42.—The court has no power to dismiss an application under this section on the ground that the arbitration agreement is a clause in a contract and the decision may involve a declaration as to the existence or validity of the contract itself. Declaration the court will make in the order would be only as to the existence of the arbitration agreement. It has no powers to dismiss the application and ask the petitioner to file a suit under ss. 42 and 39 of the Specific Relief Act. *Damodar* v. *Union,* A.I.R. 1959 Cal. 526.

1395. Amendment of application giving new facts.—An amendment of an application under this section for declaration that the award was invalid which does not alter the nature of the application and does not displace it or convert it to an application of an inconsistent nature can be allowed. Accordingly when the relief claimed in the application under this section is a declaration that the award was invalid for certain reasons an amendment merely giving additional facts on the same relief is claimed can be allowed when it is made at an early stage. *Liladhar* v. *Radhakrishna,* A.I.R. 1946 Nag. 5. But such amendment should be allowed at the end of the trial. *Shanmuga* v. *Chidambaram,* A.I.R. 1938 P.C. 123=I.L.R. (1938) Mad. 644=32 S.L.R. 448=173 Ind.Cas. 772 (P.C.).

1396. Application under this section—Forum.—The court at the place where the contract has taken place and the defendant also resides, is competent to entertain an application under this section. *Radhakishen* v. *Liladhar,* 45 P.L.R. 287=A.I.R. 1943 Lah. 295=212 Ind.Cas. 411.

1397. Pecuniary jurisdiction.—The pecuniary jurisdiction of the court for the purpose of an application under s. 33, Arbitration Act, depends on the questions that form the subjectmatter of reference, which should be cognizable by the court, if they had been the subject-matter of a suit. In the case of a declaratory suit suing to have existence and validity of the arbitration clause contained in the contract determined, the relief being one of declaration pure and simple, a claimant is entitled

to put his own valuation thereon, for the purposes of court-fee and jurisdiction and no exception can be taken to the same. Consequently the application under s. 33 cannot be beyond the pecuniary jurisdictions of the court. *Municipal Board* v. *Eastern Electric*, A.I.R. 1958 All. 506.

1398. Ss. 33 and 35.—Section 35 makes proceedings before the arbitrators invalid, in the absence of an order under s. 34 staying the legal proceedings, when the whole of the subject-matter of the reference is covered by any legal proceedings taken in respect to it. In other words, an arbitrator can continue the proceedings and proceed to make the award on the reference, unless the whole of the subject-matter of the reference is covered by the legal proceedings which have been instituted. Where in an application under s. 33 the prayers were (*a*) declaration that the arbitration agreement, if any between the parties was void *ab initio* on the ground of uncertainty and was not binding on the applicant and (b) declaration that there was in fact and in law no contract between the parties on account of mutual mistake of the parties, the prayers cannot be the subject-matter of arbitration for they go to the very root of the contract and imply that there was no arbitration agreement. Therefore, the subject-matter of the proceedings under s. 33, assuming they are legal proceedings mentioned in s. 35 cannot and does not cover any part of the subject-matter of reference. Section 35 in consequence can have no application and the award is made in the arbitration proceedings cannot be assailed as invalid on the ground that it violates s. 35. *Shiva Jute* v. *Hindley*, A.I.R. 1959 S.C. 1357=(1960) S.C.J. 35.

1399. Limitation.—An application under section 33 of the Arbitration Act is governed by Art. 181 of the Limitation Act. *Shah & Co.* v. *Ishar Singh*, A.I.R. 1954 Cal. 164=9 D.L.R. (Cal.) 50; *Asmatali* v. *Mujaharali*, A.I.R. 1948 Cal. 48 (S.B.)=I.L.R. (1948) 2 Cal. 54; *Union of India* v. *Firm Kiron*, A.I.R. 1952 Punj. 23=I.L.R. (1952) Punj. 524; I.L.R. (1951) 1 Cal. 438. It is settled law that the statute of limitation must be construed strictly. Art. 158, of the Limitation Act, cannot apply to a written statement by a defendant in application to have the award made a rule of the court. *Mohan Das* v. *Kessumal*. A.I.R. 1955 Ajmer. 47. Where the objection filed against the award by one of the parties to the arbitration reference is one under s. 15 of the Act, then the objection cannot be held barred under Act. 158, Limitation Act. *Abdul* v. *India*, A.I.R. 1957 Pat. 447.

1400. Appeal.—No appeal lies from an order rejecting an application under this section challenging the validity of an arbitration agreement or to have the effect of that agreement determined as it does not fall under s. 20 or s. 39 (4) of the Act. *Radha Kishen* v. *Liladhar*, 45 P.L.R. 287=A.I.R. 1943 Lah. 295. See also *Abdul Karim* v. *Maniram*, A.I.R. 1954 Pat. 6; but see *Ram* v. *Dukhan*, A.I.R. 1950 All. 427.

1401. Amendment of petition in appeal.—An amendment of appeal before the Supreme Court is not maintainable. *Ruby General* v. *Pearylal*,, A.I.R. 1952 S.C. 119.

1402. Applicability of s. 5 of the Limitation Act.—A court has no jurisdiction to condone delay which a party may make in filing an application under s. 33 as s. 5 of the Limitation Act has not been made applicable. *Hastimal* v. *Hiralal*, I.L.R. (1954) Bom. 311=56 Bom. I.R. 99=A.I.R. 1954 Bom. 243.

34. Where any party *to an arbitration agreement* or any person claiming under him commences any legal proceedings against any other party *to the agreement* or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings ; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with *the arbitration agreement* and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

Power to stay legal proceedings where there is an arbitration agreement.

1403. N.B.—Section 34 deals with the staying of a suit where a reference concerning the subject-matter of the suit and between the same parties is pending. It continues the existing law contained in section 19 of the 1899 Act and paragraph 18 of the Second Schedule to the Code.—*Notes on Clauses.* Section 19 of the Indian Arbitration Act is based on s. 4 of the English Arbitration Act of 1889, which again is based on s. 11 of the Common Law Procedure Act of 1854. Now see s. 4(1) of the English Arbitration Act of 1950.

1404. Analogous provisions of other enactments.—This section should be read along with s. 28 of the Indian Contract Act and s. 21 of the Specific Relief Act as amended by Act X of 1940.

1405. Applicability of English decisions.—Section 4 of the English Arbitration Act corresponds with s. 34 of the Act and therefore case under English law can be usefully considered in interpreting the section. *Johorimal* v. *Fatehchand,* A.I.R. 1960, Raj. 67=I.L.R. (1960) 10 Raj. 383=1959 Raj. L.W. 84.

1406. Application of Act of 1940.—The Arbitration Act of 1899 must govern an application made thereunder even though the new Act of 1940 comes into operation at the time when the application is heard. *Rupchand* v. *Pannalal,* A.I.R. 1941 Cal. 415 ; s. 19 of the Indian Arbitration Act 1899 was based on s. 4 of the English Arbitration Act 1889. Under the English Act, an application for stay can be made at any time after appearance and before delivering any pleading. Under s. 19 of the Indian Arbitration Act, such an application could be made at any time after appearence and before filing a written statement. Under s. 34 of the present Act such an application can be even without appearing in the suit. *Dunichand* v. *Fort Gloster,* 66 C.W.N. 821=A.I.R. 1962 Cal. 541.

1407. Scope of section 28 of the Indian Contract Act.—Section 28, Contract Act, applies to agreement, which wholly or partially prohibits the parties from having recourse to a court of law. Where all that the parties agree to is that any dispute arising between them out of various contracts should be referred to arbitration as provided by certain rules

and there is nothing in that agreement or in rule which prohibit any of the parties from taking proceedings therafter in a court of justice, the agreement is valid. *Gainda* v. *Rameshwar,* A.I.R. 1937 All. 650=(1937) A.L.J. 823=171 Ind.Cas. 584, See also, *Coringa Oil Co.* v. *Kolgler,* I Cal. 466 ; *Ganges Manufacturing* v. *Indra Chand,* 33 Cal. 1160. In *Aghore Nauth* v. *The Calcutta Tramways Co. Ltd.,* 11 Cal. 232 at page 234, *Garth C.J.* observed. "Now s. 28, as I take it, intends to enact, as nearly as may be what the law of England is upon the subject." See also, *William Jacks* v. *Harrowing,* A.I.R. 1932 Sind 111 ; *Scott* v. *Avery,* 5 H.L.C. 811 ; *Law* v. *Garret,* (1878) 8 Ch.D. 26 ; *Austrian Lloyd* v. *Gresham Life,* (1903) 1 K.B. 249 ; *Kirchner* v. *Gruban,* (1909) 1 Ch. 413. *Vide* notes under s. 2. Where agreement is to refer dispute to arbitration, civil suit to enforce that right is whether maintainable, vide A.I.R. 1958 All. 26 ; (1956) All L.J. 846. As to contract containing arbitration clause the rules of the body to which the agreement of arbitration is referred to by the parties should be deemed to have been incorporated in the contract by virtue of the agreement of the parties. *Hussain* v. *Vijayanagram,* (1954) 1 M.L.J. 23=A.I.R. 1954 Mad. 528.

1408. Matter agreed to be referred—C.P.C. s, 9—Contract Act s. 28.—It is open to the parties in a contract to agree in advance that no right of action should arise thereon until the matters in controversy have been referred to and ascertained by an arbitrator appointed in accordance with the terms of contract. Where the parties agree to submit their dispute to a domestic tribunal of their own choice and when arbitration is made a condition precedent to an action being brought it is *prima facie* the duty of the court to give effect to the agreement unless the condition precedent has been removed under the powers conferred on the court by the Arbitration Act or unless the court comes to the conclusion that the right to arbitration has been waived, either by express agreement to do so, or by an express refusal to exercise it, or by a failure or neglect to arbitrate or by participating without objection in a trial of the controversy on its merits or by omitting to demand arbitration within reasonable time, or by obstructing or delaying the arbitration proceedings, or by repudiating liability under the principal contract. An Insurance Company may repudiate its liability under a policy in two different ways. It may deny all liability under the policy by declaring that no binding contract is in existence. If the liability is repudiated on grounds which go to the root of the contract and it is contended that the agreement is void the company cannot insist on the observance of the arbitration clause. 1925 A.C. 619 ; 1915 A.C. 499 Rel. on.

If the company repudiating under the contract accepts existence of the policy as a binding contract but bases its repudiation on the claim that a clause in it relieves the company from liability the arbitration clause would be effective since the repudiation does not go to the root of the contract but on the contrary the insurers rely upon the terms of the contract to absolve them from liability. *Newzeland Insurance* v. *Nagpol Honey.* A.I.R. 1955 Punj. 115=56 Punj. L.R. 535 ; see also (1917) 2 K.B. 433 ; (1919) 1 R.B. 593. 1952 A.C. 356 ; (1933) 102 L.J.K.B. 337.

1409. Jammu and Kashmir Contract Act s. 28.—There is no inconsistency between the provisions of s. 34 of the Arbitration Act and Exception to s. 28 of the State Contract, Act. Section 28 of the State Contract Act is different from s. 28 of the Indian Contract Act, *State* v. *Sabid,* A.I.R. 1959 J. & K. 59 (F.B.) 8.

1410. Section 21 of the Specific Relief Act.—The last para of section 21 of the Specific Relief Act enacts : "And, save as provided by *the Indian Arbitration Act,* 1940, no contract to refer a present or future difference to arbitration shall be specifically enforced ; but if any person who has made such a contract, *other than an arbitration agreement to which the provisions of the said Act apply,* and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

Commenting on the exception to s. 21 of the Specific Relief Act in *Indramani* v. *Nilamani,* A.I.R. 1950 Orissa 169 (174), *Ray C.J.* said : "The latter part of the exception is not capable of application to a case of arbitration agreement during the pendency of a suit. The bar applies to a subsequently instituted suit not to one pre-existing. To hold that this bar applies in the present case would amount to saying that an arbitration agreement without intervention of a Court relating to the subject-matter of a pending suit supersedes it resulting in an automatic lapse of the courts' jurisdiction of the cause. Such a consequence is hardly conceivable except in so far as its abeyance or suspension temporarily can be achieved indirectly through the provisions of the Act, say, by exercise of the court's power to stay legal proceedings pending the disposal of he reference. This latter remedy, however, is not available to a post-suit agreement as the plaintiff was then under no obligation limiting his right to sue in a tribunal of law. (*Vide* s. 34 of the Act). Besides, the bar referred to above does not apply to a case where an agreement of reference has been acted upon and terminated in an award as a suit for cancellation is not against the tenor of s. 21, Specific Relief Act, and that section has no application except where a person having made a contract to refer a controversy to arbitration has refused to perform it and institutes a suit in respect of the subject-matter in defiance of the contract. *Dwarka* v. *Ram Jatan,* 53 All. 16=A.I.R. 1930 All. 877.

"Besides it is apparent from the language of s. 21, Specific Relief Act, that the bar contemplated is not available in the case of an arbitration to which provisions of the Act apply." As the proviso to s. 47 of the Act deals with awards obtained otherwise than under (the preceding provisions of) the Act, it can be hardly contended that the arbitration is one of which the Act does not at all apply. *Sarcar* in his *Tagore Law Lectures* on the Law of Arbitration in British India p. 86 thus summaries his comment on s. 21 of the Specific Relief Act of 1877.

"Put concisely, the Specific Relief Act of 1877 was a bar to a suit for specific perfarmance of an arbitration agreement, but it still permitted the defendant to plead the existence of such an agreement as a bar to the suit. The result of deletion of the last thirty-seven words from s. 21, Specific Relief Act, was that the defendant could not plead the existence of the arbitration agreement as a bar to the suit. *The result achieved that there could neither be specific performance nor would the arbitration agreement be a bar to the suit.* The defendant's sole remedy lay in moving for the stay of the suit. On the suit being stayed, the defendant could take appropriate proceedings under the provisions of the Indian Arbitration Act of 1899*. If the suit is not stayed, the Court alone could adjudicate, arbitration having become *functus officio.* This is also the position to day'.

*See now Act X of 1940.

The position deducible can be comprehensively formulated as below :

(1) No contract to refer present or future differences to arbitration, save as provided by the Arbitration Act, 1940, is specifically enforceable.

(2) All arbitrations both statutory and contractual, except it otherwise provided for in any other law for the time being in force, are to be governed by the Act. (*Vide* ss. and 47).

(3) Chapters 2, 3 and 4 supplemented by other provisions of the Act read as a whole contemplate enquiry into and enforcement of only three kinds of references to arbitration and the awards therein obtained, *viz.*, (*i*) arbitration in suits, (*ii*) arbitration in agreements made into a rule of court and (*iii*) awards in arbitration without courts' intervention.

(4) Neither submission to arbitration of the subject-matter of a pending suit without court's order nor the award obtained thereby is one of the three enumerated above, as I have already shown.

(5) The award in such an arbitration forms into a category by itself and is within the contemplation of the proviso to s. 47 of the Act. (Parties to such a submission may at any time choose to abandon the suit by lawfully available means such as withdrawal or non-appearance or otherwise and then file the award for the purpose of its enforcement. The court shall then have the duty to enquire into its validity and may in doing so exercise the power modifying, remitting, setting aside or enforcing as the case may be under various section of the Act, for example, ss. 15, 16, 17, 19, 30 etc., or even superseding the arbitration altogether leaving the parties to remedies by suit)." *Indramani* v. *Nilamani,* A.I.R. 1950 Orissa 169.

An agreement to refer dispute to arbitration, if it falls under the Arbitration Act, is taken out altogether from the purview of the Specific Relief Act. *Arya Vidya* v. *Hansh,* (1956) All. W.R. (H.C.) 796=(1956) All. L.J. 846.

A contract in writing to refer disputes in a pending suit is an arbitration agreement to which the provisions of the Arbitration Act of 1940 apply and therefore is not specifically enforceable save as provided by the Arbitration Act in view of s. 21, Specific Relief Act. Such contract does not arrest the furher progress and trial of the suit. The contract is not an adjustment or compromise of the suit and cannot be enforced under Order 23, Rule 3, C.P.C. *Jugal Das* v. *Purushottam,* A.I.R. 1953 Cal 690 · see also *Tincowry* v *Fakir,* 30 Cal. 218 ; *Vyankatesh* v. *Ram Chandra,* A.I.R. 1914 Bom, 184=38 Bom. 687 ; *Ghulam* v. *Ghulam,* A.I.R. 1914 Sind 93=27 Ind.Cas. 369. Such contract cannot be enforced and filed in court under s. 20, Arbitration Act, 1940. The suit cannot be stayed under s. 34, Arbitration Act, 1940, on the strength of such contract as it was entered into prior to the institution of the suit. On the joint application of the parties the court may possibly under its general jurisdiction stay further proceedings in the suit. While the suit is pending such contract may be enforced under section 21, Arbitration Act, 1940, on the joint application of the parties by an order of reference by the court. *Jugaldas* v. *Purshottam,* A.I.R. 1953 Cal. 690.

1411. Principle—The principle underlying this section is to force by an indirect method a contumacious party who had agreed to arbitration. *Ladha Singh* v. *Jyoti Prosad,* A.I.R. 1940 Cal. 185=186 Ind.Cas. 617=43, C.W.N. 829=70 C.L.J. 148=I.L.R. (1939) 2 Cal. 181 *per Mitter J. ; Dinabandhu* v. *Durga Prosad,* 23 C.W.N. 716=46 Cal. 1041. "A party

to a contract to refer disputes to arbitration has a perfect right to bring an action in respect of these disputes, and the court has jurisdiction to try such disputes. Any provision to the contrary would be an ouster of the court. 'But the court has a discretion to say whether it will try such disputes or stay the proceedings, provided the other party comes in time and otherwise complies with the provisions of the section. *Per Lord Wright in Hayman* v. *Darwins Ltd.*, (1942) A.C. 356 (676)'" *Russell* 15th Edn., 55. The making of an order staying proceedings is a matter laying in the descretion of the court. That discretion must, however, be judicially exercised. *Ram Bahadur* v. *Thakurdas,* A.I.R. 1958 All. 522. It is not necessary for all defendants to apply for stay to show their willingness to submit dispute to arbitration, provided that all defendants are bound by the submission clause. It is sufficient if one of them does so and wishes to take advantage of the arbitration clause. *Ibid.*

1412. Nature of section 43.—This section is in the nature of summary procedure and does not normally include any lengthy or protracted inquiry. *Shivram* v. *Mohanlal,* A.I.R. 1940 Bom. 93=I.L.R. (1940) Bom. 249=41 Bom.L.R. 1293=187 Ind.Cas. 494.

1413. History and application of the section.—Where the parties to a dispute agree to refer it to arbitration and subsequently one of them brings a suit to enforce his rights, the defendant can neither seek specific performance of the arbitration agreement nor set it up as a bar to the suit brought against him in contravention of the agreement. His remedy is to apply for a stay of the suit under this section and the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration, and not on the defendant to show that no such reason exists. *Dinabandhu* v. *Durga Prosad,* 51 Ind.Cas. 80=23 C.W.N. 716=29 C.L.J. 399=46 Cal. 1041. In that case the court observed : "The result of this provision is that when the court is apprised that the suit has been instituted in contravention of an arbitration agreement, the court has a discretion to stay the suit. Indeed, as *Lord Selborne* said in *Willesford* v. *Watson,* (1873) 8 Ch. App. 473 (480)=42 L.J.Ch. 447 ; 'if parties choose to determine for themselves, that they will have a domestic forum instead of resorting to the ordinary courts, then since the Act of Parliament (that is, the Common Law Procedure Act, 1854, section 11, which corresponds to paragraph 18 of the Civil Procedure Code) was passed, a *prima facie* duty is cast upon the court to act upon such an agreement.' As *Sir George Jessel* put it in *Hodgson* v. *Railway Passengers' Assurance Co.,* (1882) 9 Q.B.D. 188 : 'The plaintiffs are in the position of a party applying, and if there is any reason why the matter should not be referred to arbitration, it is their duty to bring it forward and present it to the Judge, and if they cannot do so, the Judge is quite justified in being satisfied that there is no reason.' The burden, therefore, lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration, and not on the defendant to show that no such reason exists ; it is the *prima facie* duty of the court to act upon the agreement between the parties : *Lyon* v. *Johnson,* (1889) 40 Ch.D. 529 and *Clegg* v. *Clegg,* (1890) 44 Ch.D. 200. In the case before us, the appropriate course to follow would have been for the defendant to obtain a stay of suit and then on an application by either party under paragraph 17 (1) (of Civil Procedure Code, Schedule II) a reference to the arbitrators by the court under paragraph 17 (4).

"A reference to the history of the legislation on this subject in India and in England confirms the view we take as to the rights and obligations of the parties in the events which have happened here. Section 28 of the Indian Contract Act, 1872, invalidated agreements in restraint of legal proceedings for the enforcement of rights in the ordinary tribunals. The first exception, however, saved contracts to refer to arbitration future disputes between the parties ; it further provided that suits might be brought for specific performance of such agreements and that existence of the agreements might be pleaded as a bar to suits instituted in contravention thereof. The second exception saved contracts to refer questions that have already arisen. The second clause of the first exception was repealed by the Specific Relief Act, 1877 (in places where the latter Act is in force) ; section 21 barred suits for specific performance of such arbitration agreements, but preserved the right to set them up as a bar to suits broughts in defiance thereof. The Indian Arbitration Act, 1899, which has a restricted local application, excluded by section 3 the operation of the last thirty-seven words of section 21 of the Specific Relief Act and by section 19 confered on the court power to stay proceedings where there was a submission. The Civil Procedure Code, 1908, was, in respect of the matter now before us, modelled on the provisions of the Indian Arbitration Act, 1899 ; paragraph 22 corresponds to section 3 and paragraph 18 to section 19. The result of these legislative enactments is to bring the law here substantially in conformity with the law in England. The successive stages of the development of that law are indicated by *Vaughan Williams L.J.* and *Fletcher Moulton LJ.* in *Dolman and Sons* v. *Ossett Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1092. In *Mitchell* v. *Harris,* (1793) 2 Ves. Jr. 129 (137), *Lord Lough Borough L.C.* repudiated the suggestion that an agreement to refer, where no reference had taken place, would stop a court of law, as also the idea of a bill to enjoin a party from proceeding at law under a notion of giving effect to such a covenant. Indeed, it appears to have been treated in later cases as settled law that an agreement to arbitrate did not oust the jurisdiction of the court and the pendency of an arbitration was a bad plea : *Thompson* v. *Charnock,* (1799) 8 T.R. 139 and *Harris* v. *Reynolds,* (1845) 7 Q.B. 71. In the case last-mentioned, *Lord Denman C.J.* ruled that the pendency of an arbitration was no answer to an action for recovery of a debt, and the plea as a plea in bar was clearly bad. The defendant was consequently in a position of great disadpantage, and his remedy appears to have been limited in a suit for damages for breach of contract. This was obviously unsatisfactory, and led to the enactment of section 11 of the Common Law Procedure Act, 1854. The object of the Legislature was to enable effect to be given to the arbitration agreement before the action was tried, and this was achieved by the provisions that the action might be stayed by the order of a Judge made in the exercise of his discretion. This was reproduced in section 4 of the Arbitration Act, 1899 (52 & 53 Vict., c. 49). We may add that our conclusion is in harmony with the view adopted in the cases of *Sheo Babu* v. *Udit Narain* 24 Ind.Cas. 514=12 A.L.J. 757 and *Appavu* v. *Seeni,* 42 Ind.Cas. 514=41 Mad. 115=33 M.L.J. 177=6 L.W. 243.

...

The substance of the matter thus is that for the determination of the controversy between the parties, there were two competent tribunals available, the court and the arbitrators. The plaintiff contracted to

choose the latter; he has in fact taken the former. His opponents are not allowed to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit; but the law permits them to apply to the court to stay the suit in the exercise of its judicial discretion, so as to enable either of the parties to obtain a reference to the arbitrators. This, the true fact of the situation, has been overlooked till the concluding stage of this protected litigation.

"The result is that the appeal and the decree of the court, made in affirmance of that of the Subordinate Judge, is set aside. The suit is remitted to the court of first instance to be taken up at the stage in which it was when the issues were framed. The court will first determine, whether the suit should be stayed under paragraph 18 of the Second Schedule of the Civil Procedure Code. If an order for stay is made, then either party may take proceedings under paragraph 17. If the suit is not stayed it will be re-tried. But we may point out that under section 104, sub-section 1, clause (*e*), an appeal lies from an order staying or refusing to stay a suit under paragraph 18." See also, *Kishorilal* v. *Mercantile Corporation*, A.I.R. 1932 Lah. 669.

In *Jowahir Singh* v. *Fleming Shaw*, A.I.R. 1937 Lah. 851=176 Ind. Cas. 352. *Tekchand, Off. C.J.* observed: "Before deciding these points, it seems necessary to refer to certain well-established principles of law on which there is or can be no controversy. The general rule is that a party to a dispute has got the right to seek the assistance of court of law, constituted by established authority, to have his disputes settled according to law. This right inheres in every suitor and any agreement by which a party is restricted absolutely from enforcing his rights under or in respect of any contract by usual proceedings in ordinary tribunals is to that extent void, being opposed to public policy. This is enacted in s. 28, Contract Act. The law, however, permits the parties to make a valid agreement to have the present for future disputes settled out of court by private arbitration. This is clearly recognized in exceptions 1 and 2 to s. 28, which specially provide that that section does not render illegal a contract by which two or more persons agree that any dispute, which has already arisen or which may arise here-after, shall be referred to arbitration. But while this is so, the existence of a valid agreement to refer existing or future disputes to arbitration does not oust the jurisdiction of the courts to entertain a suit relating to the matters agreed to be referred to arbitration. Nor can such agreement be pleaded as a conclusive bar to the suit, unless the submission to arbitration has actually resulted in the condition of an award. Accordingly, it has been enacted in s. 21, Specific Relief Act, that no contract to refer present or future differences to arbitration shall be specifically enforced. But this does not mean that if a person, in breach of the agreement to refer to arbitration, institutes a suit in a court, the opposite party is without a remedy. *In such a case he may if he chooses apply for the stay of the suit pending arbitration, provided he does so at the earliest opportunity, and if there are no special reasons to the contrary, the court will stay the suit.* Provisions to this effect will be found in s. 19, Arbitration Act, as well as para. 18 of Schedule II, Civil Procedure Code; the former Act applies only to Presidency towns or other local areas to which its provisions have been made applicable by the Local Government. It is common ground between the parties that the present case is governed by the Arbitration Act. Section 19 of the Act read as follows.....

"It will be seen that the conditions which must be fulfilled before an application for stay can be made are : (1) that there must be a valid submission ; (2) that legal proceedings in court have been commenced by a party to the submission in respect of a matter agreed to be referred ; and (3) that the application for stay is made by the opposite party before filing his written statement or taking other steps in the proceedings. If these conditions are fulfilled, the court will grant the application and stay the suit so as to enable the parties to have the dispute settled by arbitration, unless of course the opposite party satisfies it that there are sufficient reasons to the contrary. If, however, the opposite party does not avail of himself of the provisions of s. 19, or fails to apply under that section at the proper time, or where the application if made has been refused, the court will proceed with the suit and its decision will be binding on the parties. And this is so not only where the action had been brought before the reference to arbitration, but also in cases where the arbitrators had been appointed before the institution of the suit and had actually entered upon their duties (but had not given the award) before that date. It is well-settled that the existence of the submission or the pendency of arbitration proceedings is no defence to an action in breach thereof, unless the stay is obtained in accordance with the provisions of s. 19, Arbitration Act (or para. 18, Schedule II, Civil Procedure Code) which corresponds to s. 4, English Arbitration Act. The leading authority on the subject is *Doleman & Sons* v. *Ossett Corporation,* (1912) 3 K.B. 357=81 L.J.K.B. 1092=107 L.T. 581=76 J.P. 457 see also *Pinnock Bros.* v. *Lewis & Peat Ltd.* (1925) 1 K.B. where *Fletcher Moulton L.J.* explained the law in the following terms at pp. 268-69 (of 3 K.B.) : 'The present position, therefore, of agreements to refer to private tribunals may be shortly expressed thus : The law will not enforce the specific performance of such agreements but if duly appealed to, it has power, in its discretion, to refuse to a party the alternative of having the dispute settled by a court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the court has refused to stay an action, or if the defendant, has abstained from asking to do so, the court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence, is *functus officio,* unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself be referred. *There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision.* To my mind, this is clearly involved in its proposition that the courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take the decision out of their hands, and decide the question itself is clear ouster of jurisdiction. Therefore to hold that the private tribunal is still effective after the dispute has come before the court, would be to say that, in all cases in which s. 4, Arbitration Act of 1889 applies, the defendant may still force on an arbitration and, by obtaining an award from the arbitrators, ousts the jurisdiction of the courts to decide the question they have in hand. In each case where the court

has decided that it will retain in its own hands the decision of the case, there would thus be a race between it and a private tribunal, which should be the first to give a decision in the matter. The learned Judge has decided that, if during the pendency of the action an award is obtained from the arbitrator, it can be pleaded in bar to the action, or, in other words, the decision of the arbitrator, and not that of the court, decides the rights of the parties. If this were good law, there would be in every case be the race between the public and private tribunals which I have described, and the decision of the speediest would prevail. This would be ousting the jurisdiction of the court in the most ignominious way.'

"*It was accordingly held in that case that where an action has been commenced upon a contract containing a provision for reference to arbitration of any dispute arising under the contract and is pending, no application to stay the action having been made under s. 4 or such an application having refused and award made by the arbitrator under the provision for reference upon the subject-matter of the action, subsequent to the commencement thereof, and without the consent of the plaintiff, is invalid and will not afford a defence to the action.* The principle laid down in *Doleman & Sons* v. *Osset Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1092=107 L.T. 581=76 J.P. 457, has been followed in numerous cases by this court and other courts in India. The leading case of this court is *Jai Narain Babulal* v. *Narain Das Jaini Mal,* A.I.R. 1922 Lah. 369=69 Ind.Cas. 585=3 Lah. 296, where the proposition laid down in the above case was adopted as 'resting upon sound principle, the validity of which could not be impeached,' and it was observed : 'It is clear that when the same matter comes before two tribunals, a public tribunal appointed by the Sovereign and a domestic forum chosen by the parties, and no order is made staying the proceedings before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication thereupon made by the private tribunal. Neither can that adjudication be pleaded as a bar to the action, nor can it be allowed to affect the merits of the decision given by the public tribunal'." See also, *Ghansham Das* v. *Tek Chand,* A.I.R. 1935 Lah. 916=157 Ind.Cas. 867=17 Lah. 291=38 P.L.R. 636 ; *Ramprosad* v. *Mohan Lal,* A.I.R. 1921 Cal. 770=60 Ind.Cas. 895=47 Cal. 752=38 C.L.J. 67 ; *Jokiram* v. *Ghaneshamdas,* A.I.R. 1921 Cal. 244=61 Ind.Cas. 380=47 Cal. 849=25 C.W.N. 62 ; *Sarat Chandra* v. *Rajkumar,* A.I.R. 1923 Cal. 137=69 Ind.Cas. 863=35 C.L.J. 482=26 C.W.N. 697 ; *Appavee* v. *Seeni,* A.I.R. 1918 Mad. 719=42 Ind.Cas. 514=41 Mad. 115=33 M.L.J. 177 ; *Khilloram* v. *Louis Dreyfus,* A.I.R. 1919 Sind 57=52 Ind.Cas. 130=13 S.L.R. 8 ; *Tyebally* v. *James,* A.I.R. 1924 Sind 105=17 S.L.R. 15 ; *Mitsui Bussan* v. *Totaram,* A.I.R. 1924 Sind 146=87 Ind.Cas. 83=17 S.L.R. 228 ; *Mulji* v. *Ramsi Devraj,* 34 Bom. 13.

1414. Scope of.—This section is restricted to cases in which the suit complained of has been instituted after the agreement to refer to arbitration. *Vijankatesh* v. *Ramchandra,* 27 Ind.Cas. 46=16 Bom. L.R. 53=38 Bom. 687. See also, *Peruri Suryanarayana* v. *Gallapudi,* 4 Ind.Cas. 133=11 Bom.L.R. 1060=34 Bom. 372 ; *Ramjidas* v. *Howse,* 35 Cal. 199 ; *Sawyer* v *Louis,* 20 Ind.Cas. 504=7 S.L.R. 1. Where no application for stay of suit under this section is made the existence of the agreement to refer to arbitration does not bar the suit under s 21 of the Specific Relief Act. *Tapessiere* v. *Nasiruddin,* 15 Ind.Cas. 402=37 P.R. 1912=

130 C.W.R. 1912 ; *Sheobabu* v. *Ulit Narain,* 24 Ind.Cas. 490=12 A.L.J. 757.

An agreement to arbitrate does not by itself operate as a stay. Where a court adjourns a case under this section the case should not be adjourned "sine die." The court ought not to renounce its powers and duties in disposing of a suit, and it is bound to exercise as much control as it can over the proceedings before the arbitrator. It is the duty of the court to see that the parties do not delay the disposal of the arbitration proceedings and to see that as far as possible they prosecute the proceedings. *Muhammad* v. *Muhammad,* A.I.R. 1938 Mad. 205= (1938) 1 M.L.J. 388=177 Ind.Cas 440=(1938) M.W.N. 1124. This section is in the nature of a summary procedure and does not normally include any lengthy or protracted inquiry and investigation. *Shriram* v *Mohan,* I.L.R. (1940) Bom. 249=187 Ind.Cas. 494=41 Bom.L.R. 1293=A.I.R. 1940 Bom. 93.

1415. Conditions for granting stay.—In order that a stay be granted under this section, it is necessary that the following conditions should be fulfilled:—(1) The proceedings must have been commenced by a party to an arbitration agreement ; (2) the legal proceeding which is sought to be stayed must be in respect of a matter agreed to be referred ; (3) the applicant for stay must be a party to the legal proceeding and he must have taken no step in the proceeding after appearance. It is also necessary that he should satisfy the court not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration ; and (4) that the court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement. *Anderson* v. *Moran,* 1955 Andh. W.R. (S.C.) 113=95 C.I.J. 211=1955 Mad. W.N. 107 (2)=1955 Nag. L.J. 116=1955 S.C.J. 200=1955 S.C.R. 862=(1955) 1 M.L.J. (S.C.) 113=A.I.R. 1955 S.C. 53 (S.C.). The first and essential pre-requisite to making an order to stay under this section is that there is a binding arbitration agreement between the parties to the suit. The question whether the dispute in the suit falls within the arbitration clause really presuppose that there is such agreement and involves consideration of two matters, viz., (1) what is the dispute in the suit and (2) what disputes then arbitration clause covers.

Where on an application under this section for stay of a suit, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the court is not bound to refuse a stay but may in its discretion, on an application for stay decide the issue as to the existence or validity of the arbitration agreement even though it may involve incidentally a decision as to the validity to existence of the present contract.

Thus, where the question raised by the plaintiff in the suit is that the contract containing the arbitration agreement was really between the defendant and another party and not betwen him and the defendant and consequently he was not bound by the contract and the defendant files an application under S. 34 for stay of the suit, the court has undoubted jurisdiction to decide the question for the purpose of finding as to whether or not there is a binding arbitration agreement between the parties to suit. If the person whose concern with the agreement is in question is a signatory to the contract and formally a contracting

party, that will be sufficient to enable the court to hold for the purpose of s. 34 that he is a party to the agreement. *Anderson* v. *Moran supra.* See also *Rungta* v. *J.T. Republic,* A.I.R. 1959 Cal. 423. In the last named case it has been held that in order that the court may exercise jurisdiction the suit must be in respect of any dispute as regards matter agreed to be referred.

1416. Requirement of section 34.—Section 34 requires the court to see, when an application under the section is made whether the plaintiff in the suit sought to be stayed is a party to the arbitration agreement pleaded; secondly, whether the person making the application is also a party to the said agreement and thirdly whether the suit is "in respect of any matter agreed to be referred." *Sudhansu* v. *Ruplekha,* A.I.R. 1954 Cal. 281. Under this section it is necessary that the party who applies for stay should himself take a step in the proceedings before he becomes disentitled to the stay which is asked for. The two tests which ought to be applied are, that there must be some application made by the party in the proceedings, and that the application must be of such a nature as to lead the court to the conclusion that the party prefers to have his rights and liabilities determined by the Civil Court rather than by the domestic forum upon which the parties might have agreed. *Jadavji* v. *Harachand,* A.I.R. 1954 Bom. 174.

In *Sheodatt* v. *Prakash,* A.I.R. 1954 Nag. 289, the court observed: "The question is whether the suit should be stayed. The jurisdiction of the court is not ousted because the plaintiff in the suit was a party to an agreement to refer the matter in dispute to arbitration. As the parties have preferred a private tribunal to the court to decide the dispute between them, unless there be a good reason it is but right that the court should refer the parties to the tribunal which they have chosen.

"Therefore where a suit is commenced in respect of a matter about which there is agreement to refer to arbitration, it is incumbent upon the plaintiff to make out a sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement. Where, however, the legal proceedings are not in respect of a matter which the parties have agreed to refer to arbitration, the court is bound to refuse stay. Such was the case before the *Supreme Court* in *Gaya Electric Supply Co.* v. *State of Bihar,* A.I.R. 1593 S.C. 182=1953 S.C.R. 572=91 C.L.J. 137=(1953) 1 M.L.J. 805=8 D.L.R. S.C. 223,"

If a person, who has been a party to an arbitration agreement brings a suit ignoring the agreement, the dependant's remedy, if he wants to rely on that agreement, is to proceed under this section and to ask for stay of the suit. If he does not avail of the remedy, the court has jurisdiction to hear the suit and the give decision on merits. *Raghu Nath* v. *Gurdyal,* A.I.R. 1956 All. L.J. 875=1955 All. W.R. (H.C.) 644. See also *Rungata* v. *J.T. Republic,* A.I.R. 1959 Cal. 423; I.L.R. 46 Cal. 544=A.I,R, 1920 Cal. 43. This section refers to (1) party to the agreement or persons claiming under the party to the agreement, (2) matters agreed to arbitration, (3) application to the judicial authosity before which the proceedings are pending to stay the proceedings at any time before the filing the written statement or taking any other steps in the proceedings and (4) the discretion of the judicial authority to stay the proceedings, *Union* v. *Shri Nath,* 1957 B.L.J.R. 234=A.I.R. 1957 Pat. 697.

Where part of claim is not in respect of a contract which is subject to an arbitration clause but is separable, suit in respect of that claim cannot be stayed under this section. *Union of India* v. *Nalini Ranjan,* 57 C.W.N. 304. Where a jute contract is impugned as invalid on the ground that it was entered into in violation of the Ordinance, an arbitration agreement contained in the contract is not severable and capable of having independent effect and accordingly it cannot sustain a reference of the dispute to arbitration. *Birla Jute* v. *Dulichand,* 91 C.L.J. 238 = A.I.R. 1953 Cal. 450. In the above case the court observed : "It is true that on an application under s. 34, the following three questions arise for decision of the court, *viz.*, (*i*) whether the plaintiff in the suit sought to be stayed is a party to the arbitration agreement, (*ii*) whether the applicant under s. 34 is a party and (*iii*) whether the claim in the suit is in respect to any matter agreed to be referred. When the claim in the suit is for a declaration that the alleged contract is void *ab initio*, the third question means a question whether a dispute as to the validity of the contract is within the arbitration agreement, and when the arbitration agreement is contained in the contract and is also, so far as its language goes, wide enough to cover any dispute, the question narrows down to a question whether there is any valid agreement to refer. That question arises because, in the first place, the contract which contains the agreement is itself impugned as invalid and because, in the second place, if there was no valid agreement, nothing was validly to be referred.

"But as I have already shown, the question whether there was ever a valid contract between the parties can never be a question for the arbitrators, when the arbitration agreement which gives them jurisdiction is contained in the very contract which is impugned, not because such a question cannot be within the words of the arbitration clause, but because decision of such a question by the arbitrators which would involve a decision of whether the arbitration agreement from which they derive their authority is valid, is in the nature of things impossible. In those circumstances, it appears to me, as at present advised, that no useful purpose can be served by the court proceeding to decide on the application under s. 34, whether there is a valid arbitration agreement and necessarily, except where the alleged invalidity of the contract cannot affect the agreement, whether there is valid contract." See also *Anderson* v. *Moran,* 1955 S.C.R. 53 noted *supra* under the *heading "condition of granting stay."*

Under this section, the court has always a discretion and should proceed on the facts of each particular case in the matter of granting or refusing a stay of suit. The strict principle of sanctity of an arbitration agreement is subject to the discretion of the court, for there, must be read in every such agreement an implied term or condition that it will be enforceable only if the court, having due regard to all surrounding circumstances, thinks it fit, in its discretion to enforce. *Dwarkadas* v. *Keshardeo,* I.L.R. (1948) 1 Cal. 190. In order to succeed in an application for stay under s. 34, the petitioner must prove that the respondents are parties to an arbitration agreement and the suit has been filed in respect of a matter agreed to be referred. The court must be satisfied, before making an order for stay, that there is an arbitration agreement between the parties. If there is any dispute as to the existence of the arbitration agreement, the court has no jurisdiction to order a stay unless the court

decides on the application that there is an arbitration agreement, *Sohanlal* v. *Thomas,* I.L.R. (1949) 1 Cal. 350. Where the cause of action in the suit is based wholly on tort and tort alone which had no connection direct or indirect with contract itself and where the arbitration clause is not attracted on he pleadings in the suit, the court has no jurisdiction to stay the suit under this section. *Ghewarchand* v. *Shiva Jult,* 5 D.L.R. (Cal.) 105=A.I.R. 1950 Cal. 568.

Section 34 applies only in case where the court itself has jurisdiction to decide the matter, but allowed it to go to an arbitrator on account of an existing arbitration agreement, and in view of the other existing arbitration agreement. *Municipal Committee* v. *Fazilka Electric Supply,* A.I.R. 1947 Lah. 309.

Ordinarily a dispute as to whether a contract was induced by fraud or misrepresentation and is void *ab invitio* is one which the arbitrators cannot decide. The jurisdiction of the arbitrators depends on the existence of the contract and the submission. The arbitrators cannot ordinarily decide a dispute as to whether they have jurisdiction to decide a particular issue. The parties may, however, agree by clear and unambiguous words, that any dispute between the parties including a dispute whether a contract was vitiated or avoided by reason of fraud or mistake should be decided by the arbitrators themselves. The ousting of the jurisdiction of the ordinary court of law can only be done by clear and definite words and ordinarily the court would lean against a construction conferring on the arbitrator's jurisdiction to decide a dispute to the existence or non-existence of their jurisdiction. *Bilasrai* v. *Talaram,* 52 C.W.N. 858.

The court should stay the action when there are disputes within the meaning of the arbitration agreement and where the party applying for is not precluded from raising it even if he did not raise it before action and refuses stay only when there is no dispute or when a party by reason of agreement express or implied is precluded from raising it. A mere omission to raise dispute before action from which an agreement not to raise dispute after action cannot be inferred, is no ground for precluding a party from raising it and is no justification for the court assuming jurisdiction to decide the question in respect of which its jurisdiction is ousted by statute. Likewise a mere omission to raise disputes before action, without more, ought not by itself to be any ground for refusing a stay under the Arbitration Act, although it may be taken into consideration along with other facts in exercising the discretion of the court in the matter of a stay of the suit. *Governor-General* v. *Associated Live Stock,* A.I.R. 1948 Cal. 280=52 C.W.N. 288.

Where in a partnership agreement provision is made for reference of disputes to a named arbitrator, but the named arbitrator is a shareholder of the concern, the court would be justified in not staying a suit for accounts of the dissolved partnership. *Abdul Latif* v. *Dost Mahomed,* A.I.R. 1949 All. 304=4 D.L.R. (All.) 114=1949 A.L.J. 375.

An arbitration clause under the rules framed for the management of Provident Fund must be in plain and unambigous terms to oust the jurisdiction of the court with regard to matters in dispute. When the claim is against the trustees a rule cannot authorise the trustees to adjudicate upon a claim of a member against the trustees themselves. It requires plain words to appoint a party to a dispute as arbitrator. *Atulananda* v. *Tushar Kanti,* 9 D.L.R. (Cal.) 84.

According to the arbitration agreement between the plaintiffs and defendant 1, there could be no reference to arbitration till after a reference had first been submitted to defendant 2. Plaintiffs filed a suit alleging that both he defendants had colluded with each other for the purpose of defrauding them. In an application by the defendant No. 1 for stay of suit the court observed : "Although there is no legal bar to the court proceeding with the trial of the suit as against defendant 2 not a party to arbitration agreement, while the suit, in so far as it affects defendant 1, who is a party to arbitration agreement remains stayed, considerations of practical convenience appear to make it eminently desirable that the allegations of fraud and collusion against both the defendants be tried in the same action and at same time." *Banwarilal* v. *Board of Trustees*, A.I.R. 1949 E.P. 165. A charge of fraud is a very serious matter, and anybody charged with it has a right to have such a charge investigated by the court. *Narsingh Prosad* v. *Dhanraj*, A.I.R. 1953 Pat. 53=21 Pat. 544=204 Ind.Cas. 583. See also *Hukham Chand* v. *Toyo Menka*, A.I.R. 1940 Lah. 265=190 Ind.Cas. 576.

The plaintiff was appointed under an agreement in writing the medical referee of the defendant company which carried on business as a life insurance company, by which it was provided that the plaintiff should diligently and faithfully and to his best ability and skill examine all medical reports submitted to him by the company. By another clause the company became entitled to terminate the agreement on three months' notice in case of gross negligence of work on the part of the plaintiff. Lastly there was an arbitration clause which provided that if any dispute arose between the parties concerning their rights, liabilities of duties under the agreement, the same be referred to arbitration. Subsequently the company charged the plaintiff with gross negligence in respect of a medical report on the life of a deceased policy-holder and terminated his services. The plaintiff brought a suit for remuneration and damages for the wrongful conduct of the company. Held that the plaintiff was suing for his rights under the agreement and for damages he had suffered owing to the wrongful termination of it, before its expiry, the company had the right to have the suit stayed under this section. *Happy India* v. *Kumud Bandhu*, A.I.R. 1941 Cal. 503=199 Ind.Cas. 768.

Section 34 of the Arbitration Act is to the effect that when independently of the arbitration in respect of any matter covered by the arbitration agreement, a party to it commences legal proceedings they should be stayed. *Kamani Engineering* v. *Madhya Pradesh Electricity Board*, A.I.R. 1964 M.P. 268=1964 M.P.L.J. (Notes) 134.

1417. Application for stay—Contents of.—An application under this section should make out that a dispute as understood in the law of arbitration ; had arisen before the institution of the suit or before the filing of the application, that such dispute was the subject-matter of the suit and that dispute was within the arbitration clause of the contract. *Bharat* v. *Union*, A.I.R. 1954 Cal. 606. The contention that the word 'stay' did not occur in the party's application under this section was held untenable as it is the substance that has got to be looked into and the contents of the petition pointed only to the conclusion that the party did want stay of proceedings pending in the court below. *Union* v. *Sri Nath*, 1957 B.L.J.R. 234=A.I.R. 1957 Pat. 697.

1418. Effect of sections 32 and 33 on section 34.—The first part of section 32 prevents a substantive suit to challenge the existence of an agreement. The second part of that section prevents the setting aside, amending, modifying or in any way affecting an arbitration agreement, otherwise than as provided by the Act. Section 33 provides a remedy to a party who challenges the agreement to obtain from the court a decision, irrespective of the fact whether the other side wishes to enforce it or not. Section 33 does not take away the right to set up as a defence the non-existence of an agreement when the agreement is propounded under s. 34 by the other side. The rights of the parties are to be governed by s. 34. The section starts with the fact that an arbitration agreement is alleged, the court is called upon to stay the suit on the ground that there is a subsisting agreement, which the appellant is willing to follow up but the other side is not ready and willing to act upon. In order to succeed in an application under s. 34, therefore, the defendant has to establish the necessary things required by s. 34. One of them is that he is a party to an arbitration agreement. The defendant who applies for a stay under s. 34 has to say that there is an arbitration agreement. If the plaintiff says that there is no agreement, that issue arises between the parties. There is nothing in s. 34 to prevent the court from deciding that issue, to enable it to pass an order under that section. Section 33 provides for a case where a party wants to obtain the courts substantive declaration of non-existence of an agreement for his own use. In such case he has to make his application to get the judgment. Section 34 is a discretionary section. If one of the parties contends that because of an agreement between them the normal jurisdiction of the court is given up by the other side, the onus of proof is on the party who makes the allegations. Therefore, the party who alleges such an agreement has to satisfy the court first, before he asks the court to stay its hands in respect of a suit which is pending and which is filed in the normal course by the plaintiff. *Bhagwandas* v. *Atmasing*, A.I.R. 1945 Bom. 494=47 Bom.L.R. 716.

1419. Section 34 and section 33.—Where an application under s. 34 is made alleging that there is a valid arbitration agreement the existence of which bars the trial of the suit and the respondent to such a petition raises the contention that the alleged agreement is vitiated, by reason of fraud, undue influence or collusion or even misrepresentation, it is incumbent upon the court to try the question in that very proceeding. It cannot be said that it is obligatory on the part of a person raising such a defence to make an independent application under section 33 of the Act. The very foundation of the jurisdiction of the court to stay the trial of a suit under section 34 is the existence of the arbitration agreement, and when the truth of such an agreement itself is disputed or while admitting its truth it is pleaded that it is invalid by reason of other vitiating circumstances, there is no reason why in such an event when the question is raised and the validity of the jurisdiction of the court depends upon the result of its decision on that question, the court should not try the issue. The scope and the jurisdiction of the court acting under s. 34 does not depend upon the nature of the defence raised. Section 33 of the Act gives an independent right to a person who wishes to challenge the existence or validity of an arbitration

agreement or award and to anticipate the other side and to initiate proceedings to have those questions determined beforehand. It does not prohibit the court acting under s. 34 of the Act from deciding a question which is raised before it for its decision and the decision on which alone would depend' the exercise of its jurisdiction. *Mathukutty* v. *Varu Kutty,* A.I.R. 1950 Mad. 64=62 L.W. 576=(1949) 2 M.L.J. 239; see also *Khusi Ram* v. *Hanutmal,* 53 C.W.N. 505.

When the subject-matter of an application under section 33 only relates to questions regarding the validity, effect or existence of the arbitration agreement, section 34 of the Act cannot of necessity be involved, unless there be a fresh arbitration agreement to refer those very disputes regarding the validity, effect or existence of the previous arbitration agreement. *Balabux* v. *Luchminarain,* I.L.R. (1948) 1 Cal. 265.

1420. Interference by court in case of difficult question of law.—The language of this section clearly implies that the arbitration clause should be respected and it is only when a clear case has been made out by the plaintiff and "if diffcult questions of law are likely to arise, such as would inevitably entail a special case being prepared and reference to the court made by our arbitrator" that the court should enter upon enquiry and decision of the case. *Charan Das* v. *Gur Saran Das,* I.L.R. (1945) All. 162=A.I.R. 1945 All. 146=1945 A.L.J. 77.

1421. Court which can grant stay—City Civil Court—Power of High Court apart from s. 34.—Where in a suit filed by the respondent and pending in the City Civil Court, Calcutta, the petitioner entered appearance, filed his written statement took part in the settlement of the issues and after the suit has been fixed for hearing, applied to the High Court for an order restraining the respondent (plaintiff) from proceeding with the suit, in view of the arbitration agreement to which the respondent and petitioners were parties and in view of the fact that the agreement remained effective : *Held* (*i*) (proceeding on the footing that the City Civil Court had no power to grant stay under s. 34 of the Arbitration Act, without deciding the point) that the order to stop proceeding before the City Civil Court a party has to come to the High Court and High Court can issue an injunction on the party to the arbitration agreement, if further proceeding in the suit is to be stopped. (*ii*) under s. 34 the court will stay a suit or a proceeding only when the party seeking the stay does not take any step in the suit or proceeding sought to be stayed. It is, indeed one of the most important condition to be satisfied before an order for stay can be made. When the stay is granted under s. 34, the suit cannot proceed so long as the agreement remains effective and submission is not revoked. If the same relief is sought by way of injunction, the petitioner will have to satisfy the conditions laid down in s. 34 including the condition that he has taken no step in the proceedings. In the instant case however the petitioner did not come to the court immediately on being served with the writ of summons by the City Civil Court. The fact disentitled the petitioners to ask for stay on the principles embodied in s. 34 of the Act. *Kamal Brothers* v. *Hansraj,* A.I.R. 1954 Cal. 583. As regard the jurisdiction of City Civil Court to grant stay the court observed : In the case of *Radha Krishen* v. *Bombay Co.* I.L.R. 56 Cal. 255=A.I.R. 1930 Cal. 51, *Lort Williams J.*, held that Small Cause Court had

no judisdiction to stay under s. 34 of the Act. It may be noted that the case was under the old Act and not under the Act of 1940. The present Arbitration Act however changed the language. In A.I.R. 1949 Cal. 684, it has been held that Small Cause Court has jurisdiction to order for stay under s. 34. A.I.R. 1959 Cal. 583. In the last-named case is A.I.R. 1959 Cal. 583 the court observed after considering the above cases : "However having regard to the importance of the question, I do not think it proper to decide the question in this application, when the application can be disposed of on other ground." See also, *Badri Narayan* v. *Union of India,* 67 C.W.N. 627 = A.I.R. 1963 Cal. 64.

1422. Conditions relating to arbitrations.—The arbitration clause in a contract may take one or other of these three forms : (1) a reference of all disputes to arbitration, the award of the arbitrator to be a condition precedent to any action on the contract ; (2) a reference to any difference as to amount of loss to arbitration and no action to be brought except for such amount as may be awarded by the arbitrators ; (3) a reference either of all matters in dispute or of the amount of loss to arbitration but without any stipulation that such reference shall be a condition precedent to legal proceedings. All the above conditions are valid conditions and can be enforced subject to section 36. See also, *Russell,* 13th Edn., p. 71.

1423. Application of this section.—The section applies only in a case where the court itself has jurisdiction to decide the matter, but allows it go to an arbitrator on account of an arbitration agreement, and in view of the other circumstances of the case. This section obviously has no application where the court has no jurisdiction to deal with the matter before it, by reason of statutory provision that such matter shall be submitted to the arbitration of a specified person and shall be decided by him. *Municipal Committee of Fazilka* v. *Fazilka Electric supply Co. Ltd.,* A.I.R. 1947 Lah. 309.

1424. How far jurisdiction of court may be ousted.—The general rule is that parties cannot by their private contract oust the jurisdiction of the court. *Vide* s. 28 *of the Contract Act* (IX of 1872) ; *Scott* v. *Avery,* (1856) 5 H.L.C. 811 *Atlantic Shipping* v. *Dreyfus,* (1922) 2 A.C. 255 ; *Horton* v. *Sayer,* 4 H. & N. 633. But s. 28 of the Contract Act shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be reasonable in respect of the dispute so referred. *Vide Exception* 1 of s. 28 *of the Contract Act.* This exception is based on the well-known case of *Scott* v. *Avery* (*supra*). See also, *Spurrier* v. *Lal Cloche,* (1902) A.C. 446, *Gaw* v. *British Land Fire,* (1908) 2 Ir.R. 245 ; *Scott* v. *Mercantile Accident,* 66 L.T. 81 ; *Tredwen* v. *Holman,* 1 H & Co. 72 ; *Branstein* v. *Accidental Death,* 1 B. & S. 782 ; *Hamlin* v. *Tilisker,* (1894) A.C. 202 . *Spurrier* v. *La Choche,* (1902) A.C. 446 ; *King* v. *Phoenix,* (1910) 2 K.B. 666 *Hallen* v. *Spaeth,* (1923) H.C. 684. *Vide* notes under s. 36, *infra.*

1425. Scope of submission to arbitration.—It is not always easy to determine whether the arbitration clause is intended to refer all questions to arbitration or merely questions as to amount of loss or

damage. Some contracts clearly refer all questions in dispute [*Scott* v. *Avery,* 5 H.L.C. 811 ; *Spurrier* v. *La Cloche,* (1902) A.C. 446 ; *Gaw* v. *British Land Fire,* (1908) 1 Ir.R. 245 *Scott* v. *Mercantile Marine Accident,* (66 L.T. 81), others are ambiguous [*Scott* v. *Avery,* 5 H.L.C. 811 ; *Hercules Insurance* v. *Hunter,* (1835) 14 S. 147], and others clearly confine the scope of the reference to the issue of the amount of loss. *Caledonian Insurance* v. *Gilmour,* (1893) A.C. 35 ; *Viney* v. *Bignold,* (1887) 20 Q.B.D. 172 ; *Macgillivray's Insurance Law,* 2nd Edn., p. 1100. A plea that the defendant though unable to pay the amount under the term of the contract will not pay it because it desires to appropriate it towards another claim under another independent contract cannot reasonably be regarded as a dispute under or in connection with the contract under which the liability sought to be inforce has arisen. *Union of India* v. *Birla Cotton Spinning and Weaving,* (1964)2 S.C.J. 297.

1426. Whether the plaintiff in the suit is a party to the contract. —The court has jurisdiction to decide on an application under this section whether the plaintiff in the suit is a party to the arbitration agreement, even if it involves deciding whether the plaintiff in the suit is a party to the arbitration agreement, even if it involves deciding whether he is a party to the principal contract. That question is one of the three questions under the section and in disposing of the application, it must be decided before the court can make an order for stay. *Moran* v. *Wright,* A.I.R. 1953 477 ; *Khustram* v. *Hanutmal,* 53 C.W.N. 505. But where the dispute raised in the suit is as to whether the plaintiff is at all a party to the principal contract such a dispute is obviously not one for the arbitrators and the suit can in no event be stayed. In those circumstances, the court should not unnecessarily decide the issue by way of deciding the question of parties in relation to the agreement, particularly when there is no reason for saying that the dispute raised in the suit is a sham dispute. *Ibid.* If the person whose concern with the agreement is in question is a signatory to the contract and formally a contracting party, that will be sufficient to enable the court to hold, for the purpose of section 34 that he is a party to the agreement. *Ibid.*

1427. Whether validity of plaintiff's contention can be gone into under this section.—For the decision of the stay application the court is not to examine the merits of the claim as laid down in the plaint. *Sheodatt* v. *Prokash,* A.I.R. 1954 Nag. 289. In *Gaya Electric* v. *State of Bihar,* A.I.R. 1953 S.C. 182=1953 S.C.R. 572=8 D.L.R. S.C. 223, *Mahajan J.* observed : "The validity of the plaintiff's contention in the suit cannot be gone into by that court exercising jurisdiction under this section as its function is very limited one. The only point in such cases to be decided is whether the claim which is brought—whether it is good, bad or indifferent—comes within the submission to arbitration. It may be that there are grounds upon which the defendant would be able to satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious, but those considerations, as pointed out by *Bankes L.J.* in *Munro* v. *Bojnor Union Council,* (1915) 3 K.B. 167=84 L.J.K.B. 1091, are material only if the question to be considered is whether the case made was a frivolous and vexatious one, and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was and one can only find out what his claim is by looking at the plaint."

1428. Matters agreed to be referred—scope of the expression.— Whether the reliefs asked for in the plaint are covered by the agreement depend upon the facts of each particular case. *Union* v. *Sri Nath,* 1957 B.L. J.R. 234=A.I.R. 1957 Pat. 697 ; *Union of India* v. *Bharat Charcoal Co.* A.I.R. 1962 Cal. 510. The first pre-requisite of the Court's power to stay a suit under this section is the existence of an arbitration agreement. *Rungta* v. *Jugoputal,* 63 C.W.N. 527=A.I.R. 1959 Cal. 423. Where the submission to arbitration is governed by a written contract, the terms of the contract must be looked into when a question arises as to whether the arbitration clauses governs the dispute. Whether a dispute falls within an arbitration clause in a contract must depend on what is the dispute and what disputes the arbitration clause covers. Recourse must be had to the language used, to determine whether the clause embraces any question which may arise between the parties in any way relating to the contract. *Andhra Co-operative* v. *C. Srinivasam,* (1958) 2 Andh. W.R. 437=(1958) Andh. L.T. 311=A.I.R. 1958 Andh. Pra. 158, An arbitration clause which provides for reference of "all disputes regarding this contract" includes not only disputes relating to the interpretation of the terms and conditions of the contract, but also includes all claims arising under the contract. *Ram Chandra* v. *Howrah Oil,* 62 C.W.N. 773=A.I.R. 1958 Cal. 620, (distinguishing. A.I.R. 1949 Cal. 179). In order that the court may exercise the power of stay the suit must be in respect of any matter agreed to be referred. In an application under s. 34,, the court may in the exercise of its discretion decide an issue as to the continued existence of the arbitration agreement, although such decision may indirectly involve a decision on an issue in the suit itself as to the continued existence of the parent contract. *Rungta* v. *Jugoputal,* 63 Cal. W.N. 527=A.I.R. 1959 Cal. 423 ; A.I.R. 1955 S.C. 53=1955 S.C.J. 200=(1955) 1 M.L.J. (S.C.) 113. Where by a contract for the sale of goods the buyer and the seller agreed to refer to arbitration "any dispute arising out of the contract", held that the words "arising out of" were fairly of wide import and the claim by the seller relating to the balance goods and the claim for damages by him, based upon an alleged new arrangement which substituted the original contract and in fact superseded it, were disputes arising out of the contract and covered by the arbitration agreement. 63 Cal. C.W.N. 527=A.I.R. 1959 Cal. 423 ; (1942) A.C. 356 : A.I.R. 1920 Cal. 143. Any dispute whether there was a valid contract in settlement of the original contract was a dispute arising out of or relating to the original contract or the fulfilment thereof. 63 C.W.N. 527 ; 51 C.W.N. 863 (Affirmed in A.I.R. 1948 Cal. 257) and 88 C.L.J 155.

In an application under this section, the court has the power to decide an issue whether the arbitration agreement was rescinded by an express oral agreement subsequent by an affidvaits. This power should be exercised sparingly and with caution. *Rungta* v. *Jugoputal, supra.* However wide the terms of an arbitration agreement may be, a dispute as to the validity of a contract cannot be held to be within the arbitration agreement contained in the contract itself and such a dispute cannot be referred to arbitrators or dealt with by them under such an agreement on the basis that it is "matter agreed to be referred." *Birla Jute* v *Duli Chand,* A.I.R. 1953 Cal. 450=91 C.L.J. 236. See also *Heyman*

v. *Darwins Ltd.*, (1942) A.C. 356=(1942) 1 All. E.R. 337=111 L.J.K.B. 241=166 L.T. 306=587 L.R. 169. In the last named case "If", observed *Viscount Simon, L.C.*, "one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal) the arbitration clause cannot operate, for, on this view, the clause itself also is void." In the same case *Lord Macmillan*, observed : "If it appears that the dispute is whether there has been a binding contract between the parties, such dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been, as part of it, an agreement to arbitrate." *Lord Russell of Killowan* in that case agreed with *Lord Macmillan.*

"The simple logic of that view is that in order to be effective, an agreement to refer must be valid agreement, but if the agreement be contained in the very contract, disputes concerning which are agreed by it to be referred, it cannot be a valid agreement if the contract itself be invalid. because it must fall along with the contract, being contained in it. Where, therefore, the dispute is as to the validity of the principal contract, there is necessarily a dispute as to the validity of the arbitration agreement and consequently, there cannot be reference to arbitration on the basis of an agreement of such disputed validity, bacause in the first place, if the principal contract be invalid, the agreement can be of no effect, and in the second place, in deciding the dispute, the arbitrators will be deciding their own jurisdiction." *Per Chatterjee, C.J.* in *Birla Jute* v. *Dulichand, supra.*

Where a party has to have recourse to the contract to establish his case, it is dispute under the contract. Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute. *A M. Man & Co.* v *Gordhandas*, A.I.R. 1951 S.C. 9 ; see also *Heyman* v. *Darwins Ltd.* (1942) A.C. 356=111 L.J.K.B. 241.

1429. Whether reference includes a reference regarding test. Where resort to arbitration was to be made only in the event of a dispute arising "under these conditions, or in connection with the contract" it could never be the intention of the parties that if one of them committed a tort, e.g., defamation the dispute to compensation for the alleged tort did not fall within the purview of the arbitration clause. *Gauri Sankar* v. *Union of India*, A.I.R. 1953 All. 446=(1953) A.L.J. 45.

1430. Question whether arbitration is a condition precedent to action.—First of all it is to be determined whether arbitration is made a condition precedent to any action on the contract or is merely a collateral agreement. If it is the former then any action brought before the matter has been referred may be dismissed, but if there is merely a collateral agreement to refer the utmost *the court will do is to stay and suspend the proceeding pending the reference to and decision of the arbitrators.....Roper* v. *Lendra*, (1891) 1 E. & E. 825 ; *Macgillivray's Insurance*, 2nd Edn., p. 110 & S. 4 of the English Arbitration Act, 1889. So this section has no application subject to S. 36 when it is mutually agreed between the parties that an arbitration shall be a condition precedent to the commencement of any action at law or the decision of arbitrator is agreed to be so in effect. *Scott* v. *Avery*, 25 L.J. Ex. 308=

19, Indian Arbitration Act. In that case the policy of insuranre provided 5 H.L.C. 811. In the above case *Lord Campbell* said. "Now in this contract of insurance it is stipulated in the most express terms, that until the arbitrators have determined, no action shall lie in any court whatsover. That is not ousting the courts of their jurisdiction *because they have no jurisdiction whatsoever and no cause of action accrues until the arbitrators have determined.' Crowder, J.* said : "Collecting the substance of the contract from the allegations in the first court of the declaration and the sixth plea, it appears to me that no cause of action can arise before the sum to be paid is ascertained and settled by the arbitrator." *Lord Cranworth* says : "If I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J.S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen." Such a provision is often termed a "*Scott* v. *Avery*" clause in English law from the case cited above. *Russell,* 15th Edn., p. 78. In *Heyman* v. *Darwin Ltd.,* (1942) A.C. 366 (377) = (1942) 1 All.E.R. 337 = 111 L.J.K.B. 241 = 166 L.T. 306, *Lord Wright* observed : "The contract, either instead of or along with a clause submitting difference and disputes to arbitration, may provide that there is no right of action save upon the award of an arbitrator. The parties in such a case make arbitration followed by an award a condition of any legal right of recovery on the contract. This is a condition of the contract to which the court must give effect, unless the condition has been 'waived,' that is, unless the party seeking to set it up has somehow disentitled himself to do so." *Vide Russell,* 15th Edn., p. 78. For waiver of right *vide, Toronto Ry., Co.* v. *National Insurance Co.* (1914) 20 Com.Cas. 1. In *Horton* v. *Sayer,* 29 L.J.Ex. 28 = 4 H. & N. 643, the *Chief Justice Baron* dealing with *Scott* v. *Avery,* said : "Even before the case of *Scott* v. *Avery,* there was a form in which a covenant, or condition, or proviso might be framed, which would prevent the parties from maintaining any action until the amount to be paid was ascertained by a third person ; for instance, if there was a covenant to pay for building of a house, or for the performance of any work, such a sum as A. B. should think reasonable, with a stipulation that the party who performed the work should not claim anything except what A. B. awarded ; there the party could not maintain any action until A. B. has found what was due : for there would be no contract to pay in the other way." See also, *Caledonian Insurance* v. *Gilmour,* (1893) A.C. 85 ; *Spurier* v. *La Cloche,* (1902) A.C. 446 = 71 L.J.P.C. 101 : *Cayer* v. *Board of Trade,* 95 L.J.K.B. 1054 = (1927) 1 K.B. 269 affirmed on appeal by the House of Lords, *Board of Trade* v. *Cayzer,* 96 L.J.K.B. 872 = (1927) A.C. 610 = 137 L.T. 419 ; *Cheshire County Council* v. *Hopeley,* 130 L.T. 123 : *South British Insurance* v. *Gauci Bros.* (1928) A.C. 352 ; *Trainor* v. *Phoentix Fire Assurance Co.,* 65 L.T. 825 ; *Scott* v. *Mercantile Accident,* 66 L.T. 811. In *M. D'Cruz* v. *The Secretary of State,* 40 C.W.N. 865 (872), *Panckridge, J.* said : "The legality of a clause in contract to the effect that no cause of action can accrue until a third person has decided on any difference that may arise between the contracting parties was recognised long ago in *Scott* v. *Avery,* 5 H.L.C. 811. In *Aghore Nath Banerjee* v. *Calcutta Tramway,* 11 Cal. 232, this court has held that there is nothing in the Contract Act which prevents

the principle from being applicable in India. It would also appear from *Trainor* v. *Phoenix Fire,* 65 L.T.Q.B. 825, that the principle holds good when the Reference has power to determine liability and his decision is not limited to *quantum.*" The case reported in 11 Cal. 232, was decided by *Sir Richard Garth, C.J.* and *Mr. Justice Wilson.* In that case it was held that such a clause in the agreement came within exception 1 to S. 28 of the Contract Act. See also, *Krishna Kamal* v. *Haripada,* A.I.R. 1942 Cal. 83=I.L.R. (1941) 2 Cal. 534=45 C.W.N. 984=(1933) A.C. 83.

In *Arthur Andrew Cipriani* v. *Macdonald Burnett,* A.I.R. 1933 P.C. 91=64 M.L.J. 284=(1933) A.L.J. 411=37 M.L.W. 639=152 Ind.Cas. 561 (P.C.), *Lord Macmillan* in delivering the judgment of the Judicial Committee of the Privy Council observed : "It is not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal shall be a condition precedent of any legal proceedings. In *Scott* v. *Avery,* 57 H.L. 811 the contract so prescribed, and the action were held not to be maintainable in the absence of an award, but *Lord Campbell* in his speech referred to *Brown* v. *Overbury,* (1856) 11 Ex. 715=25 L.J.Ex. 169, as being identical in principle and in the latter case, where the court refuse to entertain a claim for the prize in a sweepstake on a horse race, in the absence of a decision by the Stewards as the winner, the clause in the rules of the race provided no more, according to report, than that any dispute as the race was to be decided by the award of four stewards..... Their Lordships accordingly read the condition on the ticket, having regard to 'the circumstances belonging to it,' as a condition precedent, the fulfilment of which is essential before any action for the stakes can be entertained by the courts.'" See also, *Dines* v. *Wilfe,* (1869) 2 P.C. 280=5 Moore P.C.N.S. 382=20 L.T. 251. But according to *Russell* even in such a case a party still has a right to bring an action, and the jurisdiction of the court is not ousted. The court may stay the action under S. 34. If the action proceeds, the court may even then exercise its discretionary power given to it by S. 36, of ordering that the provision making the award a condition precedent cease to have effect. *Russell,* 13th Edn., p. 73. But in the absence of an express provision to that effect, an agreement to refer dispute to arbitration will not be interpreted as making arbitration a condition precedent to the right to sue. *Roper* v. *Lendon,* 1 E. & E. 825 ; *Woodal* v. *Pearl Assurance,* (1919) 1 K.B. 593 ; *Freshwater* v. *West Australia,* (1932) 102 L.J.K.B. 75=(1933) 1 K.B. 515. Sss also, *Collins* v. *Locke,* (1879) 4 App.Cas. 674 ; *Gorman* v. *Hand-in-Hand,* Ir.R. 11 Ch. 224 ; *Bramstein* v. *Accidental,* (1861) 1 B. & S. 782 ; *Gorman* v. *Goddard,* (1905) 1 K.B. 294.

An assignee of a party can take advantage of an arbitration clause. *Cottage Club* v. *Woodside,* 97 L.J.K.B. 72. A stipulation making arbitration a condition precedent to the right to sue may be waived by conduct. *Toronto Rail* v. *National British,* (1914) III L.T. 555. See also *Hickman* v. *Roberts,* (1913) A.C. 229=82 L.J.K.B. 678 (H.L.) ; *Neale* v. *Richardson,* (1938) 1All. E.R. 753. But this rule is subject to the condition laid down in S. 36 *infra.* *Vide* that section for further discussion.

1431. Repudiation of contract—effect of.—Where a contract contains an arbitration clause and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself. Where, however, a party seeks to avoid the contract for reasons *dehors* it, the arbitration

clause cannot be resorted to, since the whole contract including the arbitration clause is set aside. *State of Bihar* v. *Gaya Electric Supply,* A.I.R. 1951 Pat. 157=6 D.L.R. (Pat.) 98; see also *De La Grade* v. *Worsnop & Co.* (1928) 1Ch. 17=96 L.J.Ch. 446; *Heyman* v. *Darwin's Ltd.,* (1942) 1 All. E.R. 337=111 L.J.K.B. 241. In the last named case the respondents contracted with the appellants, an American firm, whereby the latter were to act as their selling agents over a wide area. The agreement contained an arbitration clause in these terms: "If any dispute shall arise between the parties thereto in respect of this agreement or any of the provisions herein contained or anything arising thereout the same shall be referred to arbitration....." A dispute arose between the parties and appellants, having intimated to the respondents that their letters showed that they had repudiated the agreement, issue a writ against them containing a declaration that the respondents had repudiated the agreement and claimed damages under a number of heads. The respondents claimed that the action should be stayed pursuant to Arbitration Act, 1889, S. 4, in order that the matter in dispute might be referred under the arbitration clause. The applicants contended that the respondents having repudiated the agreement as a whole and the appellants, by the issue of writ, having adopted that repudiation, the contract has ceased to exist for all purposes and the respondents could not afterwards rely on the arbitration clause. It was *held* by the *House of Lords* that the dispute between the parties was a dispute within the arbitration clause and the appellant's action ought to be stayed. (A.I.R. 1951 Pat. 157) at page 341, *Lord Viscount Simon* states: "As *Viscount Finlay,* said in *Sanderson & Son* v. *Armour Co.* (1922) S.C.H.L. 117 at page 121: 'The proposition that the mere allegation by one party of the repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause is unreasonable in itself, and there is no authority to support it." *Lord Macmilian* states: "Repudiation then, in the sense of a refusal by one of the parties to a contract to perform his obligation thereunder, does not itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. Even if, the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken and the contract provides for the measure of those damages." In *Toller* v. *Land Accident Insurance,* (1936) 2 All.E.R.952= 80 S.J. 633=55 L.I.I. Rep. 258, the court observed: "Now the class of case where the defendant Insurance Company is denying the existence of a contract is totally different from the class of case where the defendant, while admitting the existence of a contract, is relying on some clause in it to escape liability. It is very important in my view that language should be accurately used and there is great danger in the use of such words as 'repudiation'; repudiation of a contract may mean that having admittedly made a contract, you decide to break it and break it in such a way that you intend not to proceed with it. Another use of the word 'repudiation' is where you say 'there never was a contract at all between the parties.' If it turns out there was a contract the act of one party denying the existence of it is to repudiate it but supposing it turns out he was right and there never was a contract, then 'repudiation' is used in a different sense from that in which it would be used when an existing contract is broken by a refusal to perform." When one party to a contract alleges breach by the other of provisions as to payment, some written and some unwritten, and claims to have rescinded the contract on that ground,

the dispute is one arising out of the agreement. But when his case is that, there was no valid contract, having been entered into on his behalf by a person who had no authority to do so, the dispute is not one arising out of the agreement. When a suit has been brought by the first party for a declaration that the contract has been rescinded and does not subsist and for an injunction restraining the second party from referring the dispute to arbitration in accordance with an arbitration clause in the contract, the latter is entitled in the first case, to an order under this section staying the suit, but in the second case he is not. *Harinagar Sugar Mills* v. *Skoda,* 41 C.W.N. 563 ; *Krishna Kamal* v. *Haripada,* A.I.R. 1942 Cal. 83=I.L.R. (1941) 2 Cal. 534=45 C.W.N. 984 ; *Governor-General* v. *Associated Livestock,* A.I.R. 1948 Cal. 230=I.L.R. (1948) I Cal. 161. Where a contract contains an arbitration clause, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself. Where, however, a party seeks to avoid the contract for reasons *dehors* it, the arbitration clause cannot be resorted to as it, together with other terms of the contract, is set aside. In other words, a party cannot rely on a term of the contract to repudiate it and still say the arbitration clause should not apply. If he relies on a contract he must rely on it for all purposes. *India Electric Co.* v. *General Electric Trading* A.I.R. 1929 Bom. 242=121 Ind.Cas. 437=53 Bom. 573=31 Bom.L.R. 426 ; *Happy India* v. *Kumud Bandhu,* A.I.R. 1941 Cal. 503 ; *Jureidini* v. *National British,* (1915) A.C. 444=84 L.J.K.B. 640 ; *Stebbing* v. *Liverpool and London,* (1917) 2 K.B. 433=86 L.J.K.B. 115 ; *Woodal* v. *Pearl Assurance,* (1919) 1 K.B. 593=88 L.J.K.B. 706 ; *Fullwood* v. *Hurley,* 96 L.J.Ch. 446 ; *Scott & Sons* v. *Delsel,* (1923) S.C.H.L. 37 ; *Johannesburg Municipal Council* v. *Stewart,* (1909) 46 S.C.L.R. 657, *Ballasty* v. *Army,* (1916) 50 I.L.T. 114 ; *Fury* v. *Eagle,* (1922) 56 Ir.L.T. 23 ; *De La Grade* v. *Worshop & Co.,* (1928) 1 Ch. 17=96. L.J.Ch. 441 ; *Stevens* v. *General Mutual,* (1933) 49 T.L.R. 342 ; *Hirji Mulji* v. *Cheong Yue,* (1926) A.C. 497=95 L.J.P.C. 121 ; *Monro* v. *Bogour Urban District,* (1915) 3 K.B. 167 ; but see *Sardarmull Jeoraj* v. *Agarchand,* 23 C.W.N. 811 ; *Ramdas Khatan* v. *The Atlas Mills Company,* 55 Bom. 659 ; *Chiranjilal* v. *Jata Sankar,* 203 Ind.Cas. 322=44 Bom.L.R. 692=A.I.R. 1942 Bom. 297 The distinction would seem to be a fine one, and the question whether a party has repudiated the contract or not is one which depends on the facts of the particular case. *Per Bankes, J.* in *Woodall* v. *Pearl Assurance,* (1919) 1 K.B. 593 (604). The difficulty, however, is lessened in England by the provisions of section 14 of the Arbitration Act of 1934, which enacts that where there is an agreement to refer disputes, and a dispute raises the question whether one party has been guilty of fraud, the court shall have the power, for the determination of that question, to order that the agreement shall cease to have effect, and to revoke any submission made thereunder, and in such a case may refuse to stay any action brought in breach of the agreement to refer. *Vide* section 14(2) & (3). In the Indian Act there is no section corresponding to this section. But it seems that the court has power to decide that question in a proceeding under this section *Vide* S. 36, *supra.*

In *Chandu Lal* v. *Grahams Trading,* A.I.R. 1941 Lah. 427=43 P.L.R. 693 it was held that the arbitration clause being an integral part of the contract was also wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale and hence no reference to arbitration could be made in pursuance of the arbitration clause.

See also, *Hirji Mulji* v. *Cheong Yue,* (1926) A.C. 497=95 L.J.P.C. 121, where *Lord Summer* said. "The arbitration clause is but part of the contract, and, unless it is concluded in such terms as will except it out of the results, which follow from frustration, generally, it will come to an end too. This must be so, if the law is, that the legal effect of the frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen." But this question again came up before a later Full Bench case of the Lahore High Court in *Faram Karam Narain* v. *Volkart Brothers,* A.I.R. 1946 Lah. 116 (F.B.)=48 L.P.R. 116 (F.B.) which overruled the case reported in A.I.R. 1941 Lah. 477. It has been held in a recent case following the Full Bench case that where a contract is repudiated, it survives for the purpose of measuring the claims arising out of the breach and the arbitration clause contained in it survives for determining the mode of settlement of the claims. The repudiating party is not prevented from invoking the arbitration clause in the contract for the purpose of settling all questions to which his repudiation has given rise. It is not correct to say that the arbitration clause will be given effect to only if the contract comes to an end by virtue of some clause in the agreement but not when the contract is ended by something *dehors* the agreements. *Radha Krishna* v. *General Construction Co.,* A.I.R. 1947 Sind 57. This case was decided on the authority of the Full Bench case reported in A.I.R. 1946 Lah. 116 (F.A.) and the case decided by the House of Lords in *Hayman* v. *Darwins,* (1942) A.C. 356=111 L.J.K.B. 241=166 L.T. 306=(1942) 1 All. E.R. 337. The headnote in the Law Journal Report states: "What is commonly called repudiation, or total breach of a contract, whether acquiesced in by the other party or not, did not entirely abrogate a contract, though it might relieve the injured party of the duty of further fulfilling the obligations which he had by the contract undertaken to the repudiating party. The contract was not put out of existence, though all further performance of obligations undertaken by each party in favour of the other might cease. It survived for the purpose of measuring the claims arising out of the breach, and the arbitration clause might survive for determining the mode of their settlement. The purpose of the contract had failed, but the arbitration clause was not one of the purpose of the contract." See also *Chabildar* v. *Damodar,* A.I.R. 1943 Bom. 199=45 Bom.L.R. 387.

The law before this decision of the House of Lords had been dubious owing to somewhat conflicting views which had appeared in previous decisions of the House of Lords and of the Privy Council. The Privy Council Case, *Hirji Mulji* v. *Cheong Yone,* 95 L.J.P.C. 121=(1926) A.C. 497 must be now explained as applying only to cases of frustration of contracts wholly executory. The case reported in *Premier Dairies* v. *Garlick,* (1920) Ch. 17=89 L.J.Ch. 332 and *Jivraj* v. *Thakamdas,* A.I.R. 1920 Sind 27=58 Ind.Cas. 790=14 S.L.R. 91 have been overruled by the House of Lords in the case reported in (1942) A.C. 356. The full Bench case reported in A.I.R. 1946 Lah. 116 (F.B.) overruled *Radha Kissen* v. *Bombay Co.,* A.I.R. 1943 Lah. 295=212 Ind.Cas. 411=45 P.L.R. 287 and *Chandu Lal* v. *Graham,* A.I.R. 1941 Lah. 427. See also *Happy India* v. *Kumud Bandhu,* A.I.R. 1941 Cal. 503=199 Ind.Cas. 768.

By the law of Scotland the parties to a contract, in framing that contract, may insert a clause binding them to refer all future disputes, either in the carrying out of the contract or in respect of a breach of it,

to arbitration, and one party to such a contract cannot, by averring in his pleadings that the other party has repudiated the contract, get rid of the arbitration clause. *Sanderson* v. *Armour & Co.*, 91 L.J.P.C. 167=(1922) S.C.H.L. 117. In the above case *Viscount Finlay* observed : "The proposition, that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause is unreasonable in itself, and there is no authority to support it."

In *Johansburgh Municipal Council* v. *Stewart & Co.*, (1909) S.C. (H.L.) 53,*Lord Loreburn L.C.* said : "If the course of action which is established be that there has been repudiation or a breaking of contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clause in either of these contracts." In the case *Lord Shaw* said : "It does not appear to me to be sound law to permit a person to repudiate a contract thereupon specifically to found upon a term in the contract which he has thus repudiated." Commenting on the above statement of *Lord Shaw, Lord Dunedin* in *Sanderson* v. *Armour, supra,* observed : "The argument founded upon this remark is, I think another instance of the old danger of forgetting that every remark of a Judge must be understood *secundum subjectam Materieum*. Unless I am greatly mistaken, what was in *Lord Shaw's* mind was the fact that there was an admission in the pleadings by the defendant that they had repudiated the contract by giving formal notice that they did not further intend to carry out, and by, in fact stopping work. But it is quite another matter to fasten on the word 'repudiate,' and then because the same word is used in the Sale of goods Act, 1893, to apply the *dictum* to a case where the defender strenuously denies that he has committed any breach." In the same case, *Lord Shaw* said : "I agree with the opinion of *Lord Dunedin.*"

Where an arbitration clause in a contract provides for a reference to arbitration of any dispute whatsoever arising in or out of the contract the question whether there has been an interpolation in the terms of the contract falls within the arbitration clause and must be decided by arbitrators. Consequently a suit is not maintainable on that ground. *Rupchand* v. *Pannalal,* A.I.R. 1941 Cal. 415. See also, *Woodal* v. *Pearl Assurance,* (1919), 1 K.B. 593=88 L.J.K.B. 706 : *Revershaw* v. *Queen,* (1897) 1 Q.B. 662 ; *Parry* v. *Liverpool Malt,* (1900) 1 Q.B. 399. Where the existence of the contract as a binding contract is not disputed and merely liability under the contract is repudiated, the party repudiating is entitled to rely on the arbitration clause. *Hailsham's Law of England,* Vol. 1, citing *Stebbing* v. *Liverpool,* (1917) 2 K.B. 433 , *Woodall* v. *Pearl Assurance Co.,* (1919) 1 K.B. 593 ; *Richardson* v. *Army Narmy Navy,* (1924) 2 I.R. 69. Where the defendants are repudiating liability under an alleged term in the contract a stay cannot be refused on the ground that the defendants disclaimed liability. *Narsing Prasad v. Dhanraj,* A.I.R. 1943 Pat. 53=21 Pat. 544=204 Ind.Cas. 583. But order for stay is granted where it involves very intricate question of law. *Tolaram* v. *Jewanram,* A.I.R. 1941 Cal. 39=L.R. (1940) 2 Cal. Ind.Cas. 126. If the fact of the contract itself is disputed the arbitrator cannot decide the point and the court in the normal course would refuse a stay. *Shivram* v. *Mohan Lal* A.I.R. 1940 Bom. 93=41 Bom.L.R. 1293=I.L.R. (1940) Bom. 249=187 Ind.Cas. 494.

1432. Frustration of contract—Difficult question of law.—The application of the principle of frustration of contracts due to the outbreak of war may involve a difficult and intricate question of law and upon the

answer to this question depends the right of the plaintiffs to damage, but, no difficult or intricate question regarding the frustration of contracts can arise, where there is a clear provision in the contract itself that in case of war all should be over between the parties. *Firm Ayasam* v. *Sukhdev,* A.I.R. 1942 Sind 57=(1941) Kar. 587=199 Ind.Cas. 707. Sections 32 and 56 of the Contract Act embrace the whole of the Indian law on the subject of frustration of contract, S. 32 applying in cases of contingent contracts and S. 56 covering the rest. Under either, however, impossibility is the central or the dominating idea and determining factor, in cases of contingent contract in the happening of the event or events, on which the same depend, and, in other cases impossibility of the act to be performed under the contract. Illegality or unlawfulness of the act is given in S. 56 as a separate ground for frustration of contract, being comprehended within the above conception of impossibility for that purpose. The doctrine of frustration is really an aspect or part of the law of discharge of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of S. 56, Contract Act. It would be incorrect to say that S. 56 applies only to cases of physical impossibility and that where this section is is not applicable, recourse can be had to the principles of English law on the subject of frustration. To the extent that Indian Contract Act deals with in a particular subject, it is exhausive upon the same and it is not permissible to import principles of English law deter these statutory provisions. *Mengeram* v. *Gurbachand,* 63 C.W.N. 549 relying A.I.R. 1954 S.C. 44=1954 S.C.J. 1=(1954) 1 M.L.J. 41.

1433. Conditions for a stay.—Under this section the Judicial authority before which the proceedings are pending may make an order staying the proceedings if the following conditions are fulfilled :—

(1) There has been a valid arbitration agreement. (*Vide* A.I.R. 1937 Lah. 851 ; A.I.R. 1947 Bom. 65 ; A.I.R. 1961 M.P. 333= 1961 Jab L.J. 629).

(2) Proceeding in the court have been commenced.

(3) The proceedings have been commenced by a party to the arbitration agreement or by any person claiming under him against another party to the arbitration agreement or any person claiming under him. (*Vide* A.I.R. 1937 Lah. 851).

(4) The proceedings must be in respect of any matter agreed to be referred.

(5) The application for stay must be made by a party to the proceedings. (60 Bom L.R. 509=A.I.R. 1960 Bom. 292).

(6) The application is made at any time before filing a written statement or taking any other steps in the proceedings. (*Vide* A.I.R. 1937 Lah. 851).

(7) The application to stay is made to the judicial authority before which the proceedings are pending.

(8) The party applying for stay was at the time when the proceedings are commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. 1955 S.C.J. 200=A.I.R. 1955 S.C. 53 ; 60 Bom, L,R, 509 ; A.I.R. 1961 M.P. 322=1961 Jab. L.J. 525 ; *Union of India* v. *Thekedar,* 1960 Raj. L.W. 532=I.L.R. (1960) 10 Raj. 1244.

In *S.H. Motor Transport* v. *National Fire,* 1963 Mad. L.J. (Notes) the condition to be fulfilled before action under S.34 can be taken has been laid down. See also, A.I.R. 1956 S.C. 53.

It is necessary for the defendants applying to stay the proceedings to prove that the legal proceedings are commenced in respect of a matter agreed to be referred and that he was and is ready willing to have the matter decided by arbitration. There is no dispute as regards the second condition. For determination of the first condition it is necessary to examine the arbitration agreement and the subject-matter of the suit, unless the suit refers to the whole of the subject-matter referred to arbitration, the section is not attracted because the plaintiff will have to seek relief in a civil court for matters which are not referred to arbitration. Where the award of the arbitrators will not dispose of the whole suit, the suit cannot be stayed. *Abdul Quddos* v. *Abdul Gani*, A.I.R. 1954 Nag. 352 ; see also *Gaya Electric Supply Co.* v. *State of Bihar*, A.I.R. 1953 S.C. 182=1953 S.C.J. 217 (S.C.).

1434. Suit on award declaring it to be null and void—suit can be stayed—Any proceedings taken after the institution of a suit on a reference made prior to the institution of the suit are no doubt null and void, but a suit still be stayed and the parties cannot be compelled to waive their right to move the private tribunal upon which they had agreed at the time the contract was entered into between them. The arbitration proceedings can legally continue on the stay of the suit in spite of the decision that the award already made is a nullity. *Hukam Chand v. Toyo Menka*, A.I.R. 1940 Lah. 265=190 Ind.Cas. 576. See also, *Chandu Lal* v. *Grahams Tradings*, A.I.R. 1941 Lah. 427 ; *Jowahir Singh v. Fleming Shaw*, A.I.R. 1937 Lah. 851=176 Ind.Cas. 352=I.L.R. (1939) Lah. 351=41 P.L.R. 746.

1935. There has been a valid arbitration agreement.—Before the jurisdiction of the court to make an order for stay of proceedings under this section can be invoked, it must be established beyond doubt that there is subsisting valid agreement for arbitration. *Kedarnath* v. *Sumputram*, 60 Ind.Cas. 951=47 Cal. 1020. See also, *Sheo Parshad* v. *Indore Malwa United Mills*, 39 Ind.Cas. 508=65 P.W.R. 1917=62 P.R. 1917 ; *Tahal* v. *Bisheshar*, 8 All. 57=(1885) A.W.N. 331 ; *Randoll* v. *Thompson*, (1876) 1 Q.B.D. 748 ; *Moffat* v. *Cornelius*, 39 L.T. 102 ; *Deutshe* v. *Busco*, 20 Q.B.D. 177 : *Ferman Daz* v. *Jivat Lal*, A.I.R. 1947 Bom. 65 ; *Dinasari* v. *Hussain Ali*, A.I.R. 1951 Mad. 879 (1)=(1951) 1 M.L.J. 476 ; *Krishna Kumar* v. *Haripada*. I.L.R. (1941) 2 Cal. 534. An agreement to refer, with full knowledge, dispute to persons interested, in one of the parties is not an invalid agreement. *Central Government* v. *Chhotalal*, A.I.R. 1949 Bom. 359=51 Bom.L.R. 615=4 D.L.R. (Bom.) 147. But it is not necessary that both parties should admit that there is an agreement to refer. It is for the court to decide whether or not such an agreement had as a matter of fact been made. *Sheo Parshad* v. *Indore Malwa United Mills, supra*. See also, *Piercy* v. *Young*, (1880) 14 Ch.D. 200=42 L.T. 710. This section applies where there has been a submission to arbitration before the commencement of legal proceedings. *Surya Narayan* v. *Gullapudi*, 11 Bom.L.R. 1060=34 Bom. 372=4 Ind.Cas. 133 ; *Ramjidas* v. *Howse*, 35 Cal. 199. This section does not refer to what the defendant says, but speaks only of legal proceedings commenced "in respect of any matter agreed to be referred." The reference appears to be to the constitution of the legal proceedings as laid in the plaint. *Sudhansu* v. *Ruplekha*, A.I.R. 1954 Cal. 281=93 C.L.J. 44. In order that there may be a valid agreement to refer a dispute to arbitration under the Arbitration Act, it is necessary that the agreement should be in writing and such writing should embody all the

terms of the agreement either directly or by implication. It is not necessary that such written document should be executed by both the parties. All that is required is that both parties should accept a written document as containing the agreed terms; it might be in the form of a document signed by both parties containing the terms, or a document signed by one party containing the terms and a plain acceptance either signed or orally by the other party; or an unsigned document containing the terms agreed to orally by both parties. *Keshoram* v. *Kanhyalal,* 44 C.W.N. 607. See also, *Radha Kanto* v. *Baerlin Bros.,* 56 Cal 118=32 C.W.N. 1101; *Shanker Lal* v. *Jainy,* 53 All. 384. It is for the party who invokes the Arbitration Act to prove his right so to do. *Keshoram* v. *Kanhyalal,* 44 C.W.N. 607. A court can only take action under this section when there is a subsisting agreement to refer a dispute to arbitration. *Sheo Prasad* v. *Indore-Malwa United Mills,* 39 Ind.Cas. 508=65 P.W.R. 1917=62 P.R. 1917; *Tahal* v. *Bisheshar,* 8 All. 57= (1885) A.W.N. 331; *Randall* v. *Thompson,* (1876) 1 Q.B.D. 748=45 L.J.Q.B. 713; *Shivram* v. *Mohanlal,* I.L.R. (1940) Bom. 249=187 Ind. Cas. 494=41 Bom.L.R. 1293=A.I.R. 1940 Bom. 93. See *Middle East Trading Co.* v. *New National Mills* 60 Bom.L.R. 509=A.I.R. 1960 Bom. 202 where it was held that a vague and uncertain arbitration clause cannot be enforced. Before the jurisdiction of a court to make an order for stay under this section, can be invoked, it must be established beyond doubt that there is valid submission. *Ramlal* v. *Haribux,* 61 Cal. 702= 38 C.W.N. 737=A.I.R. 1934 Cal. 796. Where arbitration clause has been naturally altered by writing or parole, the change may amount to substitution of the original contract, in which case it may not be allowed. *Lachminarain* v. *Hoare Miller,* 41 Cal. 35. So this section is not applicable where the arbitration agreement has not come into force on the date of the suit. *Hast* v. *Hast,* (1881) 16 Ch. D. 670; see also *London and North Western Ry.* v. *Bellington,* (1899) A.C. 79.

But failure to solve differences by arbitration does not affect the validity of the arbitration clause. *Rikhal* v. *Trivedi,* 27 A.L.J. 788=116 Ind.Cas. 444=A.I.R. 1929 All. 45. In order to apply the doctrine that an award made during the pendency of a suit is invalid, the person instituting the suit must be party to the agreement to refer, the pary wishing to stay the suit must have the right to apply to the court to stay it, and the subject-matter of the dispute must be the same before arbitrator and before the court. *Harjas Raj* v. *Tekchand,* 101 Ind.Cas. 786=A.I.R. 1927 Lah. 465.

Where an arbitration clause is inserted in the contract the general rule is that the dispute is referable to arbitration in a case where the avoidance of the contract arises out of the terms of the contract itself. Where however, a party seeks to avoid the contract for reasons *dehors* it, the arbitration clause cannot be resorted to as it, together with the other terms of the contract sought to be set aside. In other words, a party cannot rely on a term of the contract to repudiate it and still say that the arbitration clause should not apply. If he relies on the contract he must rely on it for all purposes. *India Electric* v. *Central Electric,* A.I.R. 1929 Bom. 242=31 Bom.L.R. 426=53 Bom. 573=121 Ind.Cas. 437. See also, *Jureidini* v. *National,* (1915) A.C. 499=84 L.J.K.B. 640; *Stebbing* v. *Liverpool,* (1917) 2 K.B. 433=86 L.J.K.B. 1155; *Woodall* v. *Pearl Assurance Co.* (1919) 1 K.B. 593=88 L.J.K.B. 706; *De Ka Garde* v. *Workshop,* (1928) 1 Ch. 17; bue see, *Atmarams* v. *Gajan Mal,* 61 Ind.

Cas. 141=14 S.L.R. 123 ; *Shibrams* v. *Mohan Lal,* A.I.R. 1940 Bom. 93=I.L.R. (1940) Bom. 249=187 Ind.Cas. 494=41 Bom.L.R. 129=12 R.B. 460.

Where the suit was not in respect of a matter agreed to be referred to arbitration under the term of contract, it could not be stayed. *Middle East Trading Co.* v. *New National Mills, Ibid.*

1436. Jurisdiction of court—Agreement choosing court—Effect of such agreement—Contract Act s. 28.—It is well settled that the litigants cannot, by private agreement, confer jurisdiction upon a court which it does not possess nor can they divert a court of jurisdiction which it possesses under the ordinary law. But where there are two courts which are equally competent to try the suit, an agreement between the parties that the suit should be instituted in one of those courts is not barred by s. 28 of the Contract Act. Such an agreement does not amount to an agreement for reference to arbitration with the meaning of s. 34 of the Act nor does the fact that the defendant has appeared in court and has applied for time for written statement preclude him from enforcing the agreement, *Continental* v. *Chemoids,* 94 Cal. L.J. 254=58 C.W.N. 916=A.I.R. 1955 Cal. 161 ; but see 49 C.W.N. 58 and A.I.R. 1946 Cal. 112.

1437. Ss. 24 and 39(2)—S.51(1)(d) of Madras Co-operative Societies Act.—S. 51(1)(d) of Madras Co-operative Societies Act in its statutory and mandatory discretion that all disputes coming within the scope of s. 51 shall be referred to the Registrar for disposal is clearly inconsistent with s. 34 and 39 of the Arbitration Act. The application for stay under s. 34 of the Arbitration Act itself made by the Society is incompetent and not maintainable. *South Indian* v. *Bapi Raju,* 68 Mad. L.W. 641=(1955) 2 M.L.J. 363=A.I.R. 1955 Mad. 694.

1438. Arbitration agreement in another's document.—When a contract in writing is signed by the parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principle has been extended to cases where the contract does not actually contain the terms but reference is made to another document or contract where those terms are found. This applies as much to an arbitration agreement as to other agreements. But unless there is another contract in existence and specifically referred to, its terms cannot be deemed to have been incorporated in the agreement between the parties by reference. *Tatavasti* v. *Balabhadra,* A.I.R. 1954 Mad. 71 ; see also *Ramdayal* v. *Chandra,* A.I.R. 1951 Mad. 843=(1951) 2 M.L.J. 49=1951 M.W.N. 843.

Mere sending contract notes by a party to another without any confirmative notes signed by the other party does not amount to a submission in writing, as required by the Arbitration Act. *Shivram* v. *Mohanlal,* 41 Bom.L.R. 1293=I.L.R. (1940) Bom.249=A.I.R. 1940 Bom. 93=187 Ind. Cas. 494.

1439 Arbitrations, foreign tribunal—application of the section.—*In William Jacks & Co.* v. *Harrowing Seamship Co.,* A.I.R. 1932 Sind 111=139 Ind.C as. 769=26 S.L.R. 497, *Rupchand* A.J.C. observed : "In the leading case of *Scott v. Avery,* (1856) 5 H.L.C. 811=25 L.J.Ex. 303, it was held that an agreement which makes the obtaining of an award

as a condition precedent to the entertainment of a suit did not oust the jurisdiction of the court and was therefore not illegal ; and much less can the submission clause in the present case be illegal. The provisions of the Indian Arbitration Act, are based rpon those contained in the English Arbitration Act, 1889 ; and the Courts of England have stayed suits under the provisions of that Act not only in cases where the contract sued upon provides for a submission to private arbitration of persons residing in foreign countries but also in cases where the contract sued upon contemplates the settlement of disputes by foreign tribunal : *Halsbury's* Vol. I, para. 42 ; *Law* v. *Garret,* (1878) 8 Ch.D. 26=38 L.T. 3 ; *Ausatrian Lloyd Steamship Co. v. Gresham Life Assurance Society Ltd.'* (1903) I K.B. 249=72 L.J.K.B. 211 ; *Kirchner* M *Co.* v. *Gruban,* (1909) 1 Ch. 413=78 L.J.Ch. 117=99 L.T. 932.....In *Kureshi & Sons* v. *Soomar Haji,* A.I.R. 1921 Sind 202=15 S.L.R. 88, a case decided by *Crouch A.J.C.* on the original side of this court, the bill of lading provided that : 'claim for short delivery of or damage done to goods and all other disputes shall be settled by the British Consul at the port of destination. .....In that case, however, no application for stay of the suit under s. 19, Indian Arbitration Act, had been made, and the question came up for decision on a plea having been raised in the written statement that in view of this provision in Bill of Lading the court had no jurisdiction to entertain the suit and it was only that plea which was negativated. But the principle of the English cases referred to above was applied in the case of *Haji Abdulla* v. *G. R. Stamp,* A.I.R. 1924 Bom. 381=80 Ind.Cas. 523, where an application was made under section 19, Indian Arbitration Act. In that case the policy of insurance provided for reference of all disputes to England and further provided that no legal proceedings shall be taken to enforce any claim except in England, where the underwriters were domiciled and carried on business ; and stay of the suit was granted treating the provision referred to above as a submission clause." So also, *Marithima Italiana* v. *Burjore Framroze,* A.I.R. 1930 Bom. 185=32 Bom.L.R. 43=124 Ind.Cas. 797=54 Bom. 278 ; *Tirakram* v. *Kodumal,* A.I.R. 1928 Bom. 175 ; *The Cap Blanco,* (1913) P. 130 ; *The Dowlish,* (1910) p. 339 ; *Australian Lloyed* v. *Gresham Life,* (1903) 1 K.B. 259. But in a case like the above mentioned where the arbitration agreement only gives an option to one of the parties thereto to make a reference to arbitration, that agreement does not entitle a party to make an application for stay. *Burjore* v. *Ellerman,* 89 Ind.Cas. 866=27 Bom.L.R. 1098=A.I.R. 1925 Bom. 449=49 Bom. 854.

1440. Applicability of s. 34—Agreement contemplating foreign arbitration.—There is no limitation in the language of s. 34 to support the contention that s. 34 does not apply to agreement contemplating foreign arbitration, such as arbitration in New Yorks *Michel* v. *Serajuddin,* 63 C.W.N. 128=1959 Cal. 620. An arbitration agreement that disputes are to be settled by arbitration in New York, according to the rules of American Arbitration Society, does not suffer from any infirmity of vagueness or indefiniteness. *Ibid.,* dissenting from 85 C.L.J. 136. But on appeal *Serajuddin* v. *Michel,* 63 C.W.N. 717=A.I.R. 1960 Cal. 47 it has been held, considering various aspect that the stipulated foreign arbitration would not be a safe or convenient forum for the decision—a just and proper decision—of the disputes between the parties, and to

compel the plaintiff to seek its remedy in America would be practially a denial of justice to it and, accordingly, there was no sufficient reason for referring the dispute to the such arbitration and staying the suit. The discretion in the present case should have been exercised against the defendant. It is undeniable that the parties are *prima facie* bound by the arbitration clause and, normally they should be asked to keep to this bargain and the suit should be stayed but that places no insurmountable bar in the way of the party, seeking to avoid arbitration and maintain the suit. It only casts upon him the onus—undoubtedly, a heavy one—of satisfying the court that there is sufficient reason why the matter in dispute should not be referred to arbitration, but that onus can certainly be discharged in a proper case. The agreement or contract to refer to arbitration, is not necessarily decisive on the point and it creates no estoppel, so far, at least, as the court is concerned; it only raises a *prima facie* case or presumption in favour of a decision by arbitration, but that presumption is certainly rebuttable and is liable to be rebutted by appropriate grounds and circumstances in a particular case. The Court's jurisdiction is not ousted and approach to it is not barred and the suit is not affected and its progress is not impeded, unless the court itself, in the exercise of its discretion, stays the action. Indeed, it is fully open to the court to consider the whole matter and it is entitled, in appropriate cases, to refuse, in the exercise of its discretion, the prayer for stay, notwithstanding the arbitration agreement. Practically speaking, the whole of evidence necessary for determining the dispute between the parties, was in India and no part of it was in America. At any rate, no part of it could be produced in America without considerable difficulty and loss of time and money. Particularly also, the Indian Contract Act, governed the rights and obligations of the parties in regard to the disputed contract. Further, one of the questions which might require some serious consideration was that difficult question of the Indian law of Frustration of Contract, which was in some respects, at least materially different from the English Law on the point, and *which was yet to be settled in all its modified aspects and still retained its complexities* from various points of view, particularly, in the matter of its application. *Ibid.* The civil Court in India can stay a foreign arbitration not under s. 34 of the Act but under s. 151 of the Civil Procedure Code. *Ibid.*

1441. Arbitration clause—how to be construed.—The arbitration clause in a written submission agreed to by the parties in a contract and like every written submission to arbitration must be considered according to the language and in light of the circumstances in which it is made, while deciding whether the dispute in question is covered thereby. If the arbitration agreement is broad and comprehensive and embraces any dispute between the parties "in respect of" the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of its terms of the contract itself. Where, however, the party seeks to avoid the contract for reasons *dehors* it, the arbitration clause cannot be resorted to as it goes along with the other terms of the contract. Where, however, an arbitration clause is not so comprehensive and is not drafted in such broad language that proposition does not hold good. *Gaya Electric* v. *State of Bihar,* (1953) S.C.J. 217=(1953) 1 M.L.J. 605=91 C.L.J. 137=

A.I.R. 1953 S.C. 152; see also *Heyman* v. *Darwins Ltd.*, (1942) A.C. 356 =111 L.J.K.B. 241, where *Viscount Simon L.C.* said that the answer to the qrestion whether a dispute falls within an arbitration clause in a contract must depend on (*a*) what is the dispute and (*b*) what dispute the arbitration clause covers. Where a contract contains an arbitration clause providing that any dispute whatsoever arising in or out of the contract shall be referred to arbitration, the question whether there has been an interpolation in the terms of the contract falls within the arbitration clause and must be decided by the arbitrators. Hence a suit is not maintainable on that ground. *Rupchand* v. *Pannalal,* A.I.R. Cal. 415=200 Ind.Cas. 145.

1442. Effect of contract where time stipulated is barred.—A provision in a charter party that all disputes arising out of contract should be referred to arbitration, and that if a claim was not made in writing and the claimants' arbitrator appointed within three months of final discharge, it should be demed to have been waived, and be absolutely barred, is not void as being against public policy. *Atlantic Shipping* v. *Louis Dreyfus & Co.,* (1922) 2 A.C. 250=91 L.J.K.B. 513 (H.L.). In that case *Lord Dunedin* said : "Under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad as ousting of the jurisdiction of the courts, but that position was finally abandoned in *Scott* v. *Avery,* (1856) 5 H.L.C. 811. As I read that case it can no longer be said that the jurisdiction of the court is ousted by such an agreement ; on the contrary, the jurisdiction of the court is invoked in order to enforce it, and there is nothing wrong in persons agreeing that their disputes should be decided by arbitration. It follows that the clause here is obnoxious in so far as it provides for arbitration. It goes on, however, to say that if the claim is not made and the arbitration begun within a certain time the claim is to be held to be departed from.....All that it comes to this : I stipulate that you shall settle your differences with me by arbitration and not by action at law, and I stipulate that you shall state your differences and begin your arbitration within a certain time or you shall be held to have waived your claim. For these reasons, I do not think that the judgment of the Court of Appeal can be supported." In the above case the Court of Appeal reversed the judgment of *Rowlatt J.* on the ground that the arbitration clause contained a contract contrary to public policy. *Rowlatt J.* held that the mode of proceedure set out in the arbitration clause of the charter party was a condition precedent to the bringing of any action, and that the clause appplied and was binding on the parties. In a case mentioned above under the old law there was no subsisting contract as such the corresponding sections of the old Acts were not applicable. But now it is open to either party to apply to court under section 37(4) for an order that the time fixed in such a clause be enlarged, and the court may, in such a case, notwithstanding that the time so fixed has expired, extend the time for such period and on such terms as it thinks proper. *Vide Russell,* 13th Edn., p. 85. So also where the agreement provided that the claim of arbitration is to be made within 14 days and the claim was made after the lapse of 14 days, it was held that the facts constituted no bar to the action. *Pinnock Bros.* v. *Lewis,* (1923) 1 K.B. 690=92 L.J.K.B. 695. In the above case *Roche J.* distinguishing this case from the last-mentioned case said : "The next case relied on was *Atlantic Shipping* v. *Dreyfus & Co.,* (1922) 2 A.C. 250=91 L.J.K.B. 513.

So far as it is material, the difference between that case and the present case is that there the contract, in terms, said that unless a claim was made in writing within certain specific time, the claim shall be deemed to be waived and absolutely barred. In the contract in this case I find no such express provision, and I certainly find myself quite unable to imply one. That case, therefore, does not apply." The case of *Pinnock Brothers* v. *Lewis, supra* was referred to and distinguished by *Viscount Cave* in *Ayscough* v. *Sheed Thomson,* 93 L.J.K.B. 924. See also, *Pompee* v. *Fuchs,* 34 L.T. 800.

1443. Proceedings in court have commenced.—"It is quite clear that that section applies only to cases where there has been a submission to arbitration before the commencement of legal proceedings, and gives the court power to stay subsequent proceedings." *PerMaclean C.J.* in *Ramjidas* v. *Howse,* 35 Cal. 99. See also, *Peruri Suryanarayan* v. *Gullapudi* 11 Bom.L.R. 1060 & 4 Ind.Cas. 133 ; *Governor General in Council* v. *Simla Banking,* A.I.R. 1937 Lah. 215 ; *Anglo Persian Oil* v. *Pancha Pakrsa,* 47 Mad. 164=A.I.R. 1924 Mad. 336=76 Ind.Cas. 1011. This section provides for a special class of cases in which. after parties have agreed to submit matter in difference between them to arbitration, one of them in violation of such agreement institutes a suit in respect of any or all of these matters. *Vyankatesh* v. *Ramchandra,* 38 Bom. 687=16 Bom.L.R. 653= A.I.R. 1914 Bom. 184. In England proceedings in a petition of right, founded on a contract with the Crown containing a written agreement to submit differences to arbitration, may in a proper case be stayed under the corresponding section of the English Arbitration Act of 1889. *Anglo-Newfoundland* v. *Regem,* (1920) 2 K.B. 214=89 L.J.K.B. 570. In the above case *Warrington L.J.* observed : "The existence of the jurisdiction depends upon section 4 of the Arbitration Act, 1889. Before that section applies, certain conditions must be fulfilled. *First there must be a submission ; secondly, a party to the submission must commence legal proceedings in a court against another party to the submission : thirdly, that party must not have taken any other step in those proceedings.* If these conditions are fulfilled ; then the other party to the proceedings may apply to the court to stay them in order that the question may be referred to arbitration. The second of these conditions is that legal proceedings must have been commenced. When is a legal proceeding commenced in a petition of right ? The petition itself is, in accordance with the Petitions of Right Act, 1860, a petition addressed to the king and the prayer of the petition is not for the relief claimed by the suppliant..... In my view the presentation of the petition to the King is not a legal proceeding at all. It is a petition praying to the King to allow legal proceedings to be taken. When he has given his fiat, then the legal proceedings are commenced by leaving the petition with the solicitor of the Treasury, which is equivalent to serving a writ upon an ordinary defendant, and by filing the petition, with the endorsement upon it, in the central office."

Having regard to the provisions of Order V, rule 2, C. P. Code, the proceedings cannot be said to have commenced within the meaning of this section until the defendant has been supplied with the copy of the plaint. The fixing of time by the court for filing a written statement when defendant has been supplied with a copy of the plaint cannot, in any sense, be regarded as a step taken by the defendant in the proceedings in as much as time for filing written statement is necessarily given by the court. *Premnath* v. *Amba Prosad,* A.I.R. 1941 Lah. 64=193 Ind.Cas. 167.

Application for adjournment to file written statement is a step in the proceeding. *Union of India* v. *Sri Girish,* (1952) A.L.J. 715=A.I.R. 1952 All. 149; *U. P. Government* v. *Harnath,* A.I.R. 1949 All. 611=1949 A.L.J. 170; see also 1945 A.L.J. 38 but see, A.I.R. 1941 Lah. 64.

The delivery of a counter-claim is "the commencement of a legal proceeding" within the meaning of this section. *Chappell* v. *North,* (1891) 2 Q.B. 252. In that case *Denman J.* observed: "The first objection taken to the application was the section did not apply to counter-claims. But a counter-claim is, in reality nothing but a cross-action, and therefore I think we may assume that the delivery of a counter-claim ought to be considered as the 'commencement of a legal proceeding'." See also, *Russell* v. *Palegrinoi,* 6 E. & B. 1020; *Seligman* v. *Le Bontellier,* L.R. 1 C.P. 681; *Sparteli* v. *Von Hoora,* (1884) W.R.N. 52.

1444. Suit instituted but withdrawn or dismissed.—A dispute between A and B was referred to arbitration. In the meantime A brought a suit regarding the same dispute asking for injunction restraining B from proceeding with the arbitration. Inspite of the suit, the arbitration proceeding and during the pendency of the same an award was passed by the arbitrator. The suit has been withdrawn or dismissed and was not pending. In holding that the arbitrator was not *functus officio* during the pendency of the suit and the operation of the award was only suspended and the suit having been withdrawn or dismissed the award was revived, the court observed: "It has been said that suit related to the same disputes which were referred to arbitration and that therefore this case falls within the principle of *Doleman & Sons* v. *Osett Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1092=107 L.T. 581 and that case of *Monro* v. *Bagnor U. D. Council,* (1915) 3 K.B. 167=84 L.J.K.B. 1091 has no application. It is however, admitted that the first suit has either been withdrawn or dismissed and is not pending now. On the other hand reliance has been placed on the Bench ruling of this court in *Mitsui Bussan Kaisha Ltd.* v. *Tataram Bhagwan Das,* A.I.R. 1924 Sind 146=17 S.L.R. 228, and it has been argued that the pendency of the suit was no bar to the arbitrator proceeding with the adjudication of the matters in dispute and the award passed by him was not *ipso facto* rendered invalid but, its operation was merely suspended during the pendency of the suit and that on that having been withdrawn or dismissed the award was revived and could be enforced as a decree." *S. R. Malotra* v. *Sukhdayal,* A.I.R. 1928 Sind 169=112 Ind.Cas. 318=23 S.L.R. 428. But under similar circumstances *Pandit Kanhaiya Lal J.C.* observed in *Mt. Zainab* v. *Mt. Budhana,* A.I.R. 1922 Oudh, 158: "The learned counsel for the applicant, *Musammat Zainab,* contends that the plaint having been returned, the powers of the arbitrators, which had been temporarily suspended, revived, but there is no authority for such a proposition. A revival can only take place by means of a fresh reference to arbitration in court or out of it in the manner provided by law." See also, *Sukhnath Rai* v. *Nehal Chand,* 59 Ind.Cas. 801=18 A.L.J. 644=42 All. 661; *Dinabandhu* v. *Durga Prasad,* 51 Ind.Cas. 80=46 Cal. 1041=29 C.L.J. 399=23 C.W.N. 716; *Ramprosad* v. *Mohanlal,* 60 Ind. Cas. 895=47 Cal. 752. The Legislature by enacting s. 35 in the new Arbitration Act of 1940 has tried to a certain extent to set at rest the conflict which existed prior to the enactment as regards the effect of the institution of a suit by one of the parties to the arbitration agreement, where the subject-matter is the same. But it does not clearly say what will happen if after notice to the arbitrator and before stay of the suit,

the plaintiff withdraws the suit or his suit is dismissed. That section says : "but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid." So it seems that if strict interpretation be given to the words the defendant would be without a remedy.

1445. Any person claiming under him.—The expression "claiming under a party" in the section means the heirs, legal representatives or assigns. *Satyeendas Nath* v. *Union of India*, A.I.R. 1962 Cal. 177. An assignee of a contract is bound by a valid arbitration agreement. A court should not hold that an assignee of a contract is not valid because of an arbitration clause.' *Shaylor* v. *Woolfe*, (1946) Ch 320. But the benefit of an arbitration clause will not pass to the assignee of a debt arising out of the contract containing it. *Cottage Club* v. *Woodside Estate*, (1927) 44 T.L.R. 20—*Russell*, 15th Edn., p. 60. Partnership articles contained a clause of submission to arbitration in case of difference arising at any time between the partners, or between one or more of them, and the executors or administrators of the other or others, or between their respective executors or administrators, in regard to partnership or its affairs. The partnership having been dissolved as regards a partner who had mortgaged his share, and arbitrators having been duly appointed, the mortgagees brought an action for an account :—*Held*, that they were entitled to an account under s. 31. sub-section (2) of the Partnership Act, 1890, and that as they were not parties to the arbitration, and therefore not bound by any account therein, this action could not be staved under s. 4 of the Arbitration Act, 1889, especially as the differences arising involved questions of law. *Bonnin* v. *Neame*, 79 L.J.Ch. 388 = (1910) 1 Ch. 732. A receiver or an official assignee in an insolvency proceeding is a person claiming under the insolvent. *Vide* s. 7 ; *Sturgis* v. *Curzon*, 21 L.J.Ex. 38 ; *Vide* notes under s. 7.

The plaintiff, having been injured in a motor car accident, commenced an action against the insurers of the driver responsible for the accident. The policy contained an arbitration clause. The insurers applied to stay the action. A stay was granted, and the Court of Appeal upheld the order granting the stay. *Smith* v. *Pearl Assurance* (1939) All. E.R. 95 ; *Digby* v. *General Accident*, (1940) 2 K.B. 228.

1446. Proceedings in respect of any matter agreed to be referred.—The legal proceedings which it is sought to stay must be in respect of a matter which the parties have agreed to refer and which, therefore comes within the terms of the arbitration agreement. Where a suit has been commenced as to matters which lie outside the submission the court is competent to refuse a stay. *Atmaram* v. *Gajan Mal*, 61 Ind. Cas. 141. See also, *Thomas* v. *Ports and Steamship*, (1912) A.C. 1 ; *Smith* v. *Allen*, (1862) 3 F. & F. 156 ; *Lauras* v. *Wallasey Local Board*, (1882) 11 Q.B.D. 229 = 52 L.J.Q.B. 302 ; *Swiney* v. *Ballymena Commissioners* 23 L.R. Ir. 122 ; *Workman* v. *Belfast Harbour*, (1899) 2 Ir.R. 234 ; *Daunt* v. *Lazard* (1858) 17 L.J.Ex. 399 ; *Russell*, 13th Edn., p. 87. The legal proceedings which are sought to be staved must be in respect of matters which the parties have agreed to refer, that is to say, which comes within the terms of the arbitration agrtement. If a party brings an action in respect of any matter not agreed to be referred the court has no jurisdiction

a: all to stay proceedings and the court will refuse a stay. Further the court will exercise its discretion and refuse to stay the action in cases where substantial part of a dispute does not fall within the arbitration agreement and cannot be conveniently separated. It is however, not sufficient to induce the court to stay the action to show that only a small part of the disputes is outside the arbitration clause. *Governor-General* v. *Associated Live Stock,* 52 C.W.N. 288=A.I.R. 1948 Cal. 230. In order to arrive at a conclusion as to whether the action is in respect of matters agreed to be referred, the court has to examine the arbitration clause and ascertain its ambit and scope. It takes two to make a dispute. If one party bases his claim, outside the contracts but the other bases his defence on the contracts the resulting disputes certainly arise out of the contracts. *Ibid.* Where there had been no difference exiting between court has jurisdiction. *London and North Western etc., Ry.* v. the parties before action is brought the arbitrator has not and the *Billington,* (1899) A.C. 79; *Printing Machinery* v. *Linotype,* (1912) 1 Ch. 566. In the above case *Lord Ludlow said* : "There is, however, one matter about which I do desire to say a word, and that is that—because I entirely concur with my noble and learned friend on the *Woolsack*—that this difference is a difference which ought to have arisen before the action brought, and that it is too late afterwards to raise a difference which can be brought within the meaning of this section." See also *Governor-General* v. *Associated Live Stock, supra,* where the law on the subject is discussed. After examining a large number of cases, the court observed : "As I have said a mere omission to raise dispute before action from which an agreement cannot be inferred, is no ground for precluding a party from raising it and is no justification for the court assuming jurisdiction to decide questions in respect of which its jurisdiction is ousted by statute. Likewise a mere omission to raise dispute before action, without more ought not by itself to be any ground for refusing to stay under the Arbitration Act." Before an order for stay of suit can be made under this section, it must be established that the suit has been instituted in respect of matter agreed to be referred. *Jnanendra Krishna* v. *Sinclair Murray,* 34 C.L.J. 173. See also, *Radha Behari* v. *Diwan Singh,* 2 Lah. 335=A.I.R. 1922 Lah. 353=66 Ind.Cas. 43; *Lowzon* v. *Wallasey,* 11 Q.B.D. 229; *Thomas* v. *Portseh,* (1912) A.C. 1; *Daunt* v. *Lizard,* 17 L.J.Ex. 399; *Jethalal Kalhanjee* v. *Parasram,* 58 Ind.Cas. 799; where parties agreed to refer matters of dispute to arbitration, the fact that a small portion of the relief claimed is not within the scope of the arbitration clause is not in itself a sufficient reason for refusing to stay proceeding where the main subject of the action is within the arbitration clause. *Singaran Coal* v. *Balmukund,* A.I.R. 1931 Cal. 772=35 C.W.N. 514=53 C.L.J. 321=58 Cal. 1107=134 Ind.Cas. 529; *Iver & Barker* v. *Williams,* (1894) 2 Ch.D. 478=63 L.J.Ch. 521; *Alexander* v. *Campbell,* (1872) 41 L.J.Ch. 478 (484); *Patterson* v. *Northern Accident Insurance,* (1901); 2 Ir.R. 262; *Sheodutt* v. *Prokash,* A.I.R. 1954 Nag. 289. If matters which are agreed to be referred are mixed up in an action with matters not agreed to be referred there is no reason why the matters agreed to be referred should not be referred to arbitration leaving the action to go on to the other matters. But if the matters agreed to be referred were not the main matters in dispute, but were of a sub-ordinate and trifling nature, and if the matters not agreed to be referred were the main matters in dispute, it would be very inconvenient, to say the least of it, to refer that small part and let the action go on as to the

large part. *Singaram Coal* v. *Balmakund, supra.* See also, *Iver & Baker* v. *Williams,* (1894) 2 Ch.D. 478=63 L.J.Ch. 521. *Turnock* v. *Sartoris,* 43 Ch.D. 150; *Rowe Brothers* v. *Crossly Brothers,* (1913) 108 L.T. 11=58 S.J. 144; *Bourein* v. *Neame,* (1910) 1 Ch. 732; *Wade Gray* v. *Morrison,* (1878) 37 L.T. 270; *O'Conor* v. *Norwich Union,* (1894) 2 Ir.R. 723, *London & North Western Ry.* v. *Billington,* (1899) A.C. 79; *Printing Machinery* v. *Linotype,* (1912) 81 L.J.Ch. 422. It is for the court to decide whether matter for reference and subject-matter of the proceeding are the same. *Piercy* v. *Roung,* (1879) 14 Ch.D. 200; *Pethick Bros.* v. *Metropolitan Water Board,* 4th Ed., Vol. II p. 456; *Russell* on *Arbitration,* 13th End., p. 91; See also, *Measures* v. *Measures,* (1910) 2 Ch. 248; *Central Billporting* v. *Atkinson,* (1908) 1 Ch. 537; *Smiter* v. *Martur,* (1925) 1 K.B. 745; *May* v. *Mills,* (1914) 30 T.L.R. 287. In *Sudhansu* v. *Rupulekha,* A.I.R. 1954 Cal. 281, *Chakravarty, C.J.* observed: "Section 34, the relevant part of which I have already quoted, does not refer to what the defendant says, but speaks only of legal proceedings commenced 'in respect of any matter agreed to be referred.' The reference appears to be to the constitution of the legal proceedings as laid down in the plaint....." The legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. Where however a suit is commenced as to a matter which lies outside the submission, the court is bound to refuse the stay. *Gaya Electric* v. *State of Bihar,* A.I.R. 1953 S.C. 182=(1953) 1 M.L.J, 605=91 C.L.J. 137=(1953) S.C.J. 217. However wide the terms of an arbitration agreement may be, a dispute as to the validity of a contract cannot be held to be within an arbitration agreement contained in the contract itself and such a dispute cannot be referred to arbitrators or dealt with by them under such an agreement on the basis that it is a "matter agreed to be referred." *Birla Jute* v. *Duli Chand,* 91 C.L.J. 236=A.I.R. 1953 Cal. 450. No useful purpose can be served by the court by a decision as to the validity of such an agreement. *Ibid.* The only point which the court exercising the jurisdiction under the section can decide is whether the claim brought in the suit to be stayed comes within the submission to arbitration. The court cannot go into the validity of that claim in proceedings under this section. *Gaya Electric* v. *State of Bihar, supra.* The court has no jurisdiction to force a party to go to arbitration in respect of a matter which did not come within the arbitration agreement; that would be going against the direct provisions of the law as enacted in s. 34 of the Act. *N. K. Jain* v. *Sugar Mills,* 27 Pat. 930; see also 52 C.W.N. 389; 52 C.W.N. 397; 52 C.W.N. 460; 21 Pat. 544. But when agreement in writing refer to terms of another contract the terms and conditions of which are to be binding on the parties, such terms to be deemed to be incorporated in the agreement. *Nagapotha* v. *Rama Krishnayya* (1952) 2 M.L.J. 662.

A court will not stay a suit in terms of this section where the result will be the splitting up of the suit. *Central Hindustan* v. *Brijnath Singhji,* I.L.R. (1955) Nag. 686=1956 Nag. L.J. 520=A.I.R. 1956 Nag. 66=1956 M.P.L.J. 39; A.I.R. 1954 Nag. 289 The legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. Where, however, a suit is commenced as to a matter which lies outside the submission, the court is bound to refuse a stay. The answer to the question whether a dispute falls within an arbitration clause in a contract must depend in (a) what is the dispute and (b) what dispute

the arbitration clause covers. A.I.R. 1953 S.C. 182=(1953) S.C.J. 217= (1953) 1 M.L.J. 605 (S.C.); *Central Hindustan* v. *Brijnath Singh, supra.*

1447. Application is to be made by a party to the proceeding.—Any party to legal proceedings may apply to the judicial authority before which the proceedings are pending to stay the proceeding, if the conditions laid down in the section are satisfied. Where there are several defendants any one of them can make the application to have the action stayed and it is not necessary that they should all join in making it. *Russell,* 13th Edn., p. 92. Where all the defendants are bound by the submission clause, it is not at all necessary for all of them to apply to stay, or to show their willingness to submit dispute to arbitration. It is sufficient if one of them does so, and wishes to take advantage of the submission clause. *William Jack* v. *Harrowing,* 139 Ind.Cas. 769= = A.I.R. 1932 Sind 111; *Williford* v. *Watson,* 8 Ch. 473. Where there are several defendants any one of the can apply under this section to have the action stayed. *Willesford* v. *Watson,* (1873) L.R. 8 Ch. 473.

1448. Remedy of a party to an agreement where a suit is filed by the other party—old law.—Where the parties to a dispute agree to refer matters in dispute to arbitration, the fact that arbitration proceeding are pending is no bar to the entertainment of a suit relating to the maters referred to arbitration. The defendant's remedy in such a case is to apply for a stay of the suit, and if he fails to do so, the court can proceed to adjudicate upon the matters covered by the reference and its jurisdiction is not taken away because the arbitrators proceed to make an award after the filing of the suit, even though such award may not have been made before any written statement is filed. *Ramchand* v. *Gobindram,* 56 Ind.Cas. 150=13 S.L.R. 193; *Secretary of State* v. *Gajjan Singh,* A.I.R. 1935 Lah. 775=160 Ind.Cas. 739. In *Bhowanidas* v. *Ramgobind,* 88 Ind.Cas. 929=52 Cal. 453=A.I.R. 1925 Cal. 801; *Page J.* observed: "As regards the second ground which the plaintiff urges in support of his contention it is well to bear in mind that an agreement to refer a dispute to arbitration does not oust the jurisdiction of the court. Notwithstanding such an agreement at Common Law the parties or any of them are at liberty to invoke the assistance of the court to settle the controversy which has arisen, and the court is bound to entertain the suit. The only remedy at Common Law open to a party to the agreement is to seek damages for the breach of the agreement to refer the matter to arbitration. But this remedy would usually be found to be nugatory for under the circumstances the plaintiff would not be able to prove more than nominal damages. Of course, the parties to such an agreement either before or after action is brought are at liberty to settle the dispute by submitting the subject-matter thereof to arbitration and obtaining and award thereon. But in the absence of such an award the Common Law right of the parties or any of them to have recourse to the court for the purpose of settling the dispute unaffected by an agreement to refer the matter to arbitration, see *Doleman* v. *Ossett Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1092. Under s. 19 of the Arbitration Act, however, upon the fulfilment of the conditions therein provided, the court in its discretion may stay the proceedings in the suit pending a reference to arbitration. Now, I am satisfied that the defendant is and at all material times has been, ready and willing to refer to arbitration the matters in dispute in the suit, and in my opinion, there is no sufficient reason why the matters should not be referred in

accordance with the submission." See also *Secretary of State* v. *Surendra*, 17 Pat. 293=(1938) P.W.N. 138.

Where a suit was pending in the Sind Judicial Commissioner's court, the practice was to file an application under section 19 by way of separate proceedings to stay of such a suit and not to file the application in the suit. *McKenzies* v. *Sulleman*, A.I.R. 1933 Sind 25=27 S.L.R. 169=140 Ind.Cas. 626.

1449. What amounts to an application for stay.—The fact that a defence was raised in the written statement that under the agreement between the parties, the parties are bound to appoint arbitrator is not tantamount to an application for stay under this section, but is only a defence to the suit. *Mahomed Mohidun* v. *Mahomed Naina*, 177 Ind. Cas. 440=(1938) M.W.N. 1124=A.I.R. 1938 Mad. 205=(1938) 1 M.L.J. 38.

1450. Time for applying for stay.—It is only when a suit or a proceeding has been commenced against a party that he can make up his mind as to whether he would apply for stay or not. He is not bound to remind the other party who has commenced the suit or proceeding before such commencement, of his duty not to start the suit under the agreement between them. A notice of suit imposes no obligation on the party served with notice to say that the dispute shall be decided by their own tribunal and not by a court of law. He can apply for stay at any time before filing a written statement or taking any other step in the proceedings, but not thereafter. *Governor-General* v. *Simla Banking*, 226 Ind.Cas. 44=A.I.R. 1947 Lah. 215.

1451. Grounds for refusal to stay suit.—The arbitration clause was to the effect that "All disputes shall be referred to arbitration in accordance with the rules of Millowners' Association, Bombay for the time being in force." When the defendant applied for stay of suit the plaintiff took objection that if the rules of Millowners' Association did not contain any provision as regards words of reference then the agreement was uncertain and hence unenforceable and void. *Held* that R. 7(*a*) and (*b*) of the Rules of the Millowners' Association provide for a reference to arbitration and the objection had no basis. *Held* also that assuring the rules did not contain such provisions the reasonable interpretation of those words was that by those words the parties intended to mean that "the reference will be arbitration and the arbitration will be in accordance with the Rules of Millowners' Association of Bombay". There was thus a complete and concluded agreement to refer to arbitration. *Bhagwati* v. *Kamala*, A.I.R. 1959 Cal. 687.

1452. When the application for stay is to be made.—"An application for stay is to be made by the opposite party before filing his written statement or taking steps in the proceedings." *Jowahir Singh* v. *Fleming Shaw*, A.I.R. 1937 Lah. 851. See also *Satyendra Nath* v. *Union of India*, A.I.R. 1962 Cal. 177. Where the defendant has submitted to the jurisdiction of the trial court and has not pleaded the agreement to submit to arbitration at the earliest possible moment as required by law, he is precluded from relying upon this objection at a later stage. *Kharidar* v. *Rukmanand*, A.I.R. 1923 All. 139=71 Ind.Cas. 144. The provisions of this section are mandatory and an application under this section for stay should be made at the earliest possible opportunity. Where a suit was filed in August 1933, and the issues were framed in December of that year, but an application to stay the suit was put in only in 1936 and that at the instance of the court, it cannot be said that the provisions

of this section have been complied with. *Mahomed Mohidun* v. *Mohamed Naina,* 77 Ind.Cas. 440=(1938) M.W.N. 1124=A.I.R. 1938 Mad. 205=(1938) 1 M.L.J. 38. The wording of this section is clearly mandatory. *Ibid.* See also, *Beharilal* v. *Official Receiver,* A.I.R. 1925 Lah. 175=78 Ind.Cas. 608 ; *Shiv Dutt* v. *Moti Ram,* A.I.R. 1925 Lah. 322=88 Ind.Cas. 531=26 P.L.R. 465. All that this section contemplates is that a party to a submission who is sued should apply to the court for stay at the earliest opportunity that is to say, immediately after appearance and before filing a written statement or taking any other steps in the proceeding and that party should have been ready and willing at the time when the proceedings were commenced and should continue thereafter to be ready and willing to do all things necessary for the proper conduct of the arbitration. *Shibaldas* v. *Japan Cotton,* A.I.R. 1928 Sind 94=22 S.L.R. 269=107 Ind.Cas. 434. See also, *Mitsui Bussan* v. *Hogarth Shipping,* 43 C.L.J. 297=94 Ind.Cas. 182=A.I.R. 1926 Cal. 722. Where a defendant does not plead at the early stages of a trial a subsisting agreement to refer to arbitration but submits to the jurisdiction of the court and allows the trial to proceed he cannot afterwards raise the plea. *Karidar Kapra* v. *Kukanand,* 20 A.L.J. 975. See also, *Chimmanlal* v. *Phoolchand,* 44 All. 292=20 A.L.J. 128=65 Ind.Cas. 795=A.I.R. 1922 All. 48. In *Sarat Kumar Roy* v. *Corporation of Calcutta,* 34 Cal. 443=11 C.W.N. 306, *Woodroffe J.* observed : "By section 19 it was, I think, intended to fix a definite limit a *terminus quo* from which an application of this nature could not be entertained, viz., the date of the filing of a written statement or taking any steps in the suit. Nor can I find any authority or sound reason for the second ground that if an act does constitute a step in the proceedings, it is not a bar, if it is done under protest or accompanied by an expression of intention to arbitrate. If this were so, a party might go through most, if not all, of the steps of a suit provided that such steps was accompanied by a protest." It is only when a suit or a proceeding has been commenced against a party that he can make up his mind as to whether he would apply or not. A notice of the suit imposes on the party served with notice to say that dispute shall be decided by their own tribunal and not by a court of law. He can apply for stay at any time before filing a written statement or taking any other step in the proceedings, but not thereafter. A.I.R. 1947 Lah. 215=226 Ind.Cas. 44.

1453. Steps in the prceedings..—The word used in this section are unqualified—"before filing a written statement or taking any other steps in the proceedings." If any step whatsoever is taken by a party to the proceedings in court his right to apply for stay of the proceedings and take the advantage of the reference to arbitration clause is lost. Accordingly once an application is made for time to file a written statement there is a step taken in the proceedings and the suit cannot thereafter be stayed for the purpose of reference to arbitration. *Union of India* v. *Sri Girish,* 8. D.L.R. All. 91=1952 A.L.J. 715. *United Provinces* v. *Sri Har Nath,* A.I.R. 1949 All. 611 ; *Roop* v. *U. P. Government,* A.I.R. 1945 All. 24. The words "other steps in the proceedings" are words of a general character and wide import, and would embrace within their amplitude a large variety of acts. *Union* v. *Mansraj,* 1956 All. L.J. 841=A.I.R. 1957 All. 91=(1956) All. W.R. (H.C.) 798. Application to court after receiving plaint copy for filing written statement must necessarily amount to a step in the proceedings. Under the English Law, an application for delivering defence is a step in the proceeding but merely

requiring a statement of claim is not. *Howrah Oil Mill* v. *B. Kishanlal,* (1958) 2 Andh. W.R. 425 = 1958 Andh. L.T. 915.

A prayer for extension of time to put in a written statement undoubtedly indicates a desire to contest the suit on the merits in court and an intention to abandon the right to have the matter disposed of by arbitration. No such intention is established where the prayer is one for time to put in an application for stay of the suit because of an arbitration clause in the agreement. In that case the indication in fact are just the other way. The true test for determining whether an act is a step in the proceedings is not so much the question as to whether. it is an application but whether the act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration, *Doulat* v. *State*, I.L.R. (1957) Punj. 1760 = A.I.R. 1958 Punj. 19 ; see also A.I.R. 1924 Cal. 789 ; A.I.R. 1950 Bom. 127 ; A.I.R. 1928 Sind 97. Silence of a party before proceedings are started is not of any serious consequence. Not resorting to arbitration or taking up a plea in support of the same. on being threatened with a suit, would not disentitle the party to take a stand on the arbitration clause as a bar to the suit. The choice whether the party would like the matter to be referred or determined by the court is to be made after the proceedings are instituted and not when the same are contemplated or threatened. It is only then that he is to make up his mind and act accordingly. *Daulat Ram* v. *State, Ibid.*

What constitutes a step in the proceedings, so as to deprive a party of his right to go to arbitration within the meaning of s. 34 will depend upon the facts and circumstances of each case. The test to determine whether step in the proceeding has been taken is not a subjective one. A party cannot be entitled to say that he had no actual knowledge of the right under the arbitration agreement and that in fact he did not intend to give up that right. On the other hand, the test is objective and a person shall be deemed to have taken a step under s. 34 of the Act, if it can be held that he could have actual or constructive knowledge of his right in the event of exercising due deligence and that inspite of that he participated in the proceedings of the court. *Joharimal* v. *Fatechand,* A.I.R. 1960 Raj. 67 = I.L.R, (1960) Raj. 383. See also *Deluxe* v. *Sukumar,* A.I.R. 1960 Cal. 206. In *Union of India* v. *Sri Girish,* 1952 A.L.J. 715, the court observed. "Once any step is taken in the proceedings, the right to apply for stay of proceeding is lost. The principle seems to be that the parties having agreed to exclude the jurisdiction of the court are entitled to have that agreement enforced provided as soon as any party institutes a legal proceeding there is a refusal by the other party to have a decision from a court of law and an indication on his part that he wants to rely on the agreement to refer the dispute to arbitration. If any step whatsoever is taken by such party in the proceeding in court his right to apply for stay of proceedings and to take advantage of the reference to arbitration clause is lost. The words used in the section are unqualified—'before filing a written statement or taking any other steps in the proceedings.' Accordingly once an application is made for time to file a written statement there is a step taken in the proceedings. The true test for determining whether an act is a "step in the proceedings" within the meaning of this section, is not so much the question as to whether it is an application—although that would be a satisfactory test in many cases but not the only test, but whether act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. The filing of an unconditional

appearance in court in a suit is not a "step in the proceedings" which will debar him from applying for stay under this section. *Nuruddin* v. *Abu Ahmed,* 51 Bom.L.R. 1020=A.I.R. 1950 Bom. 127. Where a suit is pending before a Small Causes Court, the Small Causes Court is the authority to whom the application for stay under this section has to be made, and such authority may pass an order staying the suit. *Basanti Cotton* v. *Dhigra Bros.,* A.I.R. 1949 Cal. 84. In *Bhowanidas* v. *Pannachand,* 88, Ind.Cas. 929=A.I.R. 1925 Cal. 801=52 Cal. 453, *Page J.* said : "The plaintiff contends that the defendant has taken a step in the proceedings (i) by applying for a copy of the plaint and (ii) by making an application for leave to enter an appearance. With respect to the first alleged step it is enough to state that I agree with the view expressed by *Lindley L.J.,* as to the meaning of s. 4 of the English Arbitration Act, 1889, which is couched in language almost identical with that to be found in s. 19 of the Indian Arbitration Act His Lordship observe that 'The authorities show that a step in the proceedings mean something in the nature of an application to the court, and not mere talk between solicitors or solicitors' clerks not the writing of letters, but the taking of some step such as taking out a summons or something of that kind which is in the technical sense a step in the proceedings : *Ives and Barker* v. *Williams,* (1894) 2 Ch. 478 (484). Moreover, to apply for a copy of the plaint is merely to seek information in order that the defendant may ascertain the nature of the plaintiff's claim. *In so doing the defendant does not, and is not to be deemed to indicate his acquiescence in the course adopted by the plaintiff for the purpose of settling the dispute which has arisen, for until he is made aware of the plaintiff's cause of action he is not in a position to elect whether he will proceed by way of arbitration or will assent to the litigation which has been commenced against him* .....Now, in my opinion, to move the court for leave to enter an apperance is, for certain purposes. to take a step in the proceedings. For example, a party taking such a step would be deemed to have waived any irregularity in the service of writ to which he applies for leave to appear : See, *Fry* v. *Moore,* (1889) 23 Q.B.D. 395 ; *Orr-Ewing* v. *Orr-Ewing,* (1882) 22 Ch.D. 456 ; *Harris* v. *Taylor,* (1915) 2 K.B. 580=84 L.J.K.B. 1839. The question which I have to determine is whether such an application is a step in the proceedings within s. 19 of the Arbitration Act. Now, I apprehend that the intention of the legislature in enacting s. 19 was that in a proper case the court should give effect to the agreement for arbitration into which the parties had entered. It was not, however, intended that a party should lie by and after having wasted time and money in litigation should apply for a stay of the proceedings in order that the dispute should be settled by arbitration. 'The intention of the legislature in giving effect to the contract of the parties and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement was that they should at once and before any proceedings were taken specify the *terminus a quo* and if an application to stay proceedings was made under those circumstances then the court should enforce the contractual obligation to go to arbitration. That seems to me a very wise provision that costs should not be thrown away in beginning to litigate,' *per Lord Halsbury, Lord Chancellor, Ford's Hotel Co.* v. *Bartlett,* (1896) A.C. 1 (5). *Any act in the nature of an application to the court which indicates that a party is willing that the suit should proceed, in my opinion, would be a step in the proceedings*

within s. 19 of the Indian Arbitration Act. The intention of the party is to be gathered from the matter of application which is made, and if, having regard to the form of the application, the court is of opinion that a step has been taken it will so hold, notwithstanding that the party may in truth and in fact have no such intention, or that the application is coupled with a protest that the party desires that the matters in dispute should be referred to arbitration. See *Lucas Ralli* v. *Noor Mahomed,* 31 Bom. 236=8 Bom.L.R. 955 ; *Sarat Kumar Ray* v. *Corporation of Calcutta,* 34 Cal. 443=11 C.W.N. 306 ; *Austin & Whiteley Ltd.* v. *Bowley & Sons,* (1913) 108 L.T. 921. Applying this test to the motion before the court I am clearly of opinion that the defendant's application for leave to enter an appearance was not a step in the proceedings within s. 19 of the Arbitration Act. It is not a reasonable deduction from such conduct that the defendant intends to resist the suit on the merits. It is equally reasonable to infer therefrom that he intends thereafter to make a preliminary objection to the matter being made the subject of litigation at all. Nay more, the language used in the section leads me to the same conclusion, for it is therein expressly provided that the party making an application under the section for a stay of the proceedings must before so doing have entered an appearance. It is not reasonable to suppose that the legislature intended that a party should be held to have taken a step in the proceedings within s. 19 of the Arbitration Act merely because he has made an application which, if granted will place him *entrain* for fulfilling a condition preceedent to an application to stay being duly made in accordance with provisions of the section." See also, *Ramlal* v. *Harbux* A.I.R. 1934 Cal. 196=38 C.W.N. 737=61 Cal. 702 ; *Joylal* v. *Gopiram,* 47 Cal. 611 (619) ; *Adams* v. *Catby,* 66 L.T.R. 687. An application made by the counsel for the defendant asking for time to file the written statement, amounts to "taking a step in the proceedings" within the meaning of s. 19 of the Arbitration Act. *Karnani Industrial Bank* v. *Satya,* 81 Ind.Cas. 846=28 C.W.N. 771. See also, *Sarat Kumar* v. *Corporation of Calcutta,* 34 Cal. 443 ; *Edward* v *Juggilal,* A.I.R. 1943 Bom. 228=I.L.R. (1943) Bom. 298 ; *Roof* v. *U.P.,* A.I.R. 1945 All. 24=I.L.R. (1944) All. 681. A mere intimation to the court at the very outset that application for stay will be made does not amount to a submission to the court s jurisdiction ; on the contrary it is a step in bar of the proceedings in court. *Khimchand* v. *Udhavdas,* A.I.R. 1928 Sind 97=106 Ind.Cas. 565=22 S.L.R. 286. But an application made to the court for postponement of the hearing of the suit is a step in the proceedings within the meaning of s. 19, Indian Arbitration Act, irrespective of the intention with which the application is made. *Fleming* v. *Haji,* 10 S.L.R. 190=40 Ind.Cas. 81 ; *Murli Mal* v. *Banarsidas,* A.I.R. 1935 Sind 62=28 S.L.R. 366=155 Ind.Cas. 895 ; *Barlet* v. *Ford's Hotel* (1895) 1 J.B. 851 ; *Sadhan Kumar* v. *Sunil Kumar,* A.I.R. 1948 Cal. 59 ; *Gannu Rao* v. *Thiagaraja,* (1948) 2 M.L.J. 606=A.I.R. 1949 Mad. 582 ; *U. P. Government* v. *Harnath,* 1949 A.L.J. 170=A.I.R. 1949 All. 611 ; *Ganu Rao* v. *Telagaraja,* (1948) 2 M.L.J. 606=A.I.R. 1949 Mad. 582. An application by the defendant for setting aside the exparte order passed on the plaintiff's application for suing as pauper was not a step in proceedings. *Bharat Vegetable* v. *Lala Ram Saran,* 1949 All. W.R. (H.C.) 687=I.L.R. (1959) 2 All. 555= 1959 All. L.J. 893.

1454. Steps in the proceedings continued.—Having regard to the provisions of Order V, rule 2. Civil Procedure Code, a proceeding must be taken to have commenced within the meaning of s. 19, Arbitration

Act, only when the defendant is supplied with a copy of the plaint and the fixing of time by the court for filing a written statement. When the defendant has been supplied with a copy of the plaint cannot, in any sense, be regarded as a step taken by the defendant in the proceedings inasmuch as time for filing the written statement is necessarily given by the court. *Premnath* v. *Amta, Prasad,* A.I.R. 1941 Lah. 64=193 Ind.Cas. 167. Where the defendant asked for an adjourment of the hearing of the summons taken out by the plaintiff to compel him to file the written statement, and the adjournment was obtained by consent and without prejudice to the defendants' pending application for stay of suit, held that the defendant did not take any step in the proceedings within the meaning of this section. *Dwarka Das & Co.* v. *Chain Roop Singhee,* I.L.R. (1937) Cal. 63=41 C.W.N. 1261. In order to constitute a step in the proceedings within the meaning of this section, the act in question must be (*a*) an application made to the court either on summons or orally or something in the nature of an application to the court and (*b*) such an act as would indicate that the party is acquiescing in the method adopted by the other side of having the dispute decided by the court. The fact that the party was unaware of the arbitration agreement does not make his act any less a step in the proceedings if in fact and in law it was a step. *Subal Chandra* v. *Mahomed,* 47 C.W.N. 570=A.I.R. 1943 Cal. 484=I.L.R. (1943) Cal. 398=210 Ind.Cas. 545 ; see also *Edward Radbone* v. *Juggilal.* I.L.R. (1943) Bom. 298=209 Ind.Cas. 100=45 Bom. L.R. 402=A.I.R. 1943 Bom. 228 ; *Roop Kishore* v. *U. P. Government.* 1944 A.L.W. 542 ; *Jadavji* v. *Hirachand,* A.I.R. 1954 Bom. 174 ; *Zalinoff* v. *Hammond,* (1898) 2 Ch. 92=67 L.J.Ch. 370 ; *Chiman Ram* v. *Vandravandas,* A.I.R. 1948 Bom. 55 ; *Pitchers Ltd.,* v. *Plaza,* (1940) 1 All. E.R. 151=162 L.T. 213.

The mere fact that the party unconditionally signs the consent precipe sent by the other party's solicitor for postponement of the suit, on the ground that writ of summons had not been served, would not amount to taking a step by the party signing the precipe, and would not thereby debar that party from making the application for stay of the suit. *Chimanram* v. *Vandravandas,* 49 Bom.L.R. 431=A.I.R. 1948 Bom. 55 ; but see *Edward* v. *Jugglilal,* A.I.R. 1943 Bom. 228=45 Bom. L.R. 402=I.L.R. (1943) Bom. 298=209 Ind.Cas. 100.

Making an oral application for time to file a written statement is undoubtedly taking a step in the proceedings. It is not necessary that the step in the proceeding must be taken by a written application. *Abdul Quddoos* v. *Abdul Gani,* A.I.R. 1954 Nag. 332 ; see also *Per Ridley J.* in *Austin and Whiteley Ltd.* v. *S. Bowley,* (1937) 108 L.T. 921, where he observed : "In my opinion what is intended by a step in the proceedings is some step which indicate an intention on the part of a party to the proceedings that he desires that the matter be referred to arbitration."

Where after the trial court dismissed the defendants' application for stay under section 19 of the Arbitration Act of 1899, and pending an appeal thereform. the defendants applied for an adjournment to file a written statement and consented to the issue being referred to the Commissioner, held that those facts did not constitute evidence of consent on the part of the defendants precluding them from urging their their application for stay in the appellate court. *Mckenzies* v. *Sulleman,* 27 S.L.R. 169=140 Ind.Cas. 626=A.I.R. 1933 Sind 75. See also, *Bawa Chatagir* v. *Matano,* 3 S.L.R. 149=4 Ind.Cas. 359.

If a party formally appears before the Registrar of the Court through his advocate's clerk, before he has had a reasonable time to enable him to decide on the course of action to be taken, that cannot ordinarily debar him from applying for stay of suit ; that cannot amount to a step in the proceeding within the meaning of this section. *Hormusji* v. *District Local Board,* 28 S.L.R. 223=A.I.R. 1934 Sind 200. In *Fleming Shaw & Co.* v. *Haji Yusuf Ellias,* 40 Ind.Cas. 81=10 S.L.R. 190, the court observed : "The application for time seems to me to be clearly a step in the proceedings and it is pointed out in the case of *Sarat Kumar Ray* v. *Corporation of Calcutta,* 34 Cal. 443=11 C.W.N. 306, that this is so, irrespective of the intention with which the application was made. Whether the applicant wished to have further time to file a written statement or wished to have further time to raise as a bar to the suit the agreement to refer to arbitration, in either event the application was an application to invite the court to do something which would enable the applicant to establish his defence. *Mr Elphinstone* relies on a passage in the judgment of *Denman J.* in the case of *Chappell* v. *North,* (1891), 2 Q.B. 252=60 L.J.Q.B. 554=65 L.T. 23 to the effect that a mere consent to what may afterwards lead to a step is not itself a 'step' in the proceedings. But it is pointed out in the case of *Bartlett* v. *Ford's Hotel Co.,* (1895) 1 Q.B. 850=64 L.J.K.B. 452 that the consent referred to was a consent given without the intervention of the court. The application was made to the other party and not to the court. The later English cases go even further and establish that mere acquiescence in a proceeding initiated by the other party and in an order made on his separate application does amount to a step in the proceedings. *County Theatres and Hotels Ltd.* v. *Knowles,* (1902) 1 K.B. 480=71 L.J.K.B. 351=86 L.T. 132. *Lord Halsbury's Laws of England,* Vol I, paragraph 956, summarises the law on the subject as follows : 'A party who makes any application whatsoever to the court, even though it be merely an application for time, takes a step in the proceedings.' This seems to me to be also the law here and this application must, therefore, fail.' See, *Ratanchand* v. *Sahiram,* 52 Ind. Cas. 139=13 S.L.R. 23 ; *Khilloram* v. *Louis Dreyfus,* 52 Ind.Cas. 130=13 S.L.R. 8. Where the defendant attended at Chambers on the hearing of summons for directions taken out by the plaintiffs, on which an order was made that the plaintiffs and defendant should respectively make discovery of document, it was held that the defendant had taken step in the proceedings and was, therefore, not entitled to a stay. *County Theatre* v. *Knowles,* (1902) 1 K.B. 480. See also, *Chappell* v. *North,* (1894) 2 Ch. 478. The case of *County Theatre* v. *Knowles, supra,* has been relied on in *Ochs* v. *Ochs Brothers,* 78 L.J.Ch. 555=(1902) 2 Ch. 121, where it was held that an undertaking by one party to an action —for example to deliver an account upon a summons by the other for directions under Order XXX, although no order is made, constitutes a 'step in the proceedings' by the party giving undertaking, so as to preclude him from applying for a stay of the action. In the above case *Warrington J.* observed : "The question now to be decided, therefore is, have the defendants 'taken any step' in the action within the meaning of section 4, so as to preclude them from claiming the right to have the action stayed ? There are only two cases which I think it is necessary for me to refer to. They are *County Theatres and Hotel Ltd.* v. *Knowles,* 71 L.J.K.B. 351=(1902) 1 K.B. 480 and *Richardson* v. *Le Maitre,* 72 L.J. 779=(1903) 2 Ch. 222. In *County Theatres and Hotels Ltd.* v. *Knowles, supra,* the defendant attended at chambers on the hearing of summons

for directions taken out by the plaintiffs, and on that summons an order was made which was known as a cross-order for discovery—that is, an order that the plaintiffs should make discovery to the defendant and that the defendant should make discovery to the plaintiffs, and the *Master of the Rolls* (*Sir R. H. Collins*) pointed out that upon a summons for directions, under Order XXX either party might apply for relief just as if he had issued a separate summons, and so the order for discovery must be treated as made at the request of the defendant as well as of the plaintiffs, and therefore the defendants must be regarded as having taken a step in the action. In *Richardson* v. *Le Maitre, supra,* matters did not go so far as in *County Theatres and Hotels Ltd.* v. *Knowles, supra.* The defendant there had attended before the Master on a summons for directions taken out by the plaintiff and had only acquiesced, without protest, in a common form order for delivery of pleadings. *Mr. Justice Swinfen Eady* held that attending the summons for directions without protest was sufficient, and that the defendant had 'taken a step in the proceedings within the meaning of section 4 of the Arbitration Act, 1889; and wound up his judgment with a paragraph which I think is desirable to read. It is thus : 'In my opinion, the details of the order made on a summons for direction do not make any difference. I should be frittering away the decision of the Court of Appeal if I hold that it applied only to orders exactly similar to the one before them. Their decision is based on wider grounds. Attending this general summons for directions without objection, and without asking for an adjournment, in order to make an application to stay the action, is taking up step in the proceedings within the meaning of section 4 of the Arbitration Act, 1889.' Thus, *Mr. Justice Swinfen Eady* states in general terms that attending a general summons for directions and making no protest is taking a 'step.'" See also, *Steven* v. *Bunch,* (1902) W.N. 44 ; *Cohen* v. *Arthur,* (1912) 56 So.J. 344 ; *Smith* v. *British Mariie,* (1833) W.N. 176.

1455. Illustrative cases.—A very extreme case is that of *Parker, Gainer & Co.* v. *Turpin,* 87 L.J.K.B. 357 = (1918) 1 K.B. 358. In that case the plaintiffs sued the defendant in the County Court for breach of a contract of service by him as manager of their business under an agreement which contained an arbitration clause. During the eight years the service continued this agreement remained in the possession of the plaintiffs, and the defendant did not know of its contents, and had no copy. In the action he applied for and obtained an order for the particulars of claim, and he also agreed to an order being made against him for discovery. Subsequently he obtained a copy of the agreement, and, having found that it contained an arbitration clause, he applied for a stay of the proceeding under section 4 of the appeal *held* that the respondent had taken a "step in the proceeding," and that consequently he was not entitled to have the action stayed. *A L. Lawrence J.* in delivering the judgment of the Court of Appeal said : "The Judge, however, came to the conclusion that the defendant was entitled to the stay, basing his reasons on the observations of the Judges in *Ives* v. *Williams,* 63 L.J.Ch. 521 = (1894) 2 Ch. 478..... This was, however, different from the facts before us. The defendant there did not know what the particular breaches of contract were for which the plaintiff was suing him ; and consequently he could not decide whether the proper and suitable tribunal was a court of law or an arbitration : and the Judge in the Court of Appeal held that the notice requiring a statement of claim was not a 'step in the proceedings' within

s. 4 of the Arbitration Act, 1889. He was not taking any proceedings, or any step in the proceedings. He was not applying to the court for anything that, having entered an appearance, he required a statement of claim before taking any step. The section itself permitted him to enter an appearance, and the mere fact of his requiring a statement of claim did not amount to a step in the action. That is intelligible, but counsel for the respondent in the present case carried the doctrine further, and contended that so long as the party does not know the full facts, or whether he will go to arbitration or not, he cannot have elected to take any steps such as would prevent his obtaining a stay and going to arbitration.

"I do not think this is the true construction of the section, or that the Court of Appeal mean to say anything of the sort. They were dealing with a particular matter. They were not saying that any step may be taken so long as the party does not know of the arbitration clause, and that he may get a stay and go to arbitration. The words of the Act must be taken in this ordinary and natural meaning. If a party does take a step in the action he cannot claim a stay of the proceedings. The defendant in the present case not merely applied for particulars—I should look leniently on that—but he actually agreed to an order for discovery in the action; and this was certainly taking a step in the proceedings."

The mere filing of affidavits in answer to a motion for a receiver in an action for dissolution of partnership is not a 'step in the proceedings' the taking of which will preclude the defendant from moving to refer the case to arbitration under a clause in the partnership articles. *Zalinoff* v. *Hammond,* (1898) 2 Ch. 92. In the above case *Sterling, J.* observed : "By such a step is meant a substantive step taken by a party. It may be that a very limited application to the court—such as taking out a summons for extension of time—would be enough. That has been so decided in *Ford's Hotel Co.* v. *Barlett,* (1896) A.C. 1 (4). In *Brighton Marine Palace* v. *Woodhouse,* (1893) 2 Ch. 486, before *North, J.* the motion was ordered to stand over to the trial, and it does not appear whether affidavits had been filed or not. But I do not think in this case the defendant has taken a 'step in the proceedings' within the meaning of the Act, and therefore I think I ought to make an order in accordance with the application. That being so, the motion for a receiver will stand over, for it may be useful hereafter, until after the arbitrator has decided all questions in the action of which this may be one."

What this section requires is that there should be an application by the defendant or a step taken by the defendant in the proceedings to disentitle him to apply for stay under S. 34. The action does not require that the application filed for the purpose of taking a step in the proceedings must have been decided or disposed of before the defendant is disabled for stay in the proceedings. *Shajadavji* v. *Hira Chand,* 9 D.L.R. 79.

1456. Steps in the proceedings—Construction—Laches, Waiver —effect.—The words "other steps in the proceedings" are words of a general character and wide import, and would embrace within their amplitude a larger variety of Acts. An application by a party indicating that he has participated in the proceedings of the case or has contributed to its further progress, or any act by a party showing that he has acquiesced in the jurisdiction of the court would constitute a step in the legal

proceedings. All that appears to be necessary is that a party constitute a step in the legal proceedings. All that appears to be necessary is that a party against whom the bar against stay is set up should have been appraised of the contents of the plaint so as to have knowledge of the facts that might attract the arbitration clause or bring it into play. Any laches on his part, and any association by the said party in the proceedings of the case thereafter would constitute a waiver of his claim for stay. *Union of India* v. *Hans Raj*, All.W.R. (H.C.) 798=1956 All.L.J. 841=A.I.R. 1957 All. 91. Taking any step in the proceedings means some step which indicates an intention on the part of a party to the proceedings that he desires that the action should proceed and has no desire that the matter be referred to arbitration. An application for adjournment of a case to enable the defendant to file written statement would be *prima facie* be treated as a step in the proceeding, unless there are on record facts and circumstances leading to the result that effect should not be given to the *prima facie* meaning of the application. *Bansidhar* v. *Sukhia*, 1957 Jam.L.J. 79=1957 Madh. P.L.J. 360=1957 M.P.C. 8=A.I.R. 1957 Madh.Pra. 24 : A.I.R, 1945 All, 24 ; A.I.R, 1954 Nag. 332. Whether a particular application to court amounts to a step in proceedings depends on circumstances in each case and no absolute test can be laid down to determine it. It is, however, clear that such an application must be made by a defendant or under its authority. So where a person not authorised by the defendant made such an application it cannot be said that the defendant took any step at all in the proceedings. *Punjab State v. Moji Ram*, 59 Punj.L.R. 567=A.I.R. 1957 Punj. 223. Ordinarily when a dispute is covered by an arbitration agreement then the suit should be stayed and it is for the plaintiff to show why it should not be stayed. *Punjab State* v. *Moji Ram*, 59 Punj. L.R. 567=A.I.R. 1957 Punj. 222. An arbitration agreement may be superseded by a new agreement which has the effect of extinguishing the existing agreement or by the performance of the terms of the new agreement entered into in satisfaction of the prior agreement. These questions should be determind by court before it proceeds to enforce the arbitration clause. *Ibid.* See also, *Kartar Singh* v. *Meher Singh*, 59 Punj.L.R. 115=I.L.R. (1957) Punj. 382=A.I.R. 1957 Punj. 40.

Section 34 gives a statutory right to a party to move the court after the proceedings are taken against him and therefore mere silence on the part of the defendant before the filing of the plaintiff's suit cannot amount to such a waiver so as to deprive the defendant of his statutory right granted to him under this section. *Dewan Chand* v. *State of J. & K.*, A.I.R. 1961 J. & K. 58. See *Vanguard Fire* v. *N. R. Sreenivasa*, 1963 Ker L.J. 277=I.L.R. (1963) 1 Ker 545=1963 Ker L.T. 415=(1963) 1 Com.L.J. 329=A.I.R. 1963 Ker 270 (insurance policy—award made condition precedent for right of action—waiver of condition, what amounts to).

1457. Knowledge of the person taking step is required.—No person can be deemed to take any step in a proceeding who is not aware of what the proceedings are. *State* v. *Lalchand*, A.I.R. 1953 H.P. 75. In the above case the court observed : "The learned counsel for the plaintiff respondent has relied upon the following rulings. *U. P. Government* v. *Sri Haranath*, A.I.R. 1949 All. 611=I.L.R. (1950) All. 244 ; *Sadhan Kumar* v. *Sunil Kumar*, A.I.R. 1948 Cal. 59 ; *Edward Radbone* v. *Jugilal*, A.I.R. 1943 Bom. 223=I.L.R. (1943) Bom. 298 ; *Murlimal* v. *Banarashi Das*, A.I.R. 1935 Sind 62=28 Sind L.R. 360 and *Roop Kishore* v. *U. P.*

Government, 1945 All. 24=I.L.R. (1944) All. 681. In all these cases applications for postponement of the hearing of the suit for filing written statement were held to amount to the taking of steps in the proceedings within the purview of S. 34 of the Act. There is this important distinction however, between these cases and the present, that in none of them there was the prayer for adjournment of the case made by a counsel who uptil the moment of making the request for adjournment had received no instruction from his clients.....It would appear therefore that before any act of a party in the nature of an application for adjournment can be interpreted as the taking by him of a step in the proceedings it must be the act of a party willing that the suit should proceed. That being so the act of a counsel for a party in asking for an adjournment before having received any instructions from his client cannot be construed as indicating that he was willing that the suit should proceed."

1456. The Judicial authority before which the proceedings are pending.—Both in s. 19 of the Indian Arbitration Act of 1899 before its amendment by Act XXI of 1933 and para. 18 of the Second Schedule of the Civil Procedure Code, the word "court" was used. In giving the interpretation of the word "court" as used in S. 19 of the Indian Arbitration Act, 1899, *Rupchand, J. C.* observed in *Benarsidas* v. *Murilmal,* A.I.R. 1933 Sind 376 (F.B.) : "The following two questions have been referred to the Full Bench : (1) What is the court in which an application under section 19, Arbitration Act, ought properly to be presented ? (2) Is there concurrent jurisdiction of any other court to hear and decide such an application ? The answer to the first question depends hpon the true meaning of the expression "the court' which is used in S. 19, Arbitration Act. The expression has been interpreted in three different ways : *First* that it means the court in which the suit which is sought to be stayed is pending. This is the view taken by *Pratt, J.* in *Khillooram Lokuram* v. *Louis Drefus & Co.,* A.I.R. 1919 Sind 57=52 Ind.Cas. 130=13 S.L.R. 8 and in *Rattanchand Ramkrishendas* v. *Sahiram Dunichand,* A.I.R. 1919 Sind 80=52 Ind.Cas. 139=13 S.L.R. 23 (F.B.), when he was Judge of this court and in *In re Baboldas Khanchand,* A.I.R. 1921 Bom. 185=57 Ind.Cas. 997=45 Bom. 1, when later he was a Judge of the High Court of Judicature at Bombay. The view taken by *Pratt, J.* has been followed in the later rulings of the Bombay High Court in *Tatya Rawji* v. *Hathabhai,* A.I.R. 1928 Bom. 275=111 Ind.Cas. 641=52 Bom. 420 and *Babubhai* v. *Madhoji,* A.I.R. 1931 Bom. 343=134 Ind.Cas. 705=55 Bom. 503. The Allahabad and Lahore High Courts have also taken a similar view in *Sita Ram* v. *Susil Chandra,* A.I.R. 1921 All. 219=63 Ind.Cas. 813=43 All. 553 and *Jivanmal* v. *Shahzada,* A.I.R. 1931 Lah. 66. The second interpretation given to the expression is that it means ; 'not the court in which the suit sought to be stayed is pending, but the High Court or the District Court as the case may be, to which that court is subordinate.' This is the view taken by *Crouch, A.J.C.* in *Ruttanchand* v. *Sahitram, supra, by Davar. J.* in *Ralli Brothers* v. *Noor Mahomed,* 31 Bom. 236=8 Bom.L.R. 955 and by *Lort Williams, J.* in *Radha Kissan Dhanuka* v. *Bombay Co. Ltd.,* A.I.R. 1930 Cal. 51=121 Ind.Cas. 574=56 Cal. 755. A third meaning is that given to the expression by *Haywood, A.J.C.* (now *Sir Maurice Haywood*) in *Khillooram* v. *Louis Dreyfus, supra* and *Rattanchand* v. *Sahitram, supra.* He has held that 'the court means the arbitration court or the court in which the application for appointment or substitution of an arbitrator or for filing an award under the Indian Arbitration Act may be made, irres

pective of the question whether or not such court is also the court in which the suit is pending.....For these reasons, we are of opinion that 'the court' in S. 19 of the Act, means the court seized of the case, whether such court be a High Court or a District Court, or any other court, of inferrior jurisdiction such as the court of small Causes or of a subordinate court." See also, *Morriston Tinplate* v. *Brooker,* (1908) 1 K.B. 403=77 L.J.K.B. 197; *Manchester Ship* v. *Pearson,* (1900) 2 Q.B. 606=69 L.J.Q.B. 852; *The Punjab Marwari Chamber* v. *Rammallila,* A.I.R. 1931 Lah. 644=132 Ind.Cas. 850; *Kalachand* v. *Wali,* A.I.R. 1925 All. 154=85 Ind.Cas. 341=47 All. 179; *Chetumal* v. *Khirmal,* A.I.R. 1931 Sind 106=25 S.L.R. 466=134 Ind.Cas. 398. For setting at rest these conflicts of opinion by S. 2 of Act XXI of 1933, the following amendments were made, namely: "In section 19 of the Indian Arbitration Act, 1899, for the words 'the court' where they first occur, the words 'the judicial authority before which the proceedings are pending' shall be substituted, and for the said words where they occur for the second time, the words 'such authority' shall be substituted."—*Vide* section 2 of *Ibid.* In the statements of Objects and Reasons of the Bill, the object of the amendment is thus given: "Under S. 19 of the Indian Arbitration Act, 1899, where any matter which falls within an agreement to arbitrate is the subject of legal proceedings, any party may apply to 'the court' to stay proceedings; and thereupon the court may after an inquiry stay further proceedings, in order that the agreement to arbitrate may be enforced. The intention probably was that this power should be exercised by the court before which the proceedings are pending, but the phrase 'the court' is defined in section 4 of the Act as meaning the High Court in Presidency town and the District Court elsewhere. Hence a conflict of judicial rulings has arisen, which leaves it doubtful whether a Presidency Small Cause Court has the powers of the 'the court' under S. 19. The Bill is intended to make it clear that the court referred to in section 19 is the court before which the legal proceedings are pending." —*Statement of Objects and Reasons.* So now the application for stay should be made to the court trying the suit. *Per Pratt, J.* in *Ratanchand* v. *Sahiram,* 13 S.L.R. 23=52 Ind.Cas. 139 (F.B.)

1457. The applicant was, at the time when the proceeding were commenced and still remains ready and willing etc.—The time, with reference to which the readiness and willingness of a party to an arbitration to refer to arbitration is to be determined, is the time when a party brings the suit and the other party is called upon to appear and answer. *Khimchand* v. *Udhavdas,* A.I.R. 1928 Sind 97=106 Ind.Cas. 565=22 S.L.R. 286; *Kedarnath* v. *Sumpatram,* 47 Cal. 1020; *State* v. *Lalchand,* A.I.R. 1953 H.P. 75; see also *W. Wood* v. *Bengal Corporation,* A.I.R. 1959 Cal. 8. The readiness and willingness required by this section has to exist at the commencement of the legal proceedings and has to continue up to the date of application for stay. Mere inaction prior to the commencement of the legal proceedings cannot be construed as want of readiness and willingness to go to arbitration at the commencement of legal proceedings. *Subal* v. *Mohammad,* A.I.R. 1943 Cal. 484=47 C.W.N. 570=I.L.R. (1943) 2 Cal. 298=210 Ind.Cas. 454; *W. Wood* v. *Bengal Corporation,* 97 Cal.L.J. 149=60 C.W.N. 578=A.I.R. 1956 Cal. 238: *Punjab State* v. *Mouji Ram,* 59 P.L.R. 567=A.I.R. 1957 Punj. 221. It is not necessary for all the defendants to apply for stay or to show their willingness to submit dispute to arbitration provided that all the defendants are bound by the submission clause. It is sufficient if one

of them does so and wishes to take advantage of the submission clause. *Ram Bahadur* v. *Thakurdas,* A.I.R. 1958 All. 522 ; see also (1873) 8 Ch. D. 473 ; A.I.R. 1932 Sind 111. In a suit against firm of three partners, one of the partners is competent to make a stay application. *Ram Bahadur* v. *Thakur Prosad, Ibid.* In *Anglo Persian Oil* v. *Panchapakesa Ayyar,* A.I.R. 1924 Mad. 336=47 Mad. 164, *Schwabe,* C.J. said : "The law provides that if there is a submission for a reference to arbitration, and a party chooses to bring his suit the other party can then decide whether or not he will remain before the court which he indicates by taking some step in the action, or whether he will avail himself of his contractual rights to have the dispute referred to arbitration." A threat by one of the parties to an arbitration to the other party to file a suit does not necessarily mean that the party giving the threat is unwilling to have the matter referred to arbitration. *Khimchand* v. *Udhavdas,* A.I.R. 1928 Sind 97=22 S.L.R. 286. See also, *Keshoram Cotton* v *Kanhaylal,* 44 C.W.N. 607. There is nothing in the section to require the applicant to give intimation in that behalf to the other party before the institution of he suit. *Shivaldas* v. *Japan Cotton,* 22 S.L.R. 269=107 Ind.Cas. 434=A.I.R. 1928 Sind 94. All that the applicants under the section need prove is that he was ready and willing to go to arbitration at the time of the commencement of the proceedings and not before. *Ibid.* If, on the other hand, the opposite party neglects to take any steps within such time as the court might prescribe, the presumption would be that he also was dissatisfied with agreement, and the court would hold the agreement to have become a dead letter. *Sheobubu* v. *Udit Narain,* 24 Ind.Cas. 490=12 A.L.J. 757.

In *Parry* v. *Liverpool Melt,* (1900) 1 Q.B. 339, *Lindley M.R.* observed : "The argument have satisfied me that in *Davis* v. *Starr,* 41 Ch.D. 242, this court took a wrong view of the facts, though not, I think, of the law. The principle upon which we proceeded in that case was right enough, because we came to the conclusion that the applicant there—a man who wanted to enforce the arbitration clause—was not, in the language of the Act, at the time when the proceedings were commenced, nor still remained, 'ready and willing to do all things necessary to the proper conduct of the arbitration.' Assuming that we were right on the facts, the decision was right enough. I now think that we took erroneous view of the facts. I prefer myself the observations made and view taken on similar facts in the later case of *Renshaw* v. *Queen Anne Mansions Co.,* (1897) 1 Q.B. 662." See also *Bruce Ltd,* v. *strong* (1951) 2 K.B. 447, where it has been held that the opposite party may plead that the arbitration is out of time and yet be ready and willing. *Russell,* 15th Edn. 65. See also *Weir* v. *Johnson,* (1882) W.N. 159 where readiness and willingness to do all things necessary to the proper conduct of arbitration was negatived by the fact that the party brings suit.

In *Hodson* v. *Railway Passengers' Assurance Co.,* (1904) 2 K.B. 833 (841) *Collins, M.R.* said : "The only other point made for the plaintiff is that on the facts the defendants were not ready and willing at the time the proceedings were commenced to go to arbitration. It seems to me on that part of the case that there is no foundation for saying the defendants were unwilling. They possibly might have done more, but we have it clear that they claimed the right to arbitration They had begun by insisting on arbitration : they had received a nomination of an arbitration by the plaintiff ; they had taken exception to the gentleman on the special ground they named in their letter ; but there is nothing

to show that they would not have named another arbitrator or taken proceedings before the master in view of there being a difficulty in agreeing on a person to act as arbitrator. I do not think the mere fact that they took no steps after they had taken a particular objection to the arbitrator named affords an adequate ground for saying that they were not ready and willing to take proceedings or to do all things necessary for the proper conduct of arbitration."

1458. Power of court to grant stay is discretionary.—The jurisdiction under this section is only discretionary because the section only says that the court "may make an order staying the proceedings." *Sudhansu* v. *Rupalekha,* A.I.R. 1954 Cal. 281=93 C.L.J. 44; *Tusar Kanti* v. *Atulananda,* 9 D.L.R. Cal. 93; *Gauri Sankar* v. *Union of India,* A.I.R. 1953 All. 446=(1953) A.L.J. 45. *Union of India* v. *Thakedar Bhojraj,* 1960 Raj. L.W. 532=I.L.R. (1960) 10 Raj. 1224. See also *Printers (Mysore) P. Ltd.* v. *Pothan Joseph,* A.I.R. 1960 S.C. 1156, where it was held that if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relavant facts and has adopted an unjudicial approach it would be certainly the duty of the appellate court to interfere with the trial court's discretion. It was followed in *Swedish East Asia Co.* v. *P. R. Herman & Mohata,* 66 C.W.N. 538=A.I.R. 1962 Cal. 601; *Union of India,* v. *Lakshmi Ice Factory,* A.I.R. 1964 J. & K. 10. The provisions contained in this section undoubtedly confer a discretion on the court though the point of time and the manner in which such discretion can be exercised is regulated by the provisions contained in the section and on principles enunciated in a number of decisions. *Sailendra* v. *Chillar,* 58 C.W.N. 807. This discretion must be exercised according to the rules which have been established by a long series of decisions. *New Zealand* v. *Nagpal,* A.I.R. 1955 Punj. 113=56 Punj. L.R. 535. Where an arbitration is beset with difficulties and might never be possible that court should incline in favour of allowing the suit to continue and against staying it. *Bharat* v. *Union of India,* A.I.R. 1954 Cal. 606

Where an agreement by the parties has deliberately vested in the arbitrator determination of legal points also, there is no reason why it should not be left to the arbitrators. *Andhra Co-operative* v. *C Srinivasan,* (1958) 2 Andh.W.R. 437=1958 Andh.L.T. 311=A.I.R. 1958 And.Pra. 158.

The parties should be asked to keep to the bargain they have made and a suit should be stayed when it is instituted in breach of an agreement containing a reference to a foreign tribunal. *Michel* v. *Serajuddin,* 63 C.W.N. 128. The *prima facie* leaning of the court is to stay the suit if the disputes are covered by the arbitration agreement. *Rangta* v. *Jugometal,* 63 Cal.W.N. 522=A.I.R. 1959 Cal. 423. The mere fact that the parties may have to incur large costs in the event of arbitration being held at *Zurich* is not a sufficient ground for refusing to stay. *Ibid.*

The Court will not lightly interfere with an appointment deliberately agreed upon by the parties, and the provision common in building contracts, by which certain possible disputes between building contractor and building owners are determined by the Engineer, will still be enforceable. *State* v. *Jawahar Mall,* 61 Punj.L.R. 270=A.I.R. 1959 Punj. 424; *Dewan Chand* v. *State of J & K* A.I.R. 1961 J & 58 (application can not be disallowed on the ground of bias of the arbitrator). The section undoubtedly confers a descretion on the court, but it is only a discretion to stay or not to stay the suit after the condition laid down in the section are found to be satisfied or a discretion not to stay the suit in

view of the difficulty of the questions on the facts of a case, but it is not a discretion to stay the suit even if one of the conditions may be unsatisfied.....It also appears to me that the whole scope of S. 34 is an enquiry as to whether the suit will be stayed and the moment it appears that the suit cannot be stayed, because the dispute raised by it is not a dispute agreed to be referred, the section exhausts itself and there is no warrant in its provisions for proceeding further to decide any other issue." *Birla Jute* v. *Dulichand,* A.I.R. 1953 Cal. 450=91 C.L.J. 236 *per Chakrabarti, C.J.* dissenting from *Khusiram* v. *Hanumutmal,* 53 C.W.N. 505. This section gives a discretion to the court either to stay or not to stay it. Normally the court will give effect to the terms of the agreement between the parties as to arbitration and will stay a suit. *Abdul* v. *Dost Mohamed,* A.I.R. 1949 All. 304=1949 A.L.J. 375=4 D.L.R. (All.) 114; see also *Ghewar Chand* v. *Shiva Jute,* 5 D.L.R. (Cal.) 105=A.I.R. 1950 Cal. 568; *Chandanmull* v. *Clive Mills,* A.I.R. 1948 Cal. 257. The court should exercise its discretion in refusing to stay a suit in a 'sparing and cautious manner, and should not do so unless it can be established that there is good ground for apprehending that there will be a failure of justice if the reference to arbitration is allowed to proceed. *Ratan Chand* v. *Ram Chand,* 47 Ind.Cas. 783=62 S.L.R. 41; see also *Raneegunj Coal* v. *Tata Ltd.,* 117 Ind.Cas. 417=53 Bom.L.R. 271 =A.I.R. 1929 Bom. 119. *Forbes* v. *Versimal,* 75 Ind.Cas. 1041=A.I.R. 1924 Sind 59 (F.B.). In *Freeman & Sons* v. *Chester Rural Council,* 80 L.J.K.B. 695=(1911) 1 K.B. 738, *Cozens Hardy, M.R.* said : "Now it is clear that *prima facie* the court would give effect to such an agreement, but the court has a discretion." In the same case *Buckley, L.J.* said : "It remains that section 4 of the Arbitration Act, 1889, gives a discretion, and that in two ways—namely, first, the words are permissive, not imperative, for the verb is 'may make' and not 'shall make' ; and secondly, the jurisdiction to stay the proceedings arises if the court is 'satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission.' Over and above the contractual rights, therefore, there exists this discretion in the court. The *Master of the Rolls* is not satisfied that there is no sufficient reason why the matter should not be referred. Under these circumstances I do not think that the fact that another Judge of co-ordinate jurisdiction thinks otherwise establishes that there is no sufficient reason when one Judge of the Court of Appeal is not satisfied on that point. From this point of view I can concur with the order which the *Master of the Rolls* has proposed." In *Vawdery* v. *Simpson,* (1896) 1 Ch. 414, *Chitty, J.* observed : "It is plain, too, from *Walmsley* v. *White,* 40 W.R. 675 and *Joplin* v. *Postlethwaiti,* 61 L.T.N.S. 629, that the court of first instance has full discretion, on an application of this kind, to determine whether the matters in dispute shall be tried out in the action. or whether the proceedings shall be stayed and the question referred to arbitration, a discretion of course to be exercised judicially, and according to well-known and ordinary principles. In both these cases the Court of Appeal declined to interfere with the discretion already exercised by the Judge in the court below." See also, *Barnes* v. *Young,* (1898) 1 Ch. 414; *Charles Osenton* v. *Johnston,* (1942) A.C. 130; *Evans* v. *Bartlam,* (1937) A.C. 473 (480). The *prima facie* leaning of the court is to stay the action and leave the plaintiff to the tribunal to which he has agreed but the court may in its discretion after considering all the circumstances of the case, refuse a stay on the ground that the matters in dispute between the parties involve the investigation of grave charges

of fraud and may hold that in such circumstances arbitration is not the most suitable method of determining the questions raised between the parties. *Manindra Chandra* v. *H. V. Low,* 83 Ind.Cas. 934=39 C.L.J. 504=A.I.R. 1924 Cal. 796 ; *Anglo Persian Oil* v. *Panchapakesha,* 76 Ind. Cas. 1011=(1923) M.W.N. 772=45 M.L.J. 653=18 L.W. 752 ; *Narsingh* v *Dhanraj,* 21 Pat. 544. When in an application under this section the applicant makes serious allegations of fraud against the plaintiff, he thereby puts the reputation and character in issue and puts him on the defence against serious charges and in such circumstances the court will allow the plaintiff an opportunity to have the character vindicated at a public trial and not send him to a private tribunal with all the disadvantages incidental thereto. *Tusar Kanti* v. *Atulananda,* 9 D.L.R. 93; *Sudhansu* v. *Ruplekha,* A.I.R. 1954 Cal. 281=93 C.L.J. 34 ; *Russell* v. *Russell,* (880) 14 Ch.D. 471=49 L.J.Ch. 268. In the last-named case, *Jessel, M.R.* said : "Where the party charged with fraud desires it, I can perfectly understand the court saying, 'I will not refer your character against your will to a private arbitrator.' It seems to me in that case it is almost a matter of course to refuse the reference."

The making of an order staying proceedings is a matter largely in the discretion of the court. That discretion must, however, be judicially exercised. The court should exercise its discretion in refusing to stay a suit in a sparing and cautious way as the primary duty is cast upon the court to act upon such an agreement. In commercial cases there ought to be a very strong reason for refusing a stay order. *Ram Bahadur* v. *Thakur Dass,* A.I.R. 1959 All. 522. In exercising discretion under this section the court will consider the question whether it should refuse stay in a case where allegations of fraud have been made and whether the party against whom they are made desired them to be investigated or enquired into in open court. *Andhra Co-operative* v. *C. Srinivasan,* (1958) 2 Andhra W.R. 437=(1958) Andh.L.J. 311=A.I.R. 1958 Andh.Pra. 158. Section 34 of the Act gives a discretion to the trial court either to stay the suit or not to stay it. Normally the court would be inclined to give effect to the arbitration agreement because it is the *prima facie* duty of the court to hold the parties to their agreement and to make them present their disputes to the forum of their choice. Where the discretion has been exercised by the trial court in a manner which cannot be considered to be arbitrary, the Appellate Court will not interfere with a decision which is neither unjudicial nor otherwise improper, even where the appellate court might have come to a different conclusion. *Held* further, that where one of the main questions that would arise in the case would be as to the interpretation of the terms of the agreement, it was a matter which it be proper to leave for adjudication to a court of law than to an arbitrator. *Union* v. *Narayan Cold Storage,* I.L.R. (1957) Punj. 1576=59 Punj.L.R. 413=A.I.R. 1958 Punj. 24 ; see also A.I.R. 1952 Punj. 368 ; (1893) 1 Ch. 238 ; A.I.R. 1948 Cal. 257 ; (1913) A.C. 241.

But where the dispute referred to arbitration involves a question of fraud or where the dispute under consideration involves charges against the character of one of the parties, the court will usually permit the party against whom such charges are made, if he so desires, to have them investigated in open court. *Union of India* v. *Firm Vishydhaghee,* A.I.R. 1951 All. 541 ; see also *Tusar Kanti* v. *Atulananda,* 9 D.L.R. (Cal.) 93 : *Sudhansu* v. *Ruplekha,* 93 C.L.J. 44. But it cannot be laid down as a principle that merely because a difficult point of law is raised a judge must necessarily exercise his discretion in a particular manner and he must

refuse to stay the suit. *Avaram* v. *Subhden,* I.L.R. (1941) Kar. 537=199 Ind.Cas. 707=A.I.R. 1942 Sind 57. The possibility that the arbitration may become infructuous should not be altogether overlooked in determining whether or not stay of suit should be ordered. *Subal Chandra* v. *Mahomed,* 47 C.W.N. 570=A.I.R. 1943 Cal. 484. The mere fact that a defendant, who is threatened with legal proceedings for breach of a contract containing an arbitration clause, does not, before the institution of the suit, insist on the arbitration clause, but relies on it for the first time after the suit is filed, is no ground for not granting his application for stay of proceedings under the arbitration. *Chhabidas* v. *Damodar,* 45 Bom.L.R. 387=A.I.R. 1943 Bom. 199=212 Ind.Cas. 189. In the above-mentioned case the plaintiffs did not ask the defendants, whether they desired to go to arbitration before filing the suit. The fact that a party in reply to a notice of suit failed to refer to the clause in the contract providing for arbitration and ask for arbitration in accordance with it does not put an end to the right to claim under this section that the suit should be stayed and the matter decided by arbitration according to the contract. *Indian Steel* v. *Debi Prosad Malavya,* I.L.R. (1944) All. 341= 1944 A.L.J. 379=A.I.R. 1944 All. 253.

1461. Application for stay, onus.—Where an application is filed by a defendant for stay of the suit under this section the onus is always on the plaintiff to show why he shqould not be bound by the agreement. *Jubilee Chamber* v. *Lala Amrit,* A.I.R. 1940 Lah. 180=42 P.L.R. 48. In an application under the Arbitration Act for stay of a suit, it is the *prima facie* duty of the court to stay, and the onus is on the plaintiff to show why he should not be bound by the agreement to refer. *Murlimal* v. *Banarsidas,* A.I.R. 1935. Sind 62=28 S.L.R. 366=155 Ind.Cas. 895; *Abdulla* v. *Sassoon,* A.I.R. 1920 Sind 61=56 Ind.Cas. 76=13 S.L.R. 201. The discretion given by this section should be judicially exercised, and the onus of showing that the stay should be granted lies on the party who opposes the stay as the court will as a rule refer the parties to the forum which they have deliberately selected as the one to which they wish to refer their dispute. *Raneegunge Coal* v. *Tata Iron,* A.I.R. 1929 Bom. 119=53 Bom. 271=31 Bom. L.R. 21=117 Ind.Cas. 417. See also *Dinabandhu* v. *Durga Prosad,* 51 Ind.Cas. 80=23 C.W.N. 716=29 C.L.J. 399=46 Cal. 1041; *Hodgson* v. *Railway Passenger's Association,* (1882) 9 Q.B.D. 188; *Lyon* v. *Johnson,* (1889) 44 Ch.D. 200; *Fox* v. *Railway Passenger's Insurance,* (1885) 54 L.J.Q.B. 505; *Doleman* v. *Ossett Corporation,* (1912) 3 K.B. 257; *Vawdrey* v. *Simpson,* (1896) 1 Ch. 166; *Heyman* v. *Darwins Ltd.,* (1942) A.C. 356 (388). *Denton* v. *Legge,* (1895) 72 L.T. 626; *Mason v. Haddan,* 6 C.B.N.S. 526; *Sarat Chandra* v. *Rajkumar,* 26 C.W.N. 967=35 C.L.J. 482; *Volkart* v. *Fateh Muhammad,* 3 U.P.L.R. (Lah.) 48=61 Ind.Cas. 322; *Ganesh Das* v. *Durga Dat,* 3 Lah.L.J. 61=2 Lah. 19=60 Ind.Cas. 776; *Abdulla Haroon* v. *E. D. Sassoon,* 13 S.L.R. 201=56 Ind.Cas. 76. In *Willesford* v. *Watson,* (1873) L.R. 8 Ch.D. 473 (480), *Lord Selborne, L.C.* said: "If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament (*i.e.,* Common Law Procedure Act, 1854) was passed, a *prima facie* duty is cast upon the courts to act upon such an agreement." See also, *Law* v. *Garrett,* 8 Ch.D. 27 (37); *Lyon* v. *Johnson,* 40 Ch.D. 579; *Kitchen* v. *Turnbull,* 20 W.R. 253. Under S. 34, the primary onus is on the applicant for stay of suit to satisfy the court that the preliminary conditions prescribed by the section have been complied with. If that onus is discharged then the onus shifts in to the party opposing the stay to

satisfy the court that there is sufficient reason why the matter should not be referred to arbitration. *Tolaram* v. *Birla Jute,* I.L.R. (1948) 2 Cal. 171. Where the private tribunal never came into existence or is *functus officio,* the courts will not allow their jurisdiction to be ousted. *Radha* v. *Jaffer,* 2 Lah. 353=A.I.R. 1922 Lah. 353.

1462. Difference between English and Indian Law.—The discretion given by s. 19 should be judicially exercised and the onus of showing that the stay should not be granted lies on the party who opposes the stay as the court will as a rule refer the parties to the forum which they have deliberately selected as the one to which they wish to refer their disputes. *Raneegunge Coal* v. *Tata Iron,* A.I.R. 1929 Bom. 119=31 Bom. L.R. 21=53 Bom. 271=117 Ind.Cas. 417. In the above case after quoting the above passage from *Russell* on *Arbitration,* 11th Edn., at p. 102, *Kemp, J.* said : "The question is whether the learned judge has exercised a judicial discretion in this case having agreed to the principles by which he must be guided. With all respects to him, I am of opinion that he has not, and that he has taken into account the principles of decisions in England which since the English Arbitration of 1889 make the courts there reluctant to stay the suit where the main point in dispute is a pure question of law, because such a question must ultimately return by way of a case stated to the court of decision. *The greater control exercised by courts in England over arbitrations under the English Arbitration Act should not, I think, be applied as a main reason for refusing to stay under the Indian Arbitration Act.* Before the English Arbitration Act, the courts in England did not hesitate to order a stay where there was a pure question of law. The learned Judge refused to stay the suit on the grounds, firstly, that there was an important point of law for determination which would be more properly tried by the court than by the arbitrators.....Secondly, he finds that there is a plea of fraud which has been set up in the plaint which is a matter that demands that the question in dispute should be determined by the court....." See also *Willesford* v. *Watson,* (1873) 3 Ch. 473 ; *Bristol Corporation* v. *John Aird,* (1913) A.C. 241=82 L.J.K.B. 684 ; *Produce Brokers* v. *Olympia Oil,* (1916) 1 A.C. 314=85 L.J.K.B. 160 ; *Metropolitan Tunnell* v. *London,* (1926) 1 Ch. 271 ; *Barnes* v. *Young* (1898) 1 Ch. 414=67 L.J.Ch. 263.

1463. Plea of fraud against party—Proof required.—Unless a *prima facie* case of fraud is made out, the proceedings should, when an arbitration agreement exists, be stayed under this section. If the plaintiff objects to the case being referred to a domestic tribunal in accordance with the arbitration agreement between the parties he must make out a substantial and *bona fide* case of fraud. *Budhulal* v. *Jagan Nath,* I.L.R. (1948) All. 401=A.I.R. 1949 All. 70=1949 A.L.J. 559 ; *Ballav Das* v. *Halwaisya,* I.L.R. (1946) 1 Cal. 203.

1464. Discretionary power of court to stay proceedings where the agreement is attacked on the ground of fraud etc.—The stay of a suit under this section is made by the court only with a view that the parties may go to arbitration in accordance with the agreement. The stay of a suit will have, therefore, to be refused if there could not be an arbitration at all. An arbitration presupposes a dispute or difference between the parties and if no dispute or difference arises before the institution of the suit, there is no occasion for an arbitration, and a pending suit between the parties not to be stayed in such a case. If the plaintiff is not aware before the institution of the suit, that there is a difference between him and the defendant or of the nature of the

difference, he cannot be said to have gone back upon his agreement to refer to arbitration or is attempting to go back upon it by rushing to court. Further if the basis of the main defence in the suit is that the contract was induced by either fraud or misrepresentation of the plaintiff and the question does not come within the scope of the arbitration clause, the rights of the parties involved in the suit should be tried by the court and the prayer for stay should be refused. *Ladha Singh* v. *Jyoti Prosad,* 186 Ind.Cas. 617=A.I.R. 1940 Cal. 105=I.L.R. (1939) 2 Cal. 181=70 C.L.J. 148=43 C.W.N. 879. See also *L. & N. W. Ry.* v. *Billington,* (1899) A.C. 79=68 L.J.Q.B. 162; *Dawoodbhai* v. *Abdul,* A.I.R. 1931 Bom. 164=33 Bom.L.R. 51; *Eastern Steam Navigation* v. *Indian Coastal Navigation,* 46 C.W.N. 933; *Green* v. *Howell,* (1910) 1 Ch. 495 (511); *Barnes* v. *Youngs,* (1898) 1 Ch. 414; *Pramatha Prosad* v. *Sagar Mal,* A.I.R. 1952 Pat. 216; *Basantalal* v. *Dominion of India,* A.I.R. 1952 Cal. 340. In *Anglo Persian Oil* v. *Panchapakesha,* 76 Ind.Cas. 1011=(1923) M.W.N. 772=45 M.L.J. 653=18 L.W. 752, *Schwabe, C.J.* observed: "There are some well defined instances where a court almost invariably refuses to stay such as a case where there are serious allegations of fraud." In *Manindra Chandra Nandi* v. *H. V. Low,* 83 Ind.Cas. 934=39 C.L.J. 504=A.I.R. 1924 Cal. 796, the court observed: "*Sir Benode Mitter* and *Mr. S. C. Bose,* also appeared for the defendant company, have strongly pressed upon me the case of *Russell* v. *Russell,* 14 Ch.D. 471=49 L.J.Ch. 268, and have argued that where fraud is charged the court will in general refuse to send the case to arbitration if the party charged with fraud desires a public enquiry and that where it is the party who is making the charge who desires that the matter should be given publicity of a public trial, the court is much less inclined to free from the undertaking to go to arbitration into which he has seen fit to enter. I assent, if I may respectfully do so, to the proposition laid down in *Russell* v. *Russell, supra,* but it is to be observed that this very case virtually decides that, provided a *prima facie* case of fraud is made out, the action will be allowed to proceed, although it is the party alleging the fraud who desires the public enquiry. On this motion for stay of the action, I am not at liberty to offer any opinion whatsoever on the merits of the plaintiff's claim, but it is permissible for me to state that I am convinced that the plaintiff has a substantial and *bona fide* cause of action and that on the affidavits a sufficient *prima facie* case of fraud has been made out. In my judgment a question like this should not be sent to the determination of arbitrators and on this ground alone I would decline to stay the action." *Majetisubbiah* v. *Tetby,* 75 Ind.Cas. 673=32 M.L.T. 380=45 M.L.J. 39=18 L.W. 771= A.I.R. 1923 Mad. 693. See also, *Wallish* v. *Hirch,* (1857) 1 C.B.N.S. 316; *Piercy* v. *Young,* 14 *Ch.D.* 200; *Russell* v. *Harris,* (1891) 65 L.T. 752; *Minifie* v. *Railway Passengers' Assurance,* (1881) 44 L.T. 552; *Barnes* v. *Young,* (1898) 1 Ch. 414; *Workman* v. *Belfast Harbour,* (1899) 2 Ir. 234. Where a dispute to be referred to arbitration involves a charge of fraud and the charge is wholly outside the terms of the reference either party cannot apply to have stay of the suit instituted by the party charged with fraud to have the matter investigated publicly in a court of law. If on the other hand it is within the terms of the reference and the facts alleged to constitute the fraud would have mere evidentiary value in the investigation of the dispute they would not in themselves be a ground for refusing the stay of a suit on the application of other party. If on other hand there are matters which would be directly in issue, and the party against whom these charges are made wants the matter to be

insvestigated in public by a suit he ought to be allowed to do so. *Eastern Steam Navigation* v. *Indian Costal Navigation,* A.I.R. 1943 Cal. 233= I.L.R. (1942) 2 Cal. 539=46 C.W.N. 933=207 Ind.Cas. 90. Where the lower court holding that there was no valid submission and that there no contract regarding arbitration between the parties and in its discretionary power did not stay the suit, held it could not be said that the lower court exercised its discretionary power in an unjudicial manner or capriciously. *Regal Theatre* v. *Gurcharan,* 39 P.L.R. 423=A.I.R. 1927 Lah. 207.

If the fact of the contract itself is disputed, the arbitrator cannot decide that point, and the court in the normal course would refuse to stay. *Shriram* v. *Mohanlal,* I.L.R. (1940) Bom. 249=187 Ind.Cas. 494= 41 Bom.L.R. 1293=A.I.R. 1940 Bom. 93; *Hari* v. *Skoda,* 41 C.W.N. 563. But where an arbitration clause in a contract provides for a reference to arbitration of any dispute whatsoever arising in or out of the contract the question whether there has been an interpolation in the terms of the contract falls within the arbitration clause and must be decided by the arbitrators. Consequently a suit is not maintainable on that ground. *Rupchand* v. *Premalal,* A.I.R. 1941 Cal. 415. Where the question at issue between the parties involves serious allegations of fraud—one of the parties going to the length of filing a criminal complaint against the other—the party who is charged with fraud has the right to ask the court that matters which affect his honesty and integrity should be decided upon. *Laldas Lakshmidas* v. *Italia,* 48 L.W. 399=(1938) M.W.N. 924=A.I.R. 1938 Mad. 918=(1938) 2 M.L.J. 531; *Murlimal* v. *Banarsidas,* 155 Ind.Cas. 895=28 S.L.R. 366=A.I.R. 1935 Sind 62. In the English Arbitration Act, 1934, section 14(2) states as follows:—"Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred and a dispute so arises involves the question whether any such party has been guilty of fraud, the court shall, so far as may be necessary to enable that question to be determined by the court, have power to order that the agreement shall cease to have effect and power to give leave to revoke any submission made thereunder." In the Indian Arbitration Act no such power is given to the court but it can indirectly revoke such arbitration by refusing stay in a proper case.

When a special circumstance does exist as where the defendant alleges fraud collusion and conspiracy on the part of the plaintiff and this is the main dispute, the suit should not be stayed. *Bengal Jute Mill* v. *Lalchand,* A.I.R. 1963 Cal. 405.

1465. Difficult question of law involved in the arbitration, whether stay should be allowed.—The arbitrators are judges both of laws and of facts. That the subject-matter of dispute between the parties involves not only question of fact but also question of law, is no reason why the arbitration proceedings should not be carried into effect. *Karanji* v. *Indo China,* 56 C.W.N. 763. So disputes which involve the applicability of the doctrine of frustration of contract and the avoidance of contract on the ground of mutual mistake can be referred to arbitration and the fact they involve consideration of question of law of some difficulty is no ground to refuse to grant a stay of suit. *Chandanmull* v. *Clive Mills,* A.I.R. 1948 Cal. 257. The court will be less disposed to grant a stay where the principal issue is a question of law or other proper construction of an agreement than if the dispute involved principally questions of fact. *Russell,* 13th Edn., p. 101. The reason of the rule is thus stated by Lord *Parker* in *Bristol Corporation* v. *John Aird & Co.,*

(1913) A.C. 241 (261) thus : "Everybody knows that with regard to the construction of an agreement it is absolutely useless to stay the action, because it will only come back on a case stated ; therefore it is more convenient in a question of construction to allow the action to proceed." See also, *In re, Carlisle,* (1890) 44 Ch.D. 200 (203), where *North J.* said : "It would be absurd to refer that question (a question of law) to an arbitrator, who would in all probability involve the opinion of the court under S. 19. I have a discretion under section 4, and I think the best course will be to try the question of law first." In *Tolaram* v. *Jewanram,* I.L.R. (1940) 2 Cal. 26=A.I.R. 1941 Cal. 39, it has been held following the English cases : *Edward* v. *Tolme,* 31 T.L.R. 137, that the court should exercise its discretion to refuse to grant an application for stay where a very difficult question of law unsuited for decision by laymen is involved in the suit. See also, *Holland Bombay* v. *Essardas,* A.I.R. 1926 Sind 286=98 Ind.Cas. 151=19 S.L.R. 168 ; *Sukdev* v. *Ayaram* A.I.R. 1941 Sind 99 ; *Singaram Coal* v. *Balmukund,* 58 Cal. 1107=134 Ind.Cas. 529=35 C.W.N. 514=53 C.L.J. 321=A.I.R. 1931 Cal. 772 ; *Koramuthu* v. *Thos. Smith,* A.I.R. 1935 Bom. 155=37 Bom.L.R. 46 ; *James Finlay* v. *E. Raymond,* 8 S.L.R. 60 ; *Union of India* v. *Din Dayal,* 54 P.L.R. 443=A.I.R. 1952 Punj. 368 ; *Chiman Ram* v. *Vandravandas,* 49 Bom.L.R. 431=A.I.R. 1948 Bom. 55. In *Singaram Coal* v. *Balmukund, supra,* the court observed : "The next contention urged is that as a question of *res judicata* will arise the court below should have in the exercise of its discretion refused the application for stay of the suit. On this question there is a long course of judicial authority and it has been repeatedly held that when parties had deliberately made contracts with an arbitration clause and thus had chosen to select their own *forum* there is a *prima facie* duty upon the court to respect the agreement : *Scott* v. *Avery,* 5 H.L.C. 811 ; *Scott* v. *Mercantile Accident,* (1892) 66 L.T. 811 ; *Trainor* v. *Phoenix Fire,* (1891) 8 T.L.R. 37 ; *Spurrior* v. *La Cloche,* (1902) A.C. 446=71 L.J.P.C. 101 ; *Rowe Bros.* v. *Crossley,* (1913) 108 L.T. 11=57 S.J. 144 and *Locke* v. *Army etc.,* (1915) 31 T.L.R. 297. *It is true that if difficult question of law are likely to arise, such as would inevitably entail a special case being prepared and reference to the court made by an arbitrator the court may in the exercise of its discretion refuse the stay* : *Bristol Corporation* v. *John Air, Co.,* (1913) A.C. 241=82 L.J.K.B. 684 and *Clough* v. *County Live Stock Insurance* (1916) 85 L.J.K.B. 1185=32 T.L.R. 52 ; *Sukdev* v. *Ayaram,* 196 Ind.Cas. 188=A.I.R. 1941 Sind 99 ; but see *Lock* v. *Army,* (1915) 31 I.L.R. 295 ; see section 13 (*b*). So also if a question of law would arise which is clearly outside the purview of the arbitration clause and other questions, though within it, are so intimately connected with the former question that a more convenient course would be to try the whole action in a court a stay may be refused : *Printing Machinery Co.* v. *Linotype and Machinery* (1912) 1 Ch. 566=81 L.J.Ch. 922=106 L.T. 743. The question has been elaborately considered and the authorities bearing on it have been fully discussed in the case of *Metropolitan Tunnel* v. *London Electric Ry.,* (1926) 1 Ch. 371=95 L.J.Ch. 246, in which the importance of upholding the bargain between the parties have been emphasized, *Lord Hanworth, M.R.* relying on the following observations of Moulton, *L.J.* in *Bristol Corporation* v. *John Aird & Co.,* (1913) A.C. 241=82 L.J.K.B 684 : 'On the other hand for many years it has been recognized that there are cases in which a well selected domestic tribunal, in which a Judge is one with a special acquiantance either with the facts of the

case or with the subjects to which the litigation relates, may give more complete and speedier justice than the more elaborate procedure of the Courts of Law (based as it is on the principle of complete independence of the parties and the case itself), is ever in a condition to render.'

"It should be noted that in the case of *Metropolitan Tunnel* v. *Electric Ry., supra,* the sole question which arose was a question of law. As observed by the Judicial Committee in the case of *Ghulam Jilani* v. *Mohammed Hassam,* (1902) 29 Cal. 167=29 I.A. 51 at page 60 'arbitrators may be Judges of law as well as judges of fact and an error in law certainly does not vitiate an award.'

"The result is that in our opinion the appellants have failed to make out a case for refusal to stay." See also, *South British Insurance* v. *Ganci Brothers & Co.,* (1928) A.C. 352=97 L.J.P.C. 101; *North British Ry.* v. *Newburgh,* (1911) S.C. 710=48 S.C.L.R. 450. But commenting on the observation of *Lord Parker* in *Bristol Corporation* v. *John Laird,* (1913) A.C. 241 (261) *Sir N. N. Sircar* in his *Tagore Law Lecture* said: '(It has to be remembered, however, that in India the arbitrator cannot be compelled to state a case and, consequently, the *dictum* is not of much assistance here, and even in Engiand stay of the suit has been granted even where the sole or main question has been a question of law." See also *Lock* v. *Army,* (1915) 31 T.L.R. 295; *Randegger* v. *Holmes,* (1886) L.R. I C.P. 679; *Lyon* v. *Johnson,* (1889) 40 Ch.D. 579; *Clough* v. *County Live Stock,* (1916) 85 L.J.K.B. 1185; *Kammuthin* v. *Thos. Smith,* A.I.R. 1935 Bom. 155; *Raneegunge Coal* v. *Tata Iron,* 53 Bom. 271.

In disposing of an application under s. 34 the court should decide the existence of the parent contract. The allegation of the plaintiff that he signed the parent contract in ignorance of the arbitration clause has to be decided by the court. The question whether the contract came to an end by substitution of a new contract stood on the same footing and must also be decided by the court. *Century Spinning and Manufacturing Co. Ltd.* v. *Motilal,* 1961 M.P.L.J. 421=1961 Jab.L.J. 629=A.I.R, 1961 M.P. 33.

1466. Jurisdiction of arbitrators to decide question of estoppel.—Arbitrators are not competent to decide the legal questions such as the question of estoppel. The question of estoppel, if any, has got be decided in the suit if the defendant raises this question to suit his defence. A question of stay of suit has to be decided on the point as it stands, for what has to be considered for the purpose of stay is the nature of the suit as pleaded. Matters like estoppel or ratification can be decided in the suit, and the suit itself may be dismissed by the court on any of these grounds; but they are not grounds upon which the court can stay a suit under this section. *Pramada* v. *Sagar Mal,* A.I.R. 1952 Pat. 352.

1467. Question whether particular rule of an Association is ultra vires.—The question whether a particular rule of the Rules of Business of an Association such as the Bombay Bullion Exchange is *ultra vires* is a difficult question of law and unsuited for decision of laymen. *Chiman Ram* v. *Vandarban Das,* 49 Bom.L.R. 431=A.I.R. 1948 Bom. 55. Similarly disputes as to the legal validity of the arbitration agreement and as to the existence of facts which render it illegal and void must be determined by the court and not by the Arbitrator. *Chiranji Lal* v. *Union of India,* A.I.R. 1963 Punj 372.

1468. First contract containing arbitration clause—subsequent contract creating new rights.—Where a second agreement between the parties materially affects, alters or modifies the rights of parties under a prior agreement and confers rights and imposes liabilities which are not at all to be formed in the original agreement, an arbitration clause contained in the first agreement but not found in the second has no applicability to the new rights and liabilities so imposed and conferred. This court will not in such a case stay a suit based on both the agreements. *Ramdas* v. *Orient Picture,* 203 Ind.Cas. 569=44 Bom.L.R. 739=A.I.R. 1942 Bom. 332.

1469. Sufficient cause for refusing to stay.—What is sufficient cause for refusing to stay on an application for stay under this section depends on the particular facts of each case. *Murlimal* v. *Banarsidas,* 155 Ind.Cas. 895=28 S.L.R. 366=A.I.R. 1935 Sind 62. In the above case the court observed : "Section 19 gives the court a discretion to stay or refuse to stay proceedings. The language of the section itself is clear and authorities are numerous. I would refer to the following cases : *Soda Waterwala* v. *Volkart Brothers,* A.I.R. 1923 Sind 25=82 Ind.Cas. 81 ; *Kedarnath* v. *Sumpatram,* A.I.R. 1920 Cal. 795=60 Ind.Cas. 951=47 Cal. 1020 ; *Holland* v. *Essardas,* A.I.R. 1926 Sind 286=98 Ind.Cas. 151 =19 S.L.R. 168 and *Dinkarrai* v. *Yeshvantrai,* A.I.R. 1930 Bom. 98=124 Ind.Cas. 119=54 Bom. 197. In the last mentioned case *Rangnekar, J.* observed : 'The authorities show that if a person files an action in breach of an agreement to refer the other party has a remedy, and that is to apply for stay of the action. But the court is not bound to stay the action. The court has a discretion and may well refuse to stay the action. If the court in the exercise of its discretion stays the action, the plaintiff has no remedy left but to proceed with the arbitration. If the court refuses to stay the action, the court has seisin of the disputes and it is by its decision, and its decision alone that the rights of the parties are settled."

"The English authorities are equally definite. See *Clough* v. *County Live Stock,* (1916) 32 T.L.R. 526=85 L.J.K.B. 1185=60 S.J. 642, and the remarks of *Lord Moulton* in *Bristol Corporation* v. *John Aird,* (1913) A.C. 241=82 L.J.K.B. 684=29 T.L.R. 360=108 L.T. 434, *declining to interfere with the discretion exercised by the court below which had refused to stay a suit.* His Lordships said : '.....On a question of judicial discretion one ought not lightly to allow an appeal from a court which had not proceeded on wrong judicial lines.'

".....The fact that a submission clause does not include all the matters which are the subject of legal proceedings may be a sufficient cause for refusing to stay. In *Turnock* v. *Sartoris,* 43 Ch.D. 150=38 W.R. 340=62 L.T. 209, with reference to arbitration proceedings arising out of disputes regarding a lease, a stay of a suit was refused, it being held that it would not be right to split up the action by referring to arbitration the matters arising under the lease leaving the action to proceed as to the other matters. In *Young* v. *Buckett,* 46 L.T. 266=51 L.J. 504, where partners had agreed to refer to arbitration dispute arising between them with respect to the partnership so that reference had to be made within a certain limited time had expired as to most of the disputes, but not as to one, one of the parties required the reference to arbitration of the matters in dispute, *Fry, J.* in the exercise of his discretion refused to separate the matters in dispute by sending to arbitration the one as to which the limited time had not expired, but the court dealt

with the matter as a whole. I would also refer to the following remarks of *Crouch, A.J.C.* in *Ratanchand* v. *Sahiram,* A.I.R. 1919 Sind 80=52 Ind.Cas. 139=13 S.L.R. 23 (F.B.) : 'It is not desirable to stay a suit when only some of the matters in litigation can be settled by the award.'

"On the other hand as held by the Court of Appeal in *Ives & Baker* v. *Williams,* (1894) 2 Ch.D. 478=63 L.J.Ch. 521, the fact that a small portion of the relief claimed is not within the scope of the arbitration clause is not itself a sufficient reason for refusing to stay proceedings when the main subject of the action is within the arbitration clause. Each case must obviously be considered on its own particular facts.

"With regard to the question of forgery, when there is charge of fraud or forgery, against one of the parties to a submission clause, a court has discretion to refuse a stay. Generally speaking where the party charged desires a public inquiry, the court will generally refuse to send the case to arbitration but where the party making the charge desires that the matter should be dealt with in court will be less inclined to stay suit ; see *Manindra* v. *H. V. Low,* A.I.R. 1924 Cal. 796=83 Ind. Cas. 934. In the present case the learned Small Causes Court Judge having heard both parties came to the conclusion that it was desirable that the matter should be adjudicated in court relying upon the decision in *Majet Subbiah* v. *Tetlay & Whitley,* A.I.R. 1923 Mad. 693=75 Ind. Cas. 673. As already indicated we are not prepared to interfere with the discretion of the learned Small Causes Court Judge which appears from his order to have been judicially exercised. However, with reference to this question we desire to sound a note of warning. *To ensure a proper discretion in refusing to stay a suit on an allegation of fraud or forgery, the court should ascertain that there is some foundation for such a charge ; otherwise there will be a tendency to allege fraud in any case in which a party to a submission clause wishes to avoid arbitration."* See also, *Graham Trading* v. *Chandu Lal,* A.I.R. 1935 Sind 228, where the court observed : "Under S. 19, Arbitration Act, a suit can only be stayed when it is 'in respect of any matter agreed to be referred' and not otherwise. If it is not in respect of the same matter which is agreed to be referred there can be no stay of the suit, and therefore there can be no question that the arbitrators are *functus officio* until such suit is stayed.

"In *Monro* v. *Bognor Urban District Council,* (1915) 3 K.B. 167=84 L.J.K.B. 1091=112 L.T. 969, an application was made to stay a suit filed by Monro (a contractor) for a declaration that the contract made by him with the defendants was void having been induced by misrepresentation and that he was entitled to damages. The contract contained in arbitration clause. The trial court granted a stay of the suit, but the Court of Appeal set it aside ; and *Bankes, L.J.* pointed out that the only question before the court was whether the claim which was brought—whether it was good, bad or indifferent—came within the submission to arbitration, and said :

"It is a claim for damages for fraudulent misrepresentation whereby the plaintiff was induced to enter into the contract, and there are claims for consequential relief. These are put in the form of a claim for work and labour done, but the essence of the claim is that the plaintiff is asserting that he was induced by fraud to enter the contract, and that as a consequence the contract never was binding. If that is the nature of the claim, it seems to me plain that it does not come within the scope

of the submission, and it is no answer to say that the plaintiff has mistaken his remedy and that he ought not have brought this form of claim, and that he cannot substantiate it or that if you look into it you will find that he ought to have brought a different action altogether, and if he had, it would have been plain that it came within the submission." See also, *Jai Narain* v. *Naraindas,* A.I.R. 1922 Lah. 369=69 Ind.Cas. 583=3 Lah. 296.

The institution of a suit by one of the parties to a contract disputing the factum or validity of the contract containing a submisson clause was no bar to arbitrators proceeding with the reference, the matters referred to the arbitrators not being the same as those which are the subject-matter of the action. In such a case there is no encroachment by the arbitrators on the jurisdiction of the court. *Donald Graham* v. *Basantram,* 107 Ind.Cas. 220=A.I.R. 1928 Sind 91 ; *Jainarain* v. *Narain Das,* A.I.R. 1922 Lah. 369=3 Lah. 296 ; *Monroe* v. *Bognor,* (1915) 3 K.B. 167=84 L.J.K.B. 1092 ; *Doleman* v. *Osset Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1092. An application for stay of suit must be clearly distinguished from an application for stay of arbitration proceedings. A case of misrepresentation set up to avoid a contract is not a dispute arising out of the contract and a stay cannot be obtained under this section. *Sadawaterwala* v. *Volkart,* A.I.R. 1923 Sind 25.

Where a party to a contract enabling the parties to refer to arbitration repudiates the contract, he cannot be permitted to rely upon a subsidiary term in the contract and demand a reference to arbitration. *Jivraj* v. *Takandas,* 58 Ind.Cas. 790.

The fact that the award would be in effect a nullity, is one good reason for not staying the action and referring the disputes to arbitration. *Karumutha* v. *Thos. Smith,* A.I.R. 1935 Bom. 155=37 Bom.L.R. 46=155 Ind.Cas. 932. The fact that one of the arbitrators is disqualified from acting affords a good reason for not staying the suit and referring the matter to the arbitration of that arbitrator. *Ibid.* Where the sending of the case to the arbitrator will involve a waste of time and expense, the ordinary course of staying the suit is not to be pursued. *Anglo-Persian Oil* v. *Ram Chapakesa,* 76 Ind.Cas. 1011=(1923) M.W.N. 772=18 L.W. 752=45 M.L.J. 653.

In *Anglo-Newfoundland Development* v. *Reg.,* 89 L.J.K.B. 570= (1920) 2 K.B. 214, the English Court of Appeal, held affirming the decision of *Bail-Loche, J.* that as the subject-matter of that petition involved an important constitutional question the proceedings in the petition should not be stayed. *Bankers, L.J.* said : "There is, further, the grave constitutional question whether the proclamation can validly require that the amount payable to the owners shall in default of agreement be ascertained by an award of the Board of Arbitration. That challenges the validity not only of the alleged agreement to refer, but of the agreement on which the petition is based. We must exercise our discretion by refusing to withdraw such questions as that from the consideration of the courts." So also where an arbitration has become abortive it is the duty of the court of law, in working out a contract of which such arbitration was part of the machinery, to supply the defect. *Cameron* v. *Cuddy,* 83 L.J.P.C. 70=(1914) A.C. 651. Therefore, where in a contract for the sale of goods it was agreed that the purchaser should be entitled to deduct from the price the value of any goods not delivered, such value to be determined by arbitration, and the arbitrators

appointed were unable to agree, the purchaser was entitled, in an action brought by the vendor to recover the contract price to apply to the court to fix the value of the goods not delivered and to deduct it from the price due, without bringing a cross action. *Ibid.* A long delay by defendants in referring the latter to arbitration justifies the court in refusing to enforce the clauses of arbitration. *Sapt Textile* v. *Raghbar Das,* A.I.R. 1933 Lah. 1007. See also, *Ram Kumar* v. *Jagan Mohan,* 8 Ind. Cas. 80=8 A.L.J. 66=33 All. 315; but see *Atma Rai* v. *Sheo Baran,* (1882) A.W.N. 58. Where the dispute does not arise out of any contract between the parties, in connection with the agreement, but it arises between one of the parties to it and a third person in connection with the acceptance of the bill, no order should be passed for the stay of the suit under this section. *Dhiraj Lal* v. *Sir Jacob Brothers,* A.I.R. 1933 All. 74=(1932) A.L.J. 1055=143 Ind.Cas. 385.

1470. Refusal to stay—Justifiable ground.—The importance of judicial impartiality on the part of the arbitrator cannot be overstated and therefore any order to stay the legal proceedings in a court of law will not be granted if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter or that it is for some reason improper that he should arbitrate in the dispute. *Union* v. *Narayan,* I.L.R. (1957) Punj. 1576=59 Punj.L.R. 413=A.I.R. 1958 Punj. 24.

1471. Application for stay—Scope of enquiry.—Before ordering stay under this section, the court has to be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant for stay was, at the time the proceedings were commenced, and still remains, ready and willing to do all things necesary to the proper conduct of the arbitration. *Hanuman Chamber* v. *Parmeshar Lal,* 5 D.L.R. (Simla) 331=A.I.R. 1951 Simla 173.

1472. Stay in case of misconduct of arbitrators.—Where works are constructed for a local authority under a contract which provides for reference of disputes thereunder to an officer of the local authority, and the contractor sues the local authority on the contract, the court will not order the action to be stayed on the submission to arbitration, where the contractor charges the arbitrator with unreasonable conduct in relation to the works, and it appears that there is a substantial dispute between the parties as to the conduct of the arbitrator. *Blackwell & Co.* v. *Derby Corporation,* 75 J.P. 129. In *Hickman & Co.* v. *Roberts,* (1913) A.C. 229=82 L.J.K.B. 678 (H.L.), which was a case like the above *Lord Ashbourne* observed : "I am of opinion that the architect here did not preserve that attitude of judicial independence which was needed and required of him in the discharge of his responsible and possibly difficult duties". : See also *Blackwell* v. *Derby Corporation,* (1911) 75 J.P. 120.

1473. Nature of an application under this section.—An application made under this section is not an interlocutory proceeding or a mere branch of a suit within the meaning of S. 115 of the Civil Procedure Code. It is a case in itself and decides finally between the parties whether the matter shall or shall not be decided by arbitration. *Indo Persian Trading Co.* v. *Purmanand,* A.I.R. 1936 Sind 205. Where an application for stay is rejected and the order is not set aside, a second application for stay is barred as *res judicata* even if the first order is erroneous. *Murlimal* v. *Banarasidas,* 28 S.L.R. 366=155 Ind.Cas. 895=

A.I.R. 1935 Sind 62. In *Malkarjun* v. *Narhari*, 25 Bom. 337=27 I.A. 216, *Lord Hobhouse*, said : "A court has a jurisdiction to decide wrong as well right. If he decides wrong the wronged party can only take the course prescribed by law for setting matters right ; and if the course is not taken, the decision however wrong cannot be disturbed."

1474. Effect of not staying suit.—A private tribunal such as an arbitrator cannot oust the jurisdiction of the court but an arbitrator becomes *functus officio* when the court has refused to stay an action or the defendant has abstained, from asking it to do so. This rule only applies when the dispute before the two tribunals is identical. When the arbitrator become *functus officio* in respect of a portion of the dispute, which formed the subject-matter of one suit, he becomes *functus officio* regarding the whole dispute including that other portion of it which formed the subject-matter of the other suit. *Gopi Ram* v. *Pokhar Das*, A.I.R. 1934 Lah. 887=154 Ind.Cas. 7 ; see also *Doleman & Sons* v. *Ossett Corporation*, (1912) 3 K.B. 257=81 L.J.K.B. 1092=107 L.T. 581 ; *Jai Narain* v. *Narain Das*, A.I.R. 1922 Lah. 369=69 Ind.Cas. 583.

1475. Effect of stay.—Where a court adjourns a case under this section, the case should not be adjourned '*sine die*.' The court ought not to renounce its powers and duties in disposing of a suit, and it is bound to exercise as much control as it can over the proceedings before the arbitrator. It is its duty to see that the parties do not delay the disposal of the arbitration proceedings and to see that as far as possible they prosecute those proceedings. *Muhammad Mohidean* v. *Muhammad Naina*, A.I.R. 1938 Mad. 205=(1938) 1 M.L.J. 38=177 Ind.Cas. 440=(1938) M.W.N. 1124 (2). See also, *Gourdhandas* v. *Ramchand*, 47 Ind.Cas. 783=12 S.L.R. 41. An order staying the suit, if made on a fraudulent misrepresentation can be reversed by the court making the order, if it is satisfied of the fraud and misrepresentation of the otherside and the suit can in the circumstances be revived. Similarly, the court is empowered under S 151 Civil Procedure Code to make any order as may be necessary for the ends of justice or to prevent abuse of the process of the court. Nothing in the Arbitration Act bars this action. *Hukum Chand* v. *Toyo Menka*, A.I.R. 1940 Lah. 265=190 Ind.Cas. 576. Where a court has stayed a suit before it under this section, before the court revives the suit, it should first remove the stay and then decide the suit on its merits. If however, a court does not write a separate order vacating its original order of stay, and proceeds to hear the suit, the order of stay must be deemed to have been vacated by implication. *Kishinchand* v. *Ramchand*, 171 Ind.Cas. 625=A.I.R. 1937 Sind 247. In *Benarsidas* v. *Murlimal*, A.I.R. 1933 Sind 376, *Rupchand, J.C.*, observed : "English Courts have always exercised certain powers during the operation of an order staying the proceeding in a suit ; for instance where the suit is *inter alia* for an injunction it is competent for the plantiff notwithstanding an order for stay to apply to the court for one at any time. *Willesford* v. *Watson*, (1873) 8 Ch. 473 ; or where the arbitrator cannot award ejectment the plaintiff may in a properly constituted suit, ask the court to give effect to the direction of the arbitrator in that respect. *Wade Grey* v. *Morrison*, (1877) 37 L.T. 270 ; or where a receiver is asked for, pending the disposal of a suit, the court may appoint a Receiver before ordering a stay of the proceedings as in *Zalinoff* v. *Hammond*, (1898) 2 Ch. 92=67 L.J.Ch. 370=78 L.T. 456 or stay the proceedings with liberty to restore the motion, as in *Machin* v. *Bennet*, (1866) 35 L.J. notes 411." It seems that where stay of suit had been granted, the court still retained the power to grant injunction. *Vide* section 41 *infra*. Where suit is stayed and

matter is referred to arbitration but during arbitration mistake in plaintiff's name is correct by court, the suit does not become a new suit and the arbitrators do not lose their jurisdiction. *Mitsui Bussan* v. *Hogarth,* 43 C.L.J. 297=94 Ind.Cas. 182=A.I.R. 1926 Cal. 722. A suit relating to a matter which had been referred to arbitration under the Arbitration Act was stayed by an order under S. 19 of the Act. The arbitration took place, an award was made, and a decree in accordance with the award was passed by another court. On the question whether the stay order could thereafter be set aside and the suit revived it was held that a stay order under S. 19 of the Arbitration Act is, when arbitration has in fact taken place sufficient by itself finally to dispose of the suit, and no final decree formally dismissing the suit necessary. The Judge had become *functus officio* and could not reverse the stay order. Ordinarily, a stay is permanent, unless the order directing it provides otherwise by imposing some terminus. *Straus* v. *Raghubar* 43 All. 279=19 A.L.J. 19=59 Ind.Cas. 784. See *Laxman* v. *Manjunath,* 45 Bom. 1181=23 Bom.L.R. 511, where the court after the removal of stay proceeds with the suit. *Sheo Babu* v. *Udit Narain,* 12 A.L.J. 757=24 Ind.Cas. 490. When a stay is obtained, either of the parties may apply under section 20 for a reference to the arbitrators. *Dinabandhu* v. *Durga Prosad,* 51 Ind.Cas. 80=40 Cal. 1041=23 C.W.N. 716.

1476. Application for stay by defendant after setting aside ex-parte order against him.—"Any proceedings" means any normal proceedings. So if a defendant against whom *ex parte* proceedings have been taken applies to have the *ex parte* order set aside and after that order is set aside without taking any other step files an application for stay under this section the application is maintainable. The fact that he took proceedings for setting aside the *ex parte* order does not preclude him from putting in the application, *Charan Das* v. *Harbhajan,* A.I.R. 1952 Punj. 109.

1477. Party asking for appointment of receiver—Stay refused.—There is nothing in the Arbitration Act to show that an arbitrator has no power to grant relief by way of appointment of receiver. Therefore the court cannot refuse to stay a suit under S. 34 of the Arbitration Act on the mere ground that the only relief asked for in the suit is one for the appointment of a receiver. *Budhu Lal* v. *Jagan,* I.L.R. (1948) All. 401=A.I.R. 1949 All. 20=(1949) A.L.J. 559. This law is applicable where parties ask for the grant of an interim relief such injunction etc. *Ibid.* The prayer in the plaint for a receiver and for an injunction whether it is intended to be for the protection pending suit or for permanent relief, is not a matter which required the court to exercise its discretion against a stay. *Ballav Das* v. *Halwasiya,* I.L.R. (1946) 1 Cal. 203.

1478. Leave for Appeal to Supreme Court—Article 133(1) of the Constitution—Application of—Final Order.—An order of the High Court, directing a suit to be stayed, under s. 34 of the Arbitration Act is not a "final order" within the meaning of Art. 133(1) of the Constitution, and therefore no leave should be granted for appeal to the Supreme Court. An order is final only if it finally disposes of the rights of the parties; the finality must be a finality in relation to the suit. *Gaya Electric* v. *State of Bihar,* 30 Pat. 853=A.I.R. 1951 Pat. 610. But in this case Supreme Court granted special leave of appeal under Art. 136 of the Constitution. *Vide Gaya Electric Supply* v. *State of Bihar,* A.I.R. 1953 S.C. 182=(1953) S.C.J. 217=91 C.L.J. 137.

1479. Effect of delay on application for stay.—If there is an arbitration agreement between the parties, it is a *prima facie* right of a party to apply for stay of proceedings in court and it is for the party who opposes that application for stay to point out that there are sufficient reasons why the matter should not be referred in accordance with the arbitration agreement. Mere delay in making the application for stay, *e.g.*, when the party believes that the dispute would be settled by a domestic tribunal of an association of which both parties are members, will not deprive the party of the benefit of the provisions of section 34 of the Act. *Chiman Ram* v. *Vemdramdas,* 49 Bom.L.R. 431=A.I.R. 1948 Bom. 55.

1480. Stay of suit where co-plaintiff not party to arbitration agreement.—The fact that one of the plaintiffs in the suit was not a party to the agreement to refer to arbitration is no bar to the defendant applying for and obtaining stay of the suit when that plaintiff is not interested in the subject-matter of reference and when all that he is entitled to is only a right to receive such money as was due to the other plaintiff or plaintiffs. *Governor-General* v. *Simla Banking,* 226 Ind.Cas. 444=A.I.R. 1947 Lah. 215.

1481. Stay of suit, where suit as framed is independent of contract.—Under this section, the court must consider the suit as it is pleaded and framed. If the court comes to the conclusion that such a suit as pleaded is a suit on the contract or arising out of the contract containing an arbitration clause, in that case the suit should be stayed. But on the other hand if the suit as pleaded is a suit independent of the contract then the court has no power to stay the suit though it is satisfied that the frame of the suit is merely a means of avoiding the consequences of alleging the true nature of the claim. *Johurmull* v. *Louis Dreyfus,* 52 C.W.N. 127. For the purpose of an application under this section the court can only consider the case as pleaded and framed. Even if the court is of opinion that the case made is of doubtful value or has been ingeniously framed with a view to avoid a possible claim under the contract itself, it cannot stay the suit, unless the dispute raised are within the ambit of the arbitration clause. *Bilas Rai* v. *Tolaram,* 52 C.W.N. 858.

1482. Named arbitrator not available.—Having regard to the provisions of the Arbitration Act for appointment of an arbitrator in place of appointed arbitrator denying or refusing to act, there cannot be said to be any insuperable impediment to arbitration. In view of those provisions, it cannot be contended that the non-availability of a named arbitrator by itself and *ipso facto* provides a ground for stay of a suit brought in contravention of an arbitration agreement. In the absence of anything in the arbitration clause suggesting that the parties agreed that any vacancy in the office of arbitrator should not be filled up. The vacancy can be easily supplied and there is no reason to think that the arbitration will be infructuous at all. If the particular officer sanctioning the contracts refuses to act or is incapable or doing so by reason of his absence or otherwise there are provisions in the Arbitration Act for the appointment of another arbitrator in his place and the arbitrator so appointed will be quite competent to proceed with the arbitration. *Governor-General* v. *Associated Live Stock Farm,* A.I.R. 1948 Cal. 230=12 C.W.N. 288.

1483. Power of Court to call upon the defendant to put in written statement.—This section does not prohibit the filing of a written

statement pending the decision of the application for stay of proceedings under that section. It is, therefore, open to the trial court to call upon the defendant to put in a written statement before deciding the application. *Hanuman Chamber* v. *Parmeshri Lal,* 5 D.L.R. (Simla), 331 = A.I.R. 1951 Simla 173.

1484. Power of court to remove stay and proceed with the suit. —Where suit is stayed in order to enable an arbitrator to proceed and arbitration subsequently becomes impossible; the court has power to remove the stay and proceed with the suit. *Laxman* v. *Manjunath,* 64 Ind.Cas. 289=23 Bom.L.R. 511=45 Bom. 1181. See also, *Sashimukhi Debi* v. *Parboty Sankar,* 50 Ind.Cas. 879=23 C.W.N. 293. In *Bawa Chhatagir* v. *Matanonel,* 4 Ind.Cas. 359=3 S.L.R. 149, *Crouch, A.J.C.* said: "I construe the order staying proceedings for such reasonable time as would enable the defendants to get an arbitration carried through. A formal order staying proceedings, is always expressed to be 'until further order.' Defendants have already had excessive time and I consider that they have shown themselves to be not ready and willing to do all things necessary for the conduct of the arbitration. Having regard to the obstinate attitude adopted by the Bawa towards arbitration, I believe that the difficulty of obtaining a satisfactory arbitrator, and of bringing the arbitration proceedings to a satisfactory and speedy conclusion would be almost impossible. It is in my opinion, desirable that the dispute between the parties should be settled in Court."

1485. Sections 34 and 35.—Section 34 of the Arbitration Act creates an exception to the general law relating to procedure *viz.,* it empowers the court which has jurisdiction to decide a dispute or to refuse to do. Where an arbitration is in existence S. 35, which is a corollary or counterpart of S. 34 and which is new, is clearly intended to modify the English Common Law rule in relation to the matters in question which was the law prevalent before 1940. The "legal proceedings" which are liable to be stayed under S. 34 are proceedings "in any matter referred." But the legal proceedings which, if notice is given of them to the arbitrators or umpire, may render invalid subsequent proceedings in the arbitration must be legal proceedisgs "upon the whole of the subject-matter of the reference."—*All India Groundnut Syndicate,* 47 Bom.L.R. 420=A.I.R. 1945 Bom. 497.

1486. Appeal.—An appeal shall lie from an order staying or refusing to stay legal proceedings where there is an arbitration agreement. Section 39(i)(v) *infra.* Before the enactment of this provision in S. 39(i)(v) there was a conflict on the point so far as section 19 of the Arbitration Act was concerned. The previous law on this point was thus summarised by *Coldstream, J.* in *The Punjab Marwari Chamber* v. *Rammal,* A.I.R. 1931 Lah. 644=132 Ind.Cas. 850=13 Lah. 59. "The points on which decisions are required are: (1) Whether an appeal lies against the order of the lower court refusing to stay proceedings.....The contention of the appellant that an appeal lies is based on S. 104(1)(*e*), Civil Procedure Code, read with S. 89(1).....The Arbitration Act does not provide for any appeal and it is argued that as there are no rules made under S. 20, Arbitration Act relating to appeals an appeal lies under S. 104(1)(*e*).

"The Indian courts have differed on the question. The applicant's counsel relies on the ruling of the Allahabad Courts. *Nainsukhdas Nagar Mal* v. *Gajanand Shyam Lal,* A.I.R. 1921 All. 273=61 Ind.Cas.

269=43 All. 348; *Firm Sitaram Nath Mal* v. *Sushil Chandra Das & Co.*, A.I.R. 1921 All. 219=63 Ind.Cas. 813=43 All. 553 and *Kachauri Mal Kalyan Mal* v. *Wali Muhammad Abdul Latif*, A.I.R. 1925 All. 154=85 Ind.Cas. 341=47 All. 179. The first of these judgments decided that an appeal lay under S. 104(1)(*e*) against an order in proceedings under clause (2), section 11, Arbitration Act. The second entertained an appeal against an order of a lower court refusing to stay proceedings on the ground that it had no power (not being the District Court) but ordering a temporary stay or rather adjournment. In this case it was apparently not disputed that an appeal lay. The third judgment dealt with an appeal against an order by a District Judge who had accepted an appeal against the first court's order refusing to stay a suit. The Higher Court decided that the appeal to the District Judge is competent under S. 104(1)(*e*), Civil Procedure Code.

"The point now under consideration was raised in this court in *Jivan Mal Thakurdas* v. *Shahzadahnand & Sons*. A.I.R. 1931 Lah. 66=130 Ind.Cas. 769, before *Dalip Singh J.* who dissenting from these decisions held that no appeal lay. He referred in his judgment to *Campbell Z Co.* v. *Jeshraj*, (1918) 45 Cal. 502=46 Ind.Cas. 687. The view there taken was that S. 104(*f*) does not apply to proceedings under clause (2) of S. 11, Arbitration Act but only to proceedings under the provisions of Sch. II to the Code and that no appeal lies under that section against an order refusing to set aside an award filed under the provisions of the Arbitration Act. The Calcutta judgment was cited with approval by the learned Chief Justice in this Court in *Jainarain Babu Lal* v. *Narain Das*, A.I.R. 1922 Lah. 369=69 IndCas. 583=3 Lah. 296 where (at p. 311 of 3 Lah.) he discussed the applicability of S. 104(*f*) to proceedings under S. 19, Arbitration Act, and pointed out that the decision of a court on an objection to an award under the Arbitration Act is not appealable under any law.

"That no appeal lies where a court has filed or refused to file an award under the Arbitration Act has been *held* by the Rangoon High Court in *Saya Pye* v. *U. Kundinnya*, A.I.R. 1924 Rang. 47=76 Ind.Cas. 525=1 Rang. 661, and the Full Bench decision of the Sind Judicial Commissioner's Court in *Mengharaj Khialdas* v. *Firm of Langley Bellimoria*, A.I.R. 1923 Sind 38=81 Ind.Cas. 759=17 S.L.R. 195 is also against the appellant, the latter decision having reference to an appeal against a stay order and clause (*e*), S. 104(1), Civil Procedure Code. The arguments taken before us were considered by the Sind Court whose conclusion was that in the absence of an express provissions that S. (1)(e) of the Code applies to the Arbitration Act as well as the Civil Procedure Code it would not be proper for Judges to assume its existence.

"It appears to me clear that S. 104(*e*), Civil Procedure Code relates to an order under para. 18, Schedule II. to the Procedure Code, that the Arbitration Act is complete in itself and not affected by rules as to appeal laid down in the Code with reference to the Schedule II, and that there is no right of appeal against the order of the lower court in this case."

Where the court below did not approach the question of defendant's willingness for arbitration from the correct point of view, the High Court can interfere with the discretion exercised by that court. *Umer* v. *Shiv Nath*, 1957 B.L.J.R. 234=A.I.R. 1954 Pat. 697; see also *Union* v. *Narayan*, I.L.R. (1957) Punj. 1576=59 Punj.L.R. 413=A.I.R. 1958

Punj. 24, In the last named case it has been held that the importance of judicial impartiality on the part of the arbitrator cannot be overstated and therefore any order to stay the legal proceedings in a court of law will not be granted if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter it is for some reason improper that he should arbitrate in the dispute. Where in case of refusal to stay no appeal was filed, the order became final and its correctness could not be looked into in regular appeal. *Gopal* v. *Baiju,* 1958 B.L.J.R. 236=A.I.R. 1958 Pat. 647.

Where the discretion has been exercised by the trial court in a manner which cannot be considered to be arbitrary, the appellate court will not interfere with the decision which has been arrived at in the exercise of the discretion which is neither unjudicial nor otherwise improper. Such a discretion is not to be interfered with even where the appellate court might have come after appreciation of the fact to different conclusion. *Union of India* v. *Narayan, Cold Storage,* A.I.R. 1958 Punj. 24; see also, *Chandu Mall* v. *Clive Mills,* A.I.R. 1948 Cal. 257=I.L.R. (1948) 2 Cal. 279; *Bristol* v. *John,* (1913) A.C. 241=82 L.J.K.B. 184; *Printers (Mysore) Private Ltd.* v. *Pothan Joseph,* A.I.R. 1960 S.C. 1156.

1487. Revision.—Where an order refusing a stay is passed upon an application under this section no case is decided. The order is merely an interlocutory order and such an interlocutory order cannot be revised under S. 115 C. P. Code. Further the order would be appealable under S. 39(1) of the Arbitration Act and on that ground also no revision lies. *Manakchand* v. *Shiv Kishan,* A.I.R. 1951 Ajmer 23.

1488. Court of appeal when can interfere.—The making of an order staying proceedings is a matter largely in the discretion of the court, and when the discretion has been exercised, a strong case must be made out to justify the interference of a Court of Appeal. *Kedarnath* v *Sumpatram,* 60 Ind.Cas. 951=47 Cal. 1020. In the above case the court observed: "In this connection reference may usefully be made to the observations of *Buckley, L.J.* in *Freeman & Sons.* v. *Chester Rural District Council,* (1911) 1 K.B. 783 (791)=80 L.J.K.B.695=104 L.T. 368=75 J.P. 137: 'Section 4 of the Arbitration Act, 1889,' (which corresponds to section 19 of the Indian Arbitration Act), gives a discretion, and that in two ways, namely (*i*) the words are permissive, not imperative, for the verb is 'may make', not 'shall make' and (*ii*) the jurisdiction to stay the proceedings arises if the court is 'satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission'." The fact that one member of a court if of opinion that the matter should not be referred to arbitration is sufficient to enable another member to concur, though the latter is satisfied that there is no sufficient reason why the matter should not be referred and if it had vested with himself alone, would have directed a stay. [See also, *Vawdrey* v. *Simpson,* (1896) 1 Ch. 166 (169); *Barnes* v. *Youngs,* (1898) 1 Ch. 414 (417)]" *Ibid.* In *Premchand* v. *Mithabhoy,* A.I.R. 1933 Bom. 202=35 Bom.L.R. 287=144 Ind.Cas. 643, *Patkar, J.* said: "Where the trial court has refused to stay the proceedings and exercised the discretion in a particular way, and one of the parties who wished the matter to be referred to arbitration, acquiesces in the order, leads evidence and takes a chance of success in the first court, it is difficult to hold that an appellate court can interfere with the discretion. See also, *Jokiram* v. *Ghanshamdas,* 47 Cal. 849. In *Chandan Mull* v. *Clive*

Mills Co., A.I.R. 1948 Cal 257=52 C.W.N. 521, *Harries, C.J.* observed : "Under S. 34, the court in a proper circumstances may stay a suit. It has always been *held* in England that an Appellate Court will not interfere with the decision of a learned Judge on a question such as this where the learned Judge has exercised his discretion in favour of one of the parties. Of course, if the discretion had not been exercised judicially different consideration would exercise. But the appellate court has uniformly refused to interfere if a learned Judge has exercised his discretion in a proper and judicial manner in granting or refusing a stay." Similarly in a letters-patent appeal interference with the exercise of the discretion should not be made unless it is capricious and arbitrary. *Hanuman Chamber* v. *Jassa Ram*, 49 P.L.R. 230=A.I.R. 1948 Lah. 64 ; see also *Upper India* v. *Haji Habib*, I.L.R. (1948) All. 443 ; *Budhu Lal* v. *Jagannath*, I.L.R. (1948) All. 401=A.I.R. 1949 All. 70=1949 A.L.J. 559 ; *Gianchand* v. *Kishan*, 52 P.L.R. 384 ; *Chundanmull* v. *Clive Mills*, I.L.R. (1948) 2 Cal. 297. See also *Grey & Co.* v. *Tolme*, (1915) 31 T.L.R. 137, which was a case in which a learned judge in chambers had refused to stay a suit. Very difficult questions of law were concerned namely as to whether the outbreak of war between England and Germany had dissolved contracts between the parties or merely suspended them. The facts were clear. Contracts had been entered into and before performance, the first European War had broken out. In those circumstances *Scrutton, J.* in Chambers refused to stay a suit, and the Court of Appeal upheld that view pointing out that it was not the custom of the court of appeal to interfere in matters of that kind when the discretion of the Judge in Chambers had been exercised judicially. But when a strong case is made out not only the court of appeal but also the court sitting in revision has jurisdiction to interfere but ought to interfere. *Chewarchand* v. *Shiva Jute*, 5 D.L.R. (Cal.) 105=A.I.R. 1950 Cal. 568.

1489. Appeal—if new objections can be raised.—An appeal from an order of the lower court disallowing objections taken to the validity of an award must be ordinarily confined to such objections as had been taken in that court and to no other. An objection as to the invalidity of reference should not be allowed to be advanced for the first time in the appeal. *Madan Lal* v. *Nabi*, 226 Ind.Cas. 241=48 P.L.R. 377.

35. (*1*) *No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid.*

Effect of legal proceedings on solution.

(*2*) *In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title.*

1490. N.B.—This section is new. This section relates to the effect of subsequent legal proceedings on a pending reference. Such proceedings will not affect the reference unless (a) they relate to the whole of the referred matter and (b) all the parties to the reference are

impleaded in the proceedings. Where these conditions are fulfilled the legal proceedings will nullify the arbitration proceedings on the expiry of the time within which an application to stay the proceedings may be made or on the refusal of such an application.—*Notes on Clauses.* "We have substituted the words 'under a stay of proceedings is granted under section 34' for the words 'on the expiry of the time for making an application under section 34 or on the rejection of such an application' because the giving of notice to the arbitrators should be that time after which arbitration proceedings become invalid and the invalidity should only result if the court does not stay the proceedings."—*Report of the Select Committee.*

1491. Object of the section.—The Civil Justice Committee in para. 19 of their report recommended as follows : "We agree that that the principle of *Doleman* v. *Ossett Corporation,* (1912) 3 K.B. 257 should be reconsidered ; the mere filing of a suit should not itself interrupt an arbitration. (Cf. I.L.R. 3 Lah. 296 at page 307.)" Section 35 speaks of the subject matter of a legal proceeding in a court and the subject of the reference before the arbitration. It is the identity of the two that attracts the operation of S. 35 (1) Arbitration Act. But where the dispute between the parties which was the subject matter of the arbitration agreement is not canvassed in the legal proceeding started in a court by one of the parties to the arbitration reference but only the alleged misconduct of the arbitrator the section is not attracted and consequently the proceedings before the arbitrator will not be invalid. *V. Gurumurthy* v. *V. Narasimha,* A.I.R. 1954 Orissa, 234. The court observed : "It is the identity of the two that should attract the operation of S. 35 (1) Arbitration Act. That section merely reproduces the principles laid down in *Doleman* v. *Ossett Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1092, which has been followed in *Ram Prosad* v. *Mohanlal,* A.I.R. 1921 Cal. 770=47 Cal. 752 ; *Ghanshamdas* v.. *Tekchand* A.I.R. 1935 Lah. 915=17 Lah. 291, *Jai Narain* v. *Naran Das,* A.I.R. 1922 Lah. 369=3 Lah. 296."

1492. Scope—Condition necessary.—Under this section the mere commencement of a legal proceeding does not *ipso facto* render invalid the arbitration proceedings. For that three very important and distinct conditions must be satisfied, namely, (1) that a "legal proceeding" must be commenced, (2) such legal proceeding must be upon the "whole" and not merely part of the subject-matter of the reference and (3) that a notice of such legal proceeding must be given to the arbitrators. The applicants who themselves filed the suit on the ground that the arbitrators had no jurisdiction cannot be heard to say that their suit related to the "whole subject-matter of the reference" before the arbitrators within the meaning of S. 35, for the plaintiff in one breath says that the subject-mater of the suit was not the subject-matter of the reference and therefore he was competent to file the suit. In the next breath he contends that the suit was a legal proceeding on the whole of the subject-matter of reference. This is to blow hot and cold and cannot be allowed. It is not merely inconsistency but is gravely prejudicial to the rights of the defendant. *Banwarilal* v. *Joylal,* A.I.R. 1956 Cal. 465 ; see also *Mohindra* v. *G.-G.,* A.I.R. 1954 Punj. 211 (F.B.). The principle behind S. 35 is that on the same subject-matter the court of law and court of the arbitrators must not complete for the good reasons that it will lead to the possibility of conflict of decisions. Therefore the possibility of conflict must be real and not fanciful. It follows natural that the legal proceeding must be

upon the "whole of the subject-matter of reference" and not merely a part. The expression "whole of the subject-matter of reference" therefore means, that the decision in that suit or legal proceedings one way or the other will decide the whole matter referred to the arbitrators. In other words, one-sided possibility of the suit being decided in one way is not enough to render invalid the arbitration proceedings. *Banwarilal* v. *Joylal,* A.I.R. 1956 Cal. 467 ; A.I.R. 1956 Cal. 321 (F.B.) ; *Mohindra* v. *G.-G. in Council,* A.I.R. 1954 Punj. 211 (F.B.).

Section 35 does not apply -to arbitrations of the International Chamber of Commerce where the Arbitration (Protocol and Convention) Act of 1937 applies. *Mury Exportation* v. *Khaitan,* A.I.R. 1956 Cal. 644 ; but see *Shiva Jute* v. *Hindlay,* A.I.R. 1959 S.C. 1380 (S.C.).

Section 35 makes the proceedings before the arbitrators invalid in the absence of an order under s. 34 staying the legal proceedings. The award made in the arbitration proceedings cannot be assailed as invalid on the ground that it violates s. 35. *Shiva Jute* v. *Hindley & Co.* A.I.R. 1959 S.C. 1357=(1960) S.C.J. 35=(1960) 1 S.C.R, (569). *Rambilas* v. *Imperial Oil Mill.* A.I.R. 1960 Cal. 304. In order to attract the provision of s. 35, the subject-matter of the reference must be indentical with the subject-matter of the suit *i.e.* to say that the decision in the suit or legal prpceeding one way or the other which decide the whole matter referred to the arbitration. *Shyamsundar* v. *Khanna Cinema,* (1964) 8 Fac. L.R. 16 cal. ; A.I.R. 1956 Cal. 470 ; (1948) 2 All. E.R, 115 ; see also, A.I.R. 1949 P.C. 78 and A.I.R. 1928 P.C. 208 (for tests laid down whether two are identical).

1493. Rule of law down in Doleman v. Ossets Corporation.—In *Jai Narain* v. *Narain Das,* 59 Ind.Cas. 585=I.L.R. 3 Lah. 215=A.I.R. 1922 Lah. 369, *Shadi Lal, C.J. observed* : "On the grounds, upon which the award was assailed and which has found favour with the trial court, was that the arbitrators had become *functus officio* after the commencement of the previous action brought by the plaintiffs impeaching the contract containing the arbitration clause, and that the award delivered by the arbitrators was *ultra vires.*

"In support of this contention our attention has been invited to the rule enunciated in the well known case of *Doleman & Sons* v. *Ossett Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1092=1 7 L.T. 581 which to quote the placitum is to the effect that where an action has been commenced upon a contract containing a provision for reference to an arbitrator of any dispute arising under the contract and is pending, no application to stay the action having been made or such application having been refused, an award made by the arbitrator under the provision for reference upon the subject-matter of the action, subsequently to the commencement thereof, and without the consent of the plaintiff, is invalid and will not afford a defence to the action.

"We have carefully examined that judgment and we find that it lays down only the proposition that an arbitrator has no authority to adjudicate upon a matter which has already been made the subject of an action unless the person bringing the action consents to the jurisdiction of the arbitrator. This proposition rests upon a sound principle and its validity cannot be impeached. It is clear, that when the same matter comes before two tribunals, a public tribunal appointed by the Sovereign and a domestic *forum* chosen by the parties and no order is made staying the proceedings before the one or the other, the public tribunal alone

must decide that matter and cannot be hampered by any adjudication thereupon made by the private tribunal.

"Neither can that adjudication be pleaded as a bar to the action, nor can it be allowed to affect the merits of the decision given by the public tribunal. As observed by *Fletcher Moulton, L.J.* in *Doleman's case,* (1912) 3 K.B. 257=81 L.J.K.B. 1092=117. L.T. 581=75 J.P. 457. 'It the court has refused to stay an action, or if the defendant has abstained from asking it to do so, the court has *seisin* of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence is *functus officio,* unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind, this is clearly involved in the proposition that the courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take that decision out of their hands and decide the question itself is a clear ouster of jurisdiction.'

"The essence of the rule enunciated in *Doleman's case, supra,* is this. The law does not permit the same question to be decided by Court of law as well as by the arbitrator, and it is only *when the dispute before the two tribunals is identical* that a decision given by the arbitrator must be treated as *ultra vires. It is the identity of the disputes before the two authorities* which is the *ratio* of the rule in *Doleman's case supra,* and it is necessary to emphasize this point because it appears, that the passage quoted above, when divorced from its context, is liable to be misinterpreted as laying down the broad proposition that when an action has been brought in respect of a contract containing an arbitration clause and has not been stayed, then an award made by the arbitrator upon a dispute coming within that clause is *ultra vires,* and it is immaterial whether that dispute was or was not a matter in controversy in the action. I can see no reason in principle to extend that scope of the rule in the matter indicated above and fail to understand why the Court of law and the arbitrator should not go on simultaneously if the disputes before them, though relating to the same contract, are entirely distinct. In such a case there is no conflict between the two jurisdictions, and no question could arise whether the decision of one tribunal should prevail as against the decision of the other. There is, of course, the possibility that if the court decides against the *factum* or the validity of the contract containing the arbitration clause, the award of the arbitrator would become abortive. But that result could not be attributed to any conflict between the decisions of the two tribunals, because no such conflict is possible when the matters in controversy are not the same, but that it would be due to the fact that the decision of the court cuts at the root of the jurisdiction of the arbitrator.

"There is no statute law in support of the proposition that an award made after the commencement of an action must be treated as invalid even through the award deals with a question which is not a matter in controversy in the action, and I know of no principle of law upon which this broad proposition could be reasonably defended. Now *Doleman's case, supra,* which is the leading case on the subject, arose

out of an action which embraced all the disputes between the parties, and a perusal of the judgment makes it clear that the award dealt with the rights of the parties which constituted the subject-matter of the action. There was, therefore, a clear conflict between the two tribunals, and the award was rightly held to be invalid. The same remarks apply to the case of *Ram Prosad Suratmull* v. *Mohan Lal Lachminarain*, 60 Ind.Cas. 895=47 Cal. 752. Another case in the same volume, which has been cited before us, is that of *Johriram Kaya* v. *Ghaneshamdas Kedarnath*, 61 Ind.Cas. 380=47 Cal. 849=25 C.W.N. 62, but here again the suit which rendered the award invalid covered the dispute referred to arbitration. The learned advocate also relies upon the judgments of the Madras High Court in *Appavu Rowther* v. *Seeni Rowther*, 42 Ind. Cal. 514=41 Mad. 115=33 M.L.J. 177=6 L.W. 243 and of the Court of the Judicial Commissioner of Sind in *Ramchand Gurdasmal* v. *Gobindram*, 56 Ind.Cas. 150=13 S.L.R. 193, but in each of these cases the award dealt with a matter which was included in the action. Not a single case has been cited on behalf of the respondent, in which an award was held to be invalid though it dealt with a dispute which was different from the subject-matter of an action before a court of justice."

1494. Sub section (1).—"Under sub-section (1) all further proceedings in a pending reference shall, unless a stay of proceedings is granted under S. 34 be invalid.,This court cannot allow its decision on the question of stay to be influenced by what the arbitrator has decided. Because the arbitrator has raced to a decision in spite of a notice given to him and has found the defendants and not the plaintiff to be entitled to damages, the court has not to consider the question before it in the light of the award which itself is precarious unless the court decides in favour of stay. For the court to consider the question would be to permit the ouster of its own jurisdiction, to quote the word of *Lord Justice Fletcher Moulton*, 'in a most ignominious way' see—*Doleman & Sons* v. *Ossett Corporation*, (1912) 3 K.B. at p 269=81 L.J.K.B. 1092. Section 35 speaks of the subject-matter of legal proceeding in a court and the subject-matter of the reference before the arbitrator. It is the identity of the two that attracts the operation of S. 35(1). But where the dispute between the parties which was the subject-matter of the arbitration agreement is not canvassed in the legal proceedings started in a court by one of the parties to the arbitration reference but only the alleged misconduct of the arbitrator, the section is not attracted. And consequently the proceedings before the arbitrator will not be invalid. *Gurumurty* v. *Narasimha*, A.I.R. 1954 Orissa 234; see also (1912) 3 K.B. 257; A.I.R. 1921 Cal. 770; A.I.R. 1935 Lah. 916.

Under section 35(1) all further proceedings in a pending reference shall, unless a stay of proceedings is granted under S. 34, be invalid. The court cannot allow its decision on the question of stay to be influenced by what the arbitrators have decided. Where the arbitrator has raced to a decision in spite of a notice given to them and have found the defendants and not the plaintiff to be entitled to damages, the court has not to consider the question before it in the light of the award which itself is precarious unless the court decides in favour of stay. For the court to so consider the question would be to permit the ouster of its own jurisdiction "in a most ignominious way." *Loukaran* v. *Prakash*, I.L.R. (1954) Nag. 377=1954 Nag.L.J. 450=A.I.R. 1954 Nag. 289 (D.B.).

1495. By reason only of the commencement of the legal proceedings.—In *Khillooram* v. *Louis Dreyfus*, 52 Ind.Cas. 130=13

S.L.R. 8, *Pratt, J.C.* said : "I am, therefore, of opinion that the mere fact of a suit being filed does not invalidate arbitration proceedings." See also, *Tyebally* v. *James,* A.I.R. 1924 Sind 103(2)=17 S.L.R. 13. In *Mitsui Bussan Kaisha* v. *Tataram,* A.I.R. 1924 Sind 146=87 Ind.Cas. 83=17 S.L.R. 228, *Kennedy, J.C.* observed : "The question, however, now before us is at what point the private tribunal activity is suspended and to what notice the parties and the private tribunal is entitled before ceasing its operation. This is a point which has, I think, been decided in the case of *Khilloram* v. *Louis Dreyfus, supra,* where it was held that the mere fact of the suit being filed does not invalidate the arbitration proceedings, and it is for the court to decide whether it should try the suit or not. If however, an order under S. 19 of the Act to stay the suit is refused or if the party applying under that Act has by pleading in the suit waived his right of going into arbitration, the arbitration proceedings are invalidated and the court alone is seized of the dispute. Therefore until the court has made up its mind under section 19 the arbitrators are not *functus officio.*

"This findings is perhaps contrary to the *ratio decidendi* in *Doleman* v. *Ossett Corporation,* (1912) 3 K.B. 257=81 L.J.K.B. 1092. But there the dictum of *Fletcher Moulton, L.J.* that the filing of the suit invalidates arbitration altogether is *obiter.* In the King's Bench case what happened was that no application had been made to say.

"On strict principles, it is possible the principle of *Doleman's case, supra,* should be extended so as to cover cases in which the court had not yet decided whether it should stay or not. In this Province, we are bound by the decision in the case of *Khilloram* v. *Louis Dreyfus, supra.* I think on that judgment, I ought to find the arbitrators were until the court had decided the application under S. 19 at liberty to proceed. But until that application is disposed of by court staying the proceedings, the award could not be filed. Of course, if the court on the application under S. 19 had refused to stay the trial, the award of the arbitrators could not be filed as award. It seems to me, therefore until the Court disposed of matter before it, the award of the arbitrators is not a nullity and is not bad but it is in suspense. The correct order, for this court would have been to reject the award and order it to be taken off the file with liberty to be represented after the Bèwar Court had disposed of the application under S. 19 or had otherwise ceased to be seized of the case without adjudication on the merits." See also, *Graham* v. *Chandulal,* A.I.R. 1935 Sind 228. But a contrary view to the effect that on the institution of the suit the arbitrators become *functious officio* was taken by other courts of India. *Vide Jowahir Singh* v. *Flemming Shaw,* A.I.R. 1937 Lah. 851 ; *Ghaneshamdas* v. *Tekchand,* A.I.R. 1935 Lah. 916=157 Ind.Cas. 867=17 Lah 291 38 P.L.R. 636 ; *Dinobandhu* v. *Durga,* A.I.R. 1919 Cal. 479=51 Ind.Cas. 80=46 Cal. 1041=29 C.L.J. 399=23 C.W.N. 716 ; *Ram Prosad* v. *Mohan Lal,* A.I.R. 1921 Cal. 770=60 Ind.Cas. 895=47 Cal. 752=38 C.L.J. 67 ; *Jokiram* v. *Ghaneshamdas,* A.I.R. 1921 Cal. 244=61 Ind.Cas. 380=47 Cal. 849=25 C.W.N. 62 ; *Sarat Chandra* v. *Raj Kumar,* A.I.R. 1923 Cal. 137=69 Ind.Cas. 863=35 C.L.J. 482=26 C.W.N. 967; *Appavu* v. *Seeni,* A.I.R. 1918 Mad. 719=42 Ind.Cas. 514=41 Mad. 115=33 M.L.J. 177, *Hukum Chand* v. *Toya Muka,* 150 Ind.Cas. 576=A.I.R. 1940 Lah. 265. But the legislature has accepted the views of the Sind Court in preference to the views of Calcutta, Lahore and Madras High Courts and has enacted that such proceedings will not affect the reference unless (*a*) they relate to the

whole of the referred matter and (*b*) all the parties to the reference are impleaded in the proceedings as well as (*c*) a notice of the proceedings has been given to the arbitrators or umpire. The rule laid down in *Doleman's case* has been modified to this extent.

1496. Whole of the subject matter of reference.—"Under s. 19, Arbitration Act, a suit can only be stayed when it is 'in respect of any matter agreed to be referred' and not otherwise. If it is not in respect of the same matter which is agreed to be referred there can be no question that the arbitrators are *fuctus officio* until suit is stayed." *Graham Trading* v. *Chandulal,* A.I.R. 1935 Sind 228=159 Ind.Cas. 824. See also *Malotra* v. *Sukhdayal,* A.I.R. 1928 Sind 169=112 Ind.Cas. 318=23 S.L.R. 427 ; *Jai Narain* v. *Naraindas,* A.I.R. 1922 Lah. 369=69 Ind.Cas. 583=3 Lah. 296. See also, *All-India Groundnut Syndicate,* A.I.R. 1945 Bom. 497=47 Bom. L.R. 420. But a legal proceeding which has for its objects or one of its objects ousting of the arbitrators from jurisdiction and the complete supersession of the arbitration as a whole is one which would prevent the arbitration from going on even if no stay has been granted under section 34 or otherwise. *Ibid.* But the institution of a suit by one of the parties to a contract disputing the factum or validity of the contract containing a submission clause was no bar to the arbitrator's proceedings with the reference, the matters referred to the arbitrators not being the same as those which are the subject-matter of the action. In such a case there is no encroachment by the arbitrators on the jurisdiction of the court. *Donald* v. *Basantram,* A.I.R. 1928 Sind 91. It is necessary for the defendant applying to stay the proceedings to prove the legal proceedings are commenced in respect of a matter agreed to be referred and that he was and is ready and willing to have the matter decided by arbitrator. Unless the suit refers to the whole of the subject-matter to arbitration, the section is not attracted because the plaintiff will still have to seek relief in a civil court for matters which are not referred to arbitration. Where the award of the arbitrators will not dispose of the whole suit the suit cannot be stayed (A.I.R. 1953 S.C. 182). Section 35 of the Act will not be a bar to the continuance of the arbitration proceedings to the extent provided by the arbitration agreement. *Abdul* v. *Abdul,* I.L.R. (1954) Nag. 634=1954 Nag. L.R. 573=A.I.R. 1954 Nag. 332. Where stay of suit is not granted, arbitration proceedings to the extent provided by arbitration agreement can proceed. *Ibid.*

1497. Sections 33 and 35.—Section 35 makes proceedings before arbitrators invalid, in the absence of an order under S. 34 staying the legal proceedings where the whole of the subject-matter of reference is carried by any legal proceeding taken in respect to it. In other words, an arbitrators can continue the proceedings and proceed to make the award on the reference, unless the whole of the subject-matter of the reference is covered by the legal proceedings which have been instituted. Where in an application under s. 33 the prayers were : (*a*) declaration that the arbitration agreement, if any, between the parties was void *ab initio* on the ground of uncertainty and was not binding on the applicant and (*b*) declaration that there was in fact and in law no contract between the parties, on account of mutual mistake of the parties, the prayers cannot be the subject-matter of arbitration for they go to the very root of the contract and imply that there was no contract between the parties at all and therefore no arbitration agreement. Therefore, the subject-matter of the proceedings under S. 33, assuming they were legal proceedings mentioned in S. 35 cannot and does not cover any part of

the subject-matter of reference. Section 35 in consequence can have no application and the award made in the arbitration proceedings cannot be assailed as invalid on the ground that it violates S. 35. *Shiva Jute* v. *Hindley,* A.I.R. 1959 S.C. 357 (S.C.).

1498. Between all the parties to the reference.—Such proceedings will not affect the reference unless all the parties to the reference are impleaded in the proceedings.—*Notes on Clauses.*

1499. Notice given to the arbitrator or umpire.—The authority delegated to an arbitrator cannot be revoked except by leave of the court, and so long as it is not revoked he has power to make an award, and there would be no impropriety of conduct on his part in proceeding with the reference after suit is filed, unless he has notice that there has been an application for leave to revoke the authority conferred on him to some court competent to grant such leave. *Dhanpatmal* v. *Kishinlal,* 35 Ind.Cas. 536=10 S.L.R. 1; *Sawyer H.* v. *Louis Dreyfus,* 20 Ind.Cas. 504=7 S.L.R. 1. A notice to one if two joint arbitrators is notice to both of them. *All-India Groundnut Syndicate,* 47 Bom.L.R. 420=A.I.R. 1945 Bom. 497.

1500. Further Proceedings in.—An application to the court for extension of time for making the award is not a proceeding in a pending reference and cannot be included in the phrase "further proceedings in" a pending reference within the meaning of this section. To merely apply to the court for an extension of time does not offend, either against the letter or spirit of this section. *All-India Groundnut Syndicate,* 47 Bom. L.R. 420=A.I.R. 1945 Bom. 497.

1501. Unless a stay of Proceedings is granted under section 34.—If the application for stay is refused by the court in the exercise of its discretion under section 34 the remedy by arbitration ceases to be available. If the suit is stayed the arbitrators are free to bring their proceedings to a termination and make an award in accordance with law. *Sarat Chandra* v. *Raj Kumar,* 69 Ind.Cas. 863=35 C.L.J. 432=26 C.W.N. 967=A.I.R. 1923 Cal. 135. See also, *Jokiram v. Ghanesham,* A.I.R. 1921 Cal. 224=61 Ind.Cas. 380=47 Cal. 849=25 C.W.N. 62; *Jowahir Singh* v. *Fleming Shaw,* A.I.R. 1937 Lah. 85.

1502. Notice of proceedings to be instituted.—The court will not and cannot set aside an award made in arbitration at a time when no actual legal proceedings were pending at all, merely on the ground that one of the arbitrators or all the arbitrators had notice that such proceedings were intended and that subsequently such proceedings are in fact commenced. *All-India Groundnut Syndicate, In re,* 47 Bom.L.R. 420=A.I.R. 1945 Bom. 497.

36. *Where it is provided (whether in the arbitration agreement or otherwise) that an award an arbitration agreement shall be condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference.*

Power of Court, where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference.

1503. N.B.—"Section 36 is based on section 3(4) of the 1934 Act of Parliament, and supplies an omission in the present Indian law. An agreement may contain a clause that no legal proceedings shall be taken on a certain matter unless the matter has first been made the subject-matter of an award. It is necessary to empower the court to overrule this provision when the award is set aside or otherwise become void."—*Notes on Clauses.* For further discussion on this section *vide* notes under s. 34 under the topics; conditions relating to arbitrations, how far jurisdiction of court may be ousted, question whether arbitration is a condition precedent to action, etc. This section corresponds to section 25(4) of the English Arbitration Act of 1950.

1504. Principle.—The principle underlying this section is the same as underlies exceptions 1 and 2 to section 28 of the Indian Contract Act. Section 28 of the Contract Act applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. But where all that the parties agree to is that any dispute arising between them out of various contracts should be referred to arbitration as provided by certain rules and there is nothing in that agreement or in such rule which prohibit any of the parties from taking proceedings thereafter in a court of justice, the agreement is valid. *Gobinda* v. *Rameshwar,* A.I.R. 1937. All. 650=(1937) A.L.J. 823=171 Ind.Cas. 584. See also, *Coringa Oil Mill* v. *Koegler,* 1 Cal. 466; *Ganges Manufacturing* v. *Indra Chand,* 33 Cal. 1169; *Scott* v. *Avery,* 5 H.L.C. 811 25 L.J.Ex. 303=2 Jur.N.S. 815. See also, *Caledonian Insurance Co.* v. *Gilmour,* (1893) A.C. 85; *Spurrier* v. *La Cloche,* (1902) A.C. 446=71 L.J.P.C. 101=86 L.T. 631.

In *Heymans* v. *Darwins Ltd.,* (1942) A.C. 366 (377) *Lord Wright* observed: "The contract, either instead of or along with a clause submitting differences or disputes to arbitration, may provide that there is no right of action save upon the award of an arbitrator. The parties in such a case make arbitration followed by an award a condition of any legal right of recovery on the contract. This is a condition of the contract to which the court must give effect, unless the condition has been 'waived', that is, unless the party seeking to set it up has somehow disentitled himself to do so." It follows that where a dispute is governed by such a condition, an action in respect of that dispute cannot succeed, and no purpose will be served by allowing it to continue. *Dennehy* v. *Bellany,* (1938) 2 All. E.R. 262, 264); *Russell,* 15th Edn. p. 78.

But "a person who agrees to arbitrate upon any matter is not, unless the award of an arbitrator is made a condition precedent to the bringing of an action, debarred from pursuing his common law right to bring an action, subject to this—that upon proper steps being taken a direction might be obtained that the case instead of being tried in action, should go before the arbitrator." *Per Collins M.R.* in *Robins* v. *Goddard,* (1905) 1 K.B. 294 (301); *Vide* also notes under section 34, *supra.*

1505. Scope of the Section.—"Under this section, it is first essential that the court should order that the agreement shall cease to have effect as regards the particular dispute, and upon making such order, if the agreement contains a provision that an award under an arbitration agreement shall be a condition precedent to the bringing of an action in respect of any matter to which the agreement applies, may further order that the provision making an award a condition precedent to the bringing of an action shall cease to have effect as regards that dispute." *Russell,* 13th Edn., p. 455. "The object of the above section is to meet

the doubt, which existed prior to this Act, as to whether the court could grant auxiliary relief in cases where the parties have agreed that no action shall be brought or proceedings taken until the arbitrator has made his award. It was arguable that the parties, by deferring the jurisdiction of the court until the event has happened, have deprived themselves of the right to invoke the power of the court until the event has happened." *Ibid.*

In the following cases the court may order that the arbitration agreement shall cease to have effect as regards any particular disputes :—

(1) Under section 12 (2)(*b*), where the court may under the circumstances mentioned in s. 12, on the application of any party to the arbitration agreement, order that the arbitration agreement shall cease to have effect; (2) where award remitted under s. 16(3) becomes void; and (3) where an award has been set aside under section 30. *Russell* says : "A party might always have been precluded from setting up such an agreement as a defence if he had waived his right to insist on arbitration as a condition precedent [*Toronto Rail Co.* v. *National etc. Insurance Co.*, (1914) 20 Com.Cas. 1], or by repudiation of the agreement [*Jureidini* v. *National British U. Insurance Co.*, (1915) A.C. 499], or by his collusion with the arbitrator in reference to the matter in dispute [see *Hickman* v. *Roberts*, (1913) A.C. 229, where it was provided in a building contract that the certificate of the architect should be a condition precedent to any action by the contractor, and it was held that the building owner was precluded by collusion with the architect from setting up the absence of a certificate as a defence.] See also, *Brodie* v. *Cardiff Corporation*, (1919) A.C. 337 ; *Eagleshams* v. *McMaster*, (1920) 2 K.B. 169."—*Russell*, p. 108. As regards cases where reference to arbitration is a condition precedent, *Vide Cipriani* v. *Burnett*, (1933) A.C. 83 ; *Viney* v. *Bignold*, 20 Q.B.D. 172.

Section 36 enables a court, when an appropriate motion is made to set aside any condition which operates as a condition precedent to the bringing of an action with respect to any matter to which the agreement relates and the court can order that the agreement shall cease to have effect as regards any particular difference. *Vanguard Fire* v. *N. R. Sreenivasa*, 1963 Kar L. J. 277=I.L.R. (1963) 1 Ker 545=1963 Ker L.T. 415=(1963) 1 Com.L.J. 329=A.I.R. 1963 Ker 270.

37. (*1*) *All the provisions of the Indian Limitation Act, 1908,* shall apply to arbitrations as they apply to proceedings in Court.*

Limitations.

(*2*) *Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter of the time when it would have accrued but for that term in the agreement.*

(*3*) *For the purposes of this section and of the Indian Limitation Act, 1908,* an arbitration shall be commenced when*

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*IX of 1908 see now Act XXXVI of 1963.

At pages 810—811, read the following for sub-section (3) of section 37 :—

(3) For the purposes of this section and of the Indian Limitation Act, 1908, (9 of 1908) an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitration, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement requiring that the difference be submitted to the person so named or designated.*

Read after sub-section (3), the following sub-sections (4) and (5) of section 37 :—

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement and difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for the period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders after the commencement of an arbitration, that the arbitration agreement, shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, (9 of 1908) for the commencement of the proceedings (including arbitration) with respect to the difference referred.*

*** See now Act XXXVI of 1963.**

Title _____

Accession No. _____

Call No. _____

Borrower's No.	Issue Date	Borrower's No.	Issue Date

one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

1506. N.B.—Section 37 makes provision as to limation in arbitration matters and follows closely section 16 of 1934 Act of Parliament.—*Notes on clauses.* "We have omitted the words 'the court may further order that' because we feel that a mere order of the court might not avail to affect the law of limitation. Without these words the clause will operate with statutory force to affect the law."—*Report of the Select Committee.* Sub-section (4) is the same as section 27 of the English Arbitration Act of 1950.

1507. Scope.—This section does not apply to statutory arbitration. —*Vide* s. 46, *infra.*

1508. Art. 181 now Art. 137 of the Limitation Act.—Since the passing of the Arbitration 9ct in 1940, Schedule IV of which amended Arts. 158 and 178, Limitation Acct, it is difficult to say that Art. 181 is confined to application under the Code of Civil Procedure. The basis of the decisions, which *held* that, Art. 181 governs only applirations under the Cide of Civil Procedure, has been taken away as result of the said amendment. I.L.R. (1948) 2 Cal. 54. *Panchanan* v. *Nani Gopal,* I.L.R. (1951) 1 Cal. 438. See now Art. 137 of Act, 36 of 1963

1509. Sub-section (1).—This sub-section corresponds to sub-section (1) section 16 of the English Arbitration Act of 1934. In *Board of Trade* v. *Cayzer Irvine & Co.,* 96 L.J.K.B. 872=(1927) A.C. 610, *Viscount Cave L.C.* said : "The arbitrator made his award in the form of a special case raising a number of questions ; but the only question which survives for Your Lordships' determination to-day is whether the arbitrator should have found that the claim of the respondents was barred by the Statute of Limitation (21 Jac. 1, c. 16) by reason of the fact that the first step in the arbitration, namely, the appointment of the arbitrator, was not taken within six years after the date of the loss of the steamship. That question has been answered by the Court of Appeal in the negative, and the Board of Trade now appeals to this House. I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in the case of *Astley and Tyldersley Coal and Salt, In re,* 68 L.J.Q.B. 252, that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, *including a defence under any statute of limitation.* A decision against that view might seriously prejudice the practice of referring dispute to arbitration ; and, which I am unwilling to pronounce final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred." *Lord Phillimore* said : "Where an action in progress is referred to arbitrators for disposal, and no special directions are given limiting or conditioning the functions to arbitrators, as for instance directing them, as I have known it happen, to take account of moral or social considerations, *the arbitrators must decide the case as a Judge would or as an official referee would, and give effect to all legal defences such as the Stutute of Limitation.*" But in the Court of Appeal

Scrutton L.J. said : "If an arbitrator is to be bound by the Statute of Limitation it must be by some implied terms in the submission. He is not bound by the statute itself because the statute applies only to actions, and this arbitration is not an action, and it must be, therefore, suggested that there is some implied term in the contract that he shall give effect to such defence as there would have been if an action had been brought in the courts."

In *Ramdutt* v. *E. D. Sasson & Co.*, A.I.R. 1929 P.C. 103=(1929) A.L.J. 254=33 C.W.N. 485=29 M.L.W. 682=56 M.L.J. 614=49 C.L.J. 462=115 Ind.Cas. 713=31 Bom.L.R. 741=56 I.A. 128=56 Cal. 1048 (P.C.), *Lord Salvesen* observed : "The first question of law which arises is the important general one, whether the Indian Limitation Act, 1908, applies to arbitration proceedings. The relevant section is S. 3..... Their Lordships were not referred to any case decided in India as to whether this clause can be extended by analogy to arbitration proceedings, but similar language is employed in the English Statute of Limitations, and the question has been considered and decided in one case in England. The is the case of *Astley and Tyldesley Coal and Salt Co.*, (1899) 68 L.J.Q.B. 252.,In that case it was held by the Divisional Court consisting of *Bruce and Ridly, JJ.* that 'a submission to arbitration does not *pre se* exclude the right of either party to raise the defence of the Statute of Limitation, but if it be intended to exclude such a defence an express term to that effect must be imported into the agreement of submission.'

"Previous to that decision there had general statements in other cases which lay down more clearly, the principle upon which the decision must be taken to have proceeded. In *Auburt* v. *Maze,* (1801) 2 Bos. & p. 371 at page 375, *Chambre, J.* said : 'There is no doubt that an arbitrator is bound by the rules of law like every other Judge,' and in *Jager* v. *Tolme,* (1916) 1 K.B. 939=85 L.J.K.B. 1116 at page 953 of I.K.B. the Judge said : 'the council (that was the Council of the London Produce Clearing House) are to give a decision.,They are to decide and in the absence of fuller and wider powers expressly given, that means to decide according to the legal rights of parties.....Although the Limitation Act does not in terms apply to arbitrations, *they think that the mercantile references, of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a court of law can be equally proposed for the arbitrator's decision unless the parties have agreed* (which is not suggested here) to exclude that defence." Application to set aside award is not proceedings before arbitrators within S. 37 (1). *Chandanmul* v. *Mohambai,* (1953) 1 M.L.J. 182=I.L.R. (1953) Mad. 583=A.I.R. 1953 Mad. 561. In the above case court observed : "The question is what is the precise meaning of the word 'arbitration' in this section ? The contention of the appellant is that arbitration proceedings mentioned in the section include not only proceedings before the arbitrators but also applications taken out for filing the awards in court or for setting them aside. He contends that they are also arbitration proceedings and that by virtue of S. 37(1), the provisions of the Limitation Act, including S. 5 will apply.....In the context, the word 'arbitration' should be limited to proceedings before the arbitrators, and an application to set aside an award being a proceeding in court, cannot be held to be an arbitration proceedings.

S. 37(1) applies to all the provisions of the Limitation Act to the arbitration proceedings. The proceedings before the arbitrators are regarded by the legislature as proceedings in the nature of suits and application. As under the explanation of S. 3 of the Limitation Act, which also applies, a suit is instituted in ordinary cases when the plaint is presented to the proper office, so as arbitration is commenced as soon a claim is submitted for adjudication before the arbitrator or the officer authorised by the arbitrator to receive the statements of claims. *Motilal* v. *Lalchand,* A.I.R. (1960) Cal. 6 (S.B.). The Limitation Act principally applies to suits, appeals and applications and it has no direct application to arbitration proceedings. It is well settled that expiry of the period of limitation prescribed for a suit does not destroy the right; it only bars the remedy for enforcement of a right in a court of law. It cannot, therefore, be said that in terms the provisions of the Limitation Act prevent an arbitrator from entertaining a claim which if made in a court of law may be barred by limitation. S. 46 of the Arbitration Act expressly excludes S. 37 thereof in its application to statutory arbitration.—Evidently an arbitration under S. 54 of the Bombay Co-operative Societies Act is a statutory arbitration to which S. 37 of the Arbitration is not applicable, and, the Board of Arbitrators appointed to resolve the disputes under S. 54 of the Co-operative Societies Act are not required to apply the law of limitation to the claim made before it. In such an arbitration proceeding, where the source of the authority of the arbitrator is a statute, and not an agreement between contending parties, a condition that the arbitrator must decide the dispute according to the law of limitation cannot in the absence of a statutory provision be implied. (A.I.R. 1929 P.C. 103=(1899) 68 L.J.Q.B. 252 and (1938) 2 All.E.R. 152 distinguished). Therefore the arbitrators are not bound to apply the law of limitation to the claim made by a society and failure to do so is not an objection to the legality of the award within the meaning of S. 54A of the Bombay Co-operative Societies Act. *Savitra* v. *Nagas,* 59 Bom.L.R. 425=A.I.R. 1957 Bom. 178.

1509A. S. 37 (1) and Sch. I Para 3.—Paragraph 3 of Sch. I of the Arbitration Act 1940 is not an article which would automatically be applicable under s. 37(1); it is essentially a rule of procedure, the distinction being that the court may at any time extend the four months' term. *Ramasahai* v. *Harishchandra,* 1962 Jab.L.J. 1009=A.I.R. 1963 M.P. 143.

1510. Sub-section (2).—This section is based on sub-section (2) of s. 16 of the English Arbitration Act of 1934. Under the existing law while parties could not oust the jurisdiction of court they could agree that no cause of action could accrue until the amount to be paid had been determined by the arbitration as prescribed in the arbitration agreement. *Russell,* 13th Edn., p. 478. In *Board of Trade* v. *Crayzer,* 96 L.J.K.B. 573=(1927) A.C. 610, *Viscount Cave* said: "It appears to me that the decision given in *Scott* v. *Avery,* (1856) 25 L.J. 308=5 H.L.C. 811 disposes of the present appeal. Under the Statute of James, which applies to this case, time runs from the cause of action; and it seems to me to follow beyond question that under the clause which we are considering, and having regard to the case cited time runs not from the date of the loss of the steamship but only from the making of the award." In *Caledonian Insurance* v. *Gilmour,* (1893) A.C. at p. 97, *Lord Watson,* quoting from *Scott* v. *Avery,* said: "Now, in this contract it is stipulated, in the most express terms, that until the arbitrators have determined, no

action shall lie in any court whatever. That is not ousting the courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrator have determined." This sub-section overrules the above cases in so far as they decide that there may be a condition precedent in any arbitration agreement that no right of action shall accrue, for the purpose of the Statutes of Limitation, until the making of the award. *Russell,* 13th Edn., p. 479. The law as laid down in *Ramdutt* v. *E. D. Sassoon,* A.I.R. 1929 P.C. 103, that the parties are at liberty to exclude the defence of limitation by contract is no longer good law. Now inspite of the agreement, a cause of action shall for the purposes of the Statutes of Limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement. *Russell,* p. 108.

When a contract contains an arbitration clause, making an award a condition precedent for any right of action, it is only when the condition is set aside under s. 36 or waived by the party entitled to insist upon it that the question of proceeding with a suit arise. *Vanguard Fire* v. *N. R. Sreenivasa,* I.L.R. (1963) 1 Kar 545 = 1963 Kar L.T. 415 = (1963) 1 Com.L.J. 329 = A.I.R. 1963 Kar 270.

1511. Sub-section (3).—This sub-section corresponds to sub-section (4) of section 16 of the English Arbitration Act of 1934. Where the arbitration bye-laws of the Madras Yarn Merchants' Association are incorporated in the arbitration clause providing for settlement of disputes between its members and a bye-law provided for invocation of arbitration by an application accompanied by a plaint and documents, etc., along with a fee of Rs. 25 the arbitration must be "deemed to have commenced" within the meaning of S. 37 (3) of the Arbitration Act on that date which constitutes the material date for limitation. If the claim for damages for breach of contract is within 3 years from the date of such commencement the claim is not barred by limitation. *Ratha Krishnamurthy* v. *Balasubramania,* (1948) 2 M.L.J. 601 = A.I.R. 1949 Mad. 559.

The contention that S. 37 (3) lays down the different conditions under which an arbitration commences and unless one or other of the two specified conditions are complied with, within the period of limitation prescribed for a particular claim, such a claim becomes barred and the arbitrator has no jurisdiction to entertain any barred claim, is not correct. Sub-section (3) cannot be construed as exhaustive of the circumstances under which an arbitration commences. The expression "shall be deemed to be commenced indicates that the sub-section deals with two modes of notional or fictional commencement as distinguished from factual commencement. It is possible to conceive of cases where an arbitration can be said to have commenced under the circumstances not contemplated by sub-section. Further too much stress cannot be laid on cl. (3) of the First Schedule in interpreting sub-section (3) of S. 37 of the Act. Sub-section (3) of S. 37 does not override the general provisions of the Limitation Act. (1948) 2 Mad.L.J. 601 = A.I.R. 1949 Mad.599. Where therefore the parties have agreed that they will be bound by the Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce and the rules show that the limitation of the arbitration proceeding is to made in a particular manner, the commencement of the arbitration can be made by adopting that course. *Motilal* v. *Lalchand.* A.I.R. 1960 Cal. 6 (S.B.).

1512. Sub-section (4).—This sub-section corresponds to sub-section

16 of the English Arbitration Act of 1934. Before the enactment of the English Arbitration Act of 1934, it was held that a provision in a charter party that all disputes arising out of the contract should be referred to arbitration, and that if a claim was not made in writing and the claimants' arbitrator appointed within three months of final discharge, it should be deemed to have been waived, and absolutely barred, was not void as being against public policy. *Atlantic Shipping* v. *Louis Dreyfus & Co.*, 91 L.J.K.B. 513=(1920) A.C. 250, *Lord Dunedin* in the course of judgment said : "Under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad as an ousting of the jurisdiction of the courts, but that position was finally abandoned in *Scott* v. *Avery*, 5 H.L.C. 811=25 L.J.Ex. 308. As I read that case it can no longer be said that the jurisdiction of the court is ousted by such an agreement ; on the contrary, the jurisdiction of the court is invoked in order to enforce it, and there is nothing wrong in persons agreeing that their disputes should be decided by arbitration. It follows that the clause here is not obnoxious in so far as it provides for arbitration. It goes on, however, to say that if the claim is not made and the arbitration begun within a certain time the claim is to be held to be departed from. Now, if it were illegal to arrange that a claim should not be good unless made within a certain time I should understand the argument, but as it is admitted that it is perfectly legal to make such a stipulation—it is done, for example, every day in insurance policies—then why should it be had because it is tacked on to a provision for arbitration instead of to an action at law ? All that it comes to it this : I stipulate that you shall settlle your differences with me by arbitration and not by action at law, and I stipulate that you shall state your differences and begin your arbitration within a certain time or you shall be held to have waived your claim." The object of this sub-section is to limit hardship in contracts like the above.

The above case was distinguished in *Pinnock Brothers* v. *Lewis & Peat Ltd.*, 92 L.J.K.B. 695=(1923) 1 K.B. 690. In this case the plaintiffs bought from the defendants a quantity of East African Copra Cake of fair average quality, sound delivered. It was contemplated by the parties that the cake would be used for cattle food and nothing else. The contract provided that "The goods are not warranted free from defect rendering same unmerchantable which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding" ; that "any disputes arising out of this contract shall be settled by arbitration in London" ; and that "notice of arbitration to be given and arbitrator nominated in writing by the last buyer claiming arbitration.....not later than fourteen working days after final discharge of vessel....." The plaintiffs, on receiving delivery of the cake, resold it to a firm of cattle food manufacturers, who manufactured part of it into cakette and dairy meal and sold it to farmers to be used for feeding cattle. They resold a small quantity of it to another firm, who manufactured it into cattle food and sold it to a farmer for use as cattle food. The cattle who were fed on this cattle food became ill, and, on analysis, it was found that a large quantity of a poisonous substance had been mixed with the copra cake. The farmers claimed damages from their sellers, who in time claimed from the plaintiffs. As soon as the mischief was discovered the plaintiffs claimed damages from the defendants. The plaintiffs claimed arbitration, but their claim was made after fourteen days had elapsed since the date of the final discharge of the vessel. The arbitrator held

that he had no jurisdiction to entertain the claim, because notice of arbitration was not given nor arbitrator nominated in time. *Roche, J.* in finding for the plaintiffs observed : "The first defence raised is based on the existence in the contract of an arbitration clause, and on an award made under it. The defendants say that the claim is not sustainable, or that the plaintiff must be held to have it. Various cases were cited by the defendants in support of their contentions which were formidable under this head.

'.The first case that I need refer to is *Ayscough* v. *Sheed, Thomson & Co.,* (1923) 28 Com.Cas. 203=39 T.L.R. 206. The difference between that case and the present case is that in that case the arbitrator decided—whether rightly or wrongly is immaterial for the present purpose—that by reason of a certain clause as to time in that contract the plaintiffs had no claim at all, and therefore he dismissed it ; whereas, in the presesnt case, the arbitrator merely decided that he had no jurisdiction to entertain the claim, and, therefore, that decision does not and cannot determine the substance of the plaintiffs' claim. That is my view of the difference between *Ayscough's case* and this case. *Ayscough's case* is therefore distinguishable.

"The next case relied on was *Atlantic Shipping and Trading Co.* v. *Dreyfus & Co.,* 91 L.J.K.B. 513=(1922) 2 A.C. 250. So far as it is material, the difference between that case and the present case is that there the contract, in terms, said that unless a claim were made in writing within a certain specified time, the claim shall be deemed to be waived and absolutely barred. In the contract in this case I find no such express provision, and I certainly find myself quite unable to imply one. The case, therefore, does not apply." Now by this sub-section the court is competent to give relief.

1513. Sub-section (5).—This sub-section corresponds to sub-section (7) of section 16 of the English Arbitration Act of 1934 . There is an analogy between this section and section 14 of the Indian Limitation Act. Section 14 makes provision for exclusion of time of proceeding *bona fide* in court without jurisdiction. Where a suit is referred to arbitration and during the pendency of arbitration the suit abates by reason of the death of one of the defendants and subsequently the court supersedes the reference, in computing the limitation for an application to set aside the abatement, the period between the death of the defendant and the date on which the court superseded the reference can be excluded under this sub-section. *Milawaram Popatram* v. *Tolarm,* A.I.R. 1957 Sind 113. Undoubtedly the time taken up in arbitration proceedings can be excluded, but that time can be excluded not under S. 14, Limitation Act but under S. 37 (5), Arbitration Act, and in order to include time taken up in arbitration proceedings the test laid down by the Legislature in S. 37 (5) must be applied and satisfied. *Purshottamdas* v. *Implex,* A.I.R. 1954 Bom. 309. In delivering the judgment in the above case *Chagla, C.J.* said : "It is no longer open to the court to rely on S. 14, Limitation Act as applying by analogy to arbitration proceedings. If the Legislature intended that S. 14 should apply and that all the time taken up in arbitration proceedings should be excluded, then there was no reason to enact S. 37 (5). The very fact that S. 37 (5) has been enacted clearly shows that the whole period referred to S. 14, Limitation Act is not to be excluded but the limited period indicated in S. 37 (5). Therefore, whatever validity the Nagpur (A.I.R. 1948 Nag. 334) and the

Allahabad [A.I.R. 1943 All. 162=I.L.R. (1943) All. 467] decisions may have had before the Arbitration Act of 1940 was passed, in view of the provisions of S. 37(5) it is clear that S. 14, Limitation Act cannot be made applicable to arbitration proceedings. Undoubtedly, the time taken up in arbitration proceedings can be excluded, but that time can be excluded not under S. 14, Limitation Act but under S. 37(5), Arbitration Act, and in order to exclude time taken up in arbitration proceelings the tests laid down by the Legislature in S. 37(5) must be applied and satisfied. Now, if we are to apply those tests, no time can be excluded in this particular case. The award has not been satisfied, nor has there been an order declaring the arbitration agreement to cease to have effect. All that happened was that there were certain arbitration proceedings which were aboritive and nothing came out of it. Time thus taken up before an arbitrator is time which cannot be excluded under S. 37(5)." This clause applies not only to suits but also to applications. In computing the period of limitation for bringing the legal representatives under O. 22, R. 4. C. P. C. therefore the period between the commencement of the arbitration and the date of the order of the court superseding the order of reference should be excluded under this clause. *Milwaram* v. *Tolaram,* I.L.R. (1946) Kar. 326=A.I.R. 1947 Sind 113. Section 37(5) undoubtedly suggests that there can be cases where, after the award has been set aside a second reference can be validly made. *Baranagore Jute* v. *Huloo Chand,* A.I.R. 1958 Cal. 490.

The court in s. 37(5) includes the appellate and revisional court and the plaintiff is entitled to the exclusion of the period taken by him in filing appeal or revision against the order of the court setting aside the award. *Babulal* v. *Ramswarup,* A.I.R. 1960 Raj. 240=I.L.R. (1960) 10 Raj. 885.

1514. Limitation for claim—Relevant date.—The limitation for a claim is judged by the point of time when the claim is instituted and not by the day when the court itself actually takes up the claim for disposal. *Murray* v. *Khaitan,* A.I.R. 1956 Cal. 644.

Disputes as to arbitrator's remuneration or costs.

38. (*1*) *If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant,*

(*2*) *An application under sub-section* (*1*) *may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.*

(*3*) *The Court may make such orders as it thinks fit res-*

pecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

1515. N.B.—Section 38 deals with disputes as to the arbitrators' fees and costs, and follows generally section 13 of the 1934 Act of Parliment and paragraph 13 of the Second Schedule to the Code. The court may require the arbitrator to deliver up the award on the deposit into court of the amount he claims, and may then investigate the claim and grant to the arbitrator such sum as fees as it thinks reasonable.—*Notes on clauses.* Sub-sections (1) and (2) correspond to sections 13(1), 13(2) and 13(4) of the English Arbitration Act, 1934 and sub-section (3) is taken verbatim from para. 13 of the Second Schedule of the Civil Procedure Code of 1908. This section corresponds to S. 19 of the English Arbitration of 1950.

1516. Scope of the section.—In the absence of evidence to show that fees charged by arbitrators or umpires are extortionate or unfair and unreasonable, the court will not interfere with such charges. The certificate of the taxing master in the arbitration proceedings, disallowing a portion of the fees charged by the arbitrators and umpire, is not evidence against the arbitrator and umpire that the fees charged by them are excessive. *Llandrindod Wells Water Co.* v. *Hawksley,* 68 J.P. 242=20 T.L.R. 241 (C.A.); but see, *Brazier* v. *Bryant,* (1834) 2 Dowl. 660; *Westwood & Co.* v. *Cape of Good Hope Government,* (1886) 2 T.L.R. 667. The court is not to vary the order of the arbitrator as regards the costs of the arbitration. *Mir* v. *Khairun,* 19 P.R. 1880; *Chuni* v. *Dhan,* 97 P.L.R. 1909. See also, *Hargopal* v. *Karter Singh,* 91 P.R. 1888; *Dhan* v. *Dildar,* 46 Ind.Cas. 182; *Basant Chunder* v. *Damigee,* Boorke. Rep. O.C. 7. If in arbitration proceedings a party has had to pay excessive fees to the arbitrator in order to get his award, an action will lie at the suit of the party against the arbitrator to recover back the excess which has been improperly charged. *Llandrindad Wells Water Co.* v. *Hawksley,* 67 J.P. 439. See also, *Fernby* v. *Branson,* 20 L.J.J.B. 178; *Barnes* v. *Haywood,* (1857) 1 H. & N. 742; *Barnes* v. *Braithwaite,* (1857) 2 H. & N. 569; *Roberts* v. *Eburhardt,* (1857) 28 L.J.C.P 74. The amount of costs to be paid must be ascertained and stated in and by the award itself, otherwise the costs of the reference and award, including the arbitrators' fees, are liable to taxation in the ordinary course. *In re, Prebble and Robinson,* (1892) 2 J.B. 602. Where the parties have chosen their arbitrator, they must be taken to have intended to pay him at a fair remuneration. *Girdharilal* v. *Surendranath,* A.I.R. 1934 Nag 199=17 N.L.J 153=152 Ind.Cas. 373; *Willis* v. *Wakely,* (1891) 7 T.L.R. 604. In *Llandrindod Wells Water Co.* v. *Hawksley,* 68 J.P. 232=20 T.L.R. 241, it was stated: "that where the parties have chosen their own arbitrator, they must be taken to have intended to pay him at the rate ordinarily charged by persons of his experience, and they must pay his fees, unless it is proved that the charges are extortionate." See also, *Bulchand* v. *Thakurdas,* A.I.R. 1933 Sind 300. "The courts formerly seem to have assumed that the amount charged for fees by an arbitrator might be summarily reviewed by them as against the arbitrator. As between party and party it is clear that an arbitrator's charges will be taxed on application to the court, and if excessive, reduced. [*Brazier* v. *Bryant,* 2 Dowl. 600; *Westwood* v. *Cape of Good Hope Government,* (1886, 2 T.L.R. 667]; but

prior to the Arbitration Act 1934, this taxation was not binding on the arbitrator, and was no ground for unsuccessful party refusing to pay to the arbitrator his full fees, although the fees had been reduced by the master on taxation as between party and party. *Llandrindod Wells Water Co.* v. *Hawksley,* (1904) 68 J.P. 242." *Russell,* 13th Edn., p. 175. Under this section court is given power to fix the fees of the arbitrator and he is bound by the order of the court. See also, *Gobinda Sing* v. *Pohumal,* I.L.R. 1944 (Kar.) 354=219 Ind.Cas. 195=A.I.R. 1945 Sind 71. Whether S. 14 (2) or S. 38 of the Arbitration Act applies to a case, a party to an arbitration cannot have the award filed unless he pays off the balance of the fees due to the arbitrators. The Act does not provide that if any of the parties does not pay his share of the arbitrators' fees, the court has power to compel him to do so by means of an interim order at the instance of another party who has paid his share and wants to have the award filed. The Act provides two remedies and two remedies only. One is that the party who wishes the award to be filed can have his wish fulfilled by paying the cost himself. The recovevry of the costs from the remaining parties must form the subject-matter of the separate proceedings or may perhaps be adjusted at the time of passing the final decree. The other remedy is that if it is found that arbitration is being brought to nothing by the recalcitrance of one of the parties who is refusing to pay his share of the arbitrators' fees, the person aggrieved may well make that a ground for an application for superseding the reference. *Shibkrishna* v. *Sunil Kumar,* A.I.R. 1949 Cal. 189.

1517. Sub-section (1)—Under the old law the arbitrator could not unless such power was expressly reserved to him by the submission, award to himself a sum (named or otherwise) for his own costs and expenses. *Roberts* v. *Eberhardt,* 3 C.B.N.S. 482=27 L.J.C.P. 70=28 L.J.C.P. 74. But he can refuse to deliver up the award unless the fee fixed by him rs paid to him. If his charges were exorbitant, the only remedy for the party is to pay him his charges and then to sue him for the excess fee charged by him. Now in such a case any one of the parties can apply to the court for the delivery of the award after depositing the amount charged by him in court. From the sum so deposited, the court may order payment of reasonable fees to the arbitrator. The balance if any, is to be refundable to the party depositing the arbitrator's fees.

1518. Sub-section (2)—No application under sub-section (1) is maintainable where there is a written agreement between the parties and the arbitrator as regards his remuneration. Sub-section (1) is applicable where there is an implied promise to pay in full but the amount is not fixed by written agreement. In such a case the arbitrator or the umpire is entitled to appear before the court and to be heard.

1519. Sub-section (3)—This sub-section reproduces verbatim para. 13 of the Second Schedule of the Civil Procedure Code. The fees of the arbitrator as being part of the costs of arbitration cannot be excluded from the provisions of this sub-section. The court has power to award the arbitrators' fees as part of the costs of the arbitration under this sub-section and as costs of the proceedings incidental to the suit under S. 35, Civil Procedure Code, even where no award has been made. The words of this sub-section are very wide and they allow the court to make such order as it thinks fit respecting the costs of arbitration if any question arises respecting such costs. *Takhitram* v. *Kishinchand,* A.I.R. 1940 Sind 190=I.L.R. (1940) Kar. 34=190 Ind.Cas. 280; see also, *Gurdinomal* v. *Wadhumal,* 6 S.L.R. 226=19 Ind.Cas. 611. The terms "costs of

arbitration" is wide and general, and there is no justification for limiting it to such costs as might be represented by travelling expenses and the summoning of witnesses. The court has, therefore jurisdiction to award remuneration to the arbitrator for their services. *Girdharilal* v. *Surendranath,* 152 Ind.Cas. 373=17 N.L.J. 153=A.I.R. 1934 Nag. 199. See also *Ramchandra* v. *Jasoda,* A.I.R. 1930 Oudh 89.

No doubt the arbitrators have been given power to decline to produce the award in court if their remuneration is not paid but if the arbitrators choose to produce it even though their charges have not been paid and have the matter of the enforcement of their charges to be dealt with by the court under section 38 (3), there is nothing in section 14 which prohibits the arbitrators from filing it. *Narayan* v. *Dewapibhawan,* A.I.R. 1945 Nag. 117=I.L.R. (1945) Nag. 223=1945 N.L.J. 169. Where the arbitration award provides for the payment by the plaintiff of the costs including the arbitrators' fee but the court omits to fix the fee before the decree is prepared, it is open to the court to fix the fee after the preparation of the decree. *Wilson* v. *Jagmandir,* 52 Ind.Cas. 653=17 A.L.J. 1015. Under this sub-section the court has full power to grant costs of arbitration when the award contains no sufficient provisions concerning them and the question has been referred to arbitration, as for costs incurred in the final stage, *i.e.,* after objections to the award are filed and investigated, the court has undoubtedly power to grant costs of this proceedings. *Hira* v. *Goya,* A.I.R. 1932 All. 183=(1931) A.L.J. 1155=136 Ind.Cas. 789=54 All. 122. Where the award is not sought to be set aside under S. 30 and the parties without following the procedure laid down in this section have paid the arbitrator's fees demanded, it is not open to a parties to take objection to the fees subsequently and seek to recover what he has already paid. *Gobind Singh* v. *Phumal,* A.I.R. 1945 Sind 71=219 Ind.Cas. 195=I.L.R. (1941) Kar. 354

1520. Arbitrator applying for filing award in court.—The Arbitration Act does not lay upon an arbitrator any obligation *suo motu* to file in court an award he has made. When the arbitrator applies for filing of an award in court, he is performing a ministerial act, at the request of a party to the arbitration or by the order of the court. He has no interest in the award apart from his fees and charges. *John* v. *Soomar,* A.I.R. 1943 Sind 33=(1942) Kar. 466=205 Ind.Cas. 304.

1521. Revision.—An order awarding a sum of money as fees to arbitrator in arbitration proceedings out of reference made through court is a case decided within S. 115, Civil Procedure Code, and a revision would lie to the High Court, though the latter would not interfere unless it involves any question of any irregularity in jurisdiction, *e.g.,* where the amount awarded is very excessive. *Takhitram* v. *Kishinchand,* I.L.R. (1940) Kar. 34=190 Ind.Cas. 880=A.I.R. 1940 Sind 190.

CHAPTER VI

APPEALS.

Appeable orders.

39. (*1*) An appeal shall lie from the following orders *passed under this Act* (and from no others) *to the Court authorised by law to hear appeals from original decrees of the Court passing the order* :—

An order—

(*i*) superseding an arbitration ;
(*ii*) on an award stated in the form of a special case ;
(*iii*) modifying or correcting an award ;
(*iv*) filing or refusing to file an *arbitration agreement* ;
(*v*) staying or refusing to stay *legal proceedings* where there is an arbitration agreement ;
(*vi*) setting aside or refusing to set aside an award ;

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(*2*) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to the *Supreme Court.**

1522. N.B.—Section 39 deals with appeal and replaces that part of section 104(1) of the Code of Civil Procedure Code, 1908 which this section seeks to replace.—*Notes on clauses.*

1523. Section 104 of the Civil Procedure Code.—Section 104 of the Civil Procedure Code runs as follows :—

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :—

(*a*) an order superseding an arbitration where the award has not been completed within the period allowed by the Court ;
(*b*) an order on an award stated in the form of a special case ;
(*c*) an order modifying or correcting an award ;
(*d*) an order filing or refusing to file an agreement to refer to arbitration ;
(*e*) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ;
(*f*) an order filing or refusing to file an award in an arbitration without the intervention of the court ;
(*ff*) an order under section 35A ;
(*g*) an order under section 95 ;
(*h*) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of decree ;

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.

1524. Sub-section (1).—In an appeal by the claimant under s. 39(1) against an order under section 30 setting aside an arbitration award, an objection by the respondent to the existence or validity of

*Substituted in India by Adaptation of Laws Order of 1950.

the arbitration agreement on the basis that the contract containing the arbitration agreement did not comply with the requirements of S. 175(3), Government of India Act, 1935, cannot be raised for the first time at the time of the argument when the claimant had no opportunity to adduce any evidence upon the question of fact. *Prince* v. *Governor-General*, A.I.R. 1955 Punj. 240.

1525. Sections 39 and 41.—Section 39 allows appeals against orders passed under the express provision of the Act itself and not against any order passed upon the application of the rules of the C. P. Code. The phrase "and from others" in the section refers to orders passed under the Act *i.e.*, under the express provisions of the Act. It has no reference to appeals which the C. P. Code provides from orders passed under the provisions of the Act. Section 39 therefore does not take away the right of appeal which is given by the C. P. Code. Therefore an appeal will lie when an application for restoration made under the Arbitration Act is dismissed for default though an appeal is not provided under the Arbitration Act itself. *Sri Kishen* v. *Radha Kissen*, 1950 A.L.J. 799. An order passed on appeal under the Arbitration Act is subject to revision by the High Court under S. 115 C. P. Code, in view of the provisions of S. 39 and 41 of the Act. *Lalchand* v. *Dev Raj*, A.I.R. 1951 Pepsu, 115; *Tirath Singh* v. *Ishar Singh*, 49 P.L.R. 129= A.I.R. 1948 Lah. 50.

1526. Letters Patent Appeal.—An order under S. 33 of the Arbitration Act which is not appealable under S. 39 of the Act is also not appealable under clause 15 of the Letters Patent. The general right of appeal given by cl. 15 is curtailed by the special provisions of S 39 of the Arbitration Act, which restricts the right of appeal only to the cases specified in the section itself. This section is sufficiently explicit to include an appeal under cl. 15 of the Letters Patent as well as the provisions of cl. 15 have to be taken under cl. 44 of the Letters Patent subject to the legislative powers of the Governor-General in Council it must be *held* that to that extent the right of appeal has been curtailed or modified *Wright* v. *Governor-General*, 52 C.W.N. 224; see also A. I. R. 1952 Bom. 229; A.I.R. 1945 Mad. 184.

1527. Scope of the section.—In *Navbat Singh* v. *Baldeo Singh*, 9 Ind.Cas. 666=8 A.L.J. 12, the court observed: "In other respects the Legislature in enacting the provisions of S. 104(2) does not seem to have altered the provisions of the old law. It seems to us to contemplate only one appeal from an order and not two appeals, as it contended for on behalf of the appellant." See also, *Rajendra Prosad* v. *Upendra Nath*, 27 Ind.Cas. 805=19 C.W.N. 633=21 C.L.J. 174. In *Ahmad Yar* v. *Co-operative Credit Society*, A.I.A.1926 Lah. 547(1)=8 Lah.L.J 310= 97 Ind.Cas. 288=27 P.L.R. 706, the court observed: "It was held by the Calcutta High Court in *Gladstone Wyllie* v. *Joosub Peer*, A.I.R. 1924 Cal. 117 that inasmuch as under S. 15 of the Indian Arbitration Act an award when filed is enforceable as a decree (just as in the case under the Co-operative Societies Act) all the provisions of the Civil Procedure Code applicable to the execution of decrees applied to an award so filed. The same view was taken by this Court, in *Pokhardas* v. *Radhakissin*, A.I.R. 1924 Lah. 544." Under S. 17 after a judgment in terms of an award a decree is to follow and no appeal shall lie from such decree except on the ground that it is in excess of or not otherwise in accordance with the award. *Vide section* 17 *supra and notes there-*

under. This section cannot apply to a reference to arbitration pending at the commencement of the Act. *Sadhu Singh* v. *Ramdeo Singh,* 210 Ind.Cas. 565=A.I.R. 1943 Pat. 381.

1528. And from no other.—The words "and from no other" used in this section, referred to orders passed under the express provisions of the Arbitration Act and not to orders passed under other provisions of law, like Code of Civil Procedure. Thus where an order is not an order passed under the Arbitration Act but is an order of rejection of plaint passed under the provisions of O. 7, R. 11, C. P. Code, section 39 of the Act does not apply. *Tharpal* v. *Arpun Singh,* 1 (1956) M.B.L.R. (Civ).) 518=1956 M.B.L.J. 1236=A.I.R. 1957 Madh.B. 22.

An order passed by the trial Judge extending time for making award is not appealable. Legislature has clearly contemplated that the question as to whether time should be extended should be left entirely to the discretion of the trial judge and the order that the trial judge may pass in the exercise of his discretion should be regarded as final. The consolidation of the application made by the respondent for extending time with the appellants' application for setting aside the award cannot give the appellant a right to challenge an order, which, under the law, is not appealable. *Shiv Omkar* v. *Bansidhar,* A.I.R. 1956 Bom. 459=58 Bom.L.R. 3=I.L.R. (1956) Bom. 100.

1529. Pleadings if part of award.—When pleadings in the arbitration are specifically referred to in the award, they are to be included by the court in the consideration whether there is any error apparent on the face of the award. *Union of India* v. *Bakshi Ram,* 59 Punj. L.R. 572=I.L.R. (1957) Punj. 1210.

1530. Order holding arbitration clause not applicable, whether appealable.—Where the court held that the arbitration clause did not apply to the dispute between the plaintiff and the defendants and directed that the suit should proceed : *Held* that no appeal lay. *State* v. *Abdul,* A.I.R. 1955 All. 673=1955 A.L.J. 624=1955 All, W.R. (H.C.) 516.

1531. Rejection of objection and decree in terms of award by same order.—Where the court does not pass a separate order rejecting the objection to the award under S. 30, but the court rejects the objections and passes a decree in terms of the award by one and the same order, an appeal is maintainable against the order. *Amarchand* v. *Mooshabhai,* A.I.R. 1955 Hyd. 213=I.L.R. (1954) Hyd. 677.

1532. Principle.—No appeal lies unless it is given by law. *Ripby* v. *Nahapiet,* 6 L.B.R. 88=5 Bur. L.T. 155=17 Ind.Cas. 902.

1533. Valuation of subject-matter of dispute.—Where the question for decision by the trial Court as well as by the High Court was whether the award should or should not be made a rule of court, the value of the entire property dealt with by the award and not the value of any share in the total assets is the criterion for judging the valuation of the suit and proposed appeal to Supreme Court. *Jagannath Prosad* v. *Hazari Lal,* I.L.R. (1952) 1 All. 878=A.I.R. 1953 All. 509.

1534. Forum of Appeal.—Under S. 39 read with S. 2(*c*) of the Arbitration Act, an appeal against an order of the Subordinate Judge, Class 1, directing an arbitration agreement to be filed, lies to the High Court and not to the court of the District Judge. *Narain Das* v. *Co-operative Society,* 54 P.L.R. 475=A.I.R. 1953 Punj. 49. Appeal to a Division

Bench against an order dismissing an application made on the original side of the High Court for appointment of Receiver of properties outside the jurisdiction cannot be justified by contending that s. 39(1) contemplates an appeal from one court to another and not an inter-court appeal. *Rebati Ranjan* v. *Suranjan,* A. I. R. 1963 Cal. 642.

1535. Order giving leave to revoke authority of arbitrator.—No appeal lies from an order giving leave to revoke the authority of an appointed arbitrator or from an order that the arbitration agreement should cease to have effect with respect to the difference referred. *Pannalal* v. *Lachmichand,* 56 C.W.N. 26.

1536. Second appeal.—No second appeal lies against an appellate order passed under the Arbitration Act. *Mam Raj* v. *Mt. Kishni,* 6 D.L.R. (Simla) 16=A.I.R. 1951 Simla 183; *Musafir* v. *Roysul Huq,* A.I.R. 1950 Ars. 114.

1537. Scope of sub-section (1).—There was some conflict of opinion whether or not the old section 104 of the Civil Procedure Code was applicable to orders passed under the Indian Arbitration Act, 1899. In *Nainsukh Das* v. *Gajanand,* 61 Ind.Cas. 269=19 A.L.J. 132=43 All. 349, the Allahabad High Court held that an order refusing to file an award made under the Arbitration Act is appealable under S. 104(1)(*f*) of the Civil Procedure Code. In *Kachari Mal Kalyan Mal* v. *Walli,* 85 Ind.Cas. 341=22 A.L.J. 1031=A.I.R. 1925 All. 154=47 All. 179; the court observed referring to section 89 of the Civil Procedure Code: "This would mean that unless the provisions of the Indian Arbitration Act, 1899 are contrary to any of the provisions of the Second Schedule that Schedule must apply to a reference made under the Arbitration Act of 1899. If that be the case it would follow that the provisions of S. 104 of the Civil Procedure Code will apply because the Schedule II is governed by that section." See also, *Sitaram* v. *Susil,* A.I.R. 1921 All. 219=63 Ind.Cas. 813=43 All. 553. But other High Courts, Chief Courts and Judicial Commissioners Courts took a contrary view. *Vide Jivans Mal* v. *Shahzadahand,* A.I.R. 1931 Lah. 66=130 Ind.Cas. 769; *Campbell & Co.* v. *Jeshraj,* 45 Cal. 520=46 Ind.Cas. 687; *Jainarain* v. *Narain Das,* A.I.R. 1922 Lah. 369=69 Ind.Cas. 583=3 Lah. 296; *Sanga Pye* v. *Kunclinnya,* A.I.R. 1924 Rang. 47=76 Ind.Cas. 525=1 Rang. 661; *Menghraj* v. *Langley,* A.I.R. 1923 Sind 38=81 Ind.Cas. 750=17 S.L.R. 195; *Regal Theatre* v. *Gurcharan,* A.I.R. 1937 Lah. 206. By the enactment of this section that conflict has been set at rest. Now an appeal is competent from all orders mentioned in sub-section (1) though there is no appeal from a decree based on the order. *Shankar Das* v. *Amirchand,* 88 Ind.Cas. 533=A.I.R. 1925 Lah. 321=7 I.L.J. 91. Where a court in refusing to grant extension of time to file an award also supersedes an arbitration and sets aside the reference, the order is appealable. *Chimman* v. *Brijmohan,* A.I.R. 1943 Oudh 117. Certain person made a private reference to arbitration. Subsequently they made an application to the court under para. 17 (1) of Schedule II, Civil Code, that the agreement to refer to arbitration should be filed in court. That application was dismissed but on appeal the agreement was ordered to be filed in court. There were three arbitrators. Two of them made one award and the third made a different award. The court found that the award of majority was bad and refused to make that award a decree of the court. *Held* that no appeal lay from the order of the court. *Mul Raj* v. *Tulsi Ram,* A.I.R. 1939 Lah. 542; but see *Ram Jawaya* v. *Devi Ditta,*

A.I.R. 1916 Lah. 89=34 Ind.Cas. 192=117 P.R. 1916. Where an application for reference to arbitration is made in a pending case, and the court, finding one of the defendants unwilling to have the case sent to arbitrators, rejects the application, despite the plaintiff's readiness to discharge the unwilling defendant from the array of parties, no appeal lies from such an order. *Janki Prasad* v. *Balmukund,* 27 Ind.Cas. 721. The Arbitration Act applies to Revenue Courts and as the U.P. Ten. Act makes no special provision for appeal against decrees or orders passed as a result of a reference to arbitration such appeals must be governed by the Arbitration Act and not by the provisions of Ss. 263 to 272 of the U. P. Act. Section 39 of the Act will govern such appeals. But an order revising an arbitration being one not mentioned in S. 39 of the Act will not be an appealable one. *Ram Khilawan* v. *Basanti,* 1949 R.D. 89 ; see also 1944 R.D. 325 ; 1945 R.D. 315. An order refusing to set aside an award on the ground that the application for filing objection to the validity of the award was out of time is an-appealable order within the meaning of this section. *Holuram* v. *Governor-General,* I.L.R. (1946) Kar, 459=A.I.R. 1947 Sind 145.

Section 14(2) can apply only to a case where the help of the court is sought for getting, the award into court by calling upon the arbitrators to do it. Where the only relief asked for is the passing of a decree in terms of the award filed in court the case falls under S. 17. No appeal is provided under S. 39(1) of the Act in case of dismissal of such application unless it comes under any of the exceptions, specified therein and the only remedy is a revision petition to the High Court under S. 115 of the C. P. Code. *Puppalla* v. *Nagidi,* 69 Mad.L.W. (Audh.) 163=A.I.R. 1957 Andh. Pra. 11.

1538. Clause (i)—Superseding an arbitration.—This clause corresponds to clause (a) sub-section (1) of section 104 of the Code of Civil Procedure, which ran as follows : "an order superseding an arbitration where the award has not been completed within the period allowed by the court." In this clause the words "where the award has not been completed within the period allowed by the court" have been repealed. So under the old law an order superseding an arbitration where the award has not been completed within the period allowed by the court was appealable. *Budh Singh* v. *Ramnath,* 17 Ind.Cas. 388=125 P.R. 1912=251 P.W.R. 1912. Where under para, 17 of the Second Schedule, Civil Procedure Code order was made filing an agreement, but on finding that arbitrators were not willing to act the court revoke the order of reference and dismissed the suit, the order was not appleable. *Hafiz Zahur* v. *Taslim-un-nissa,* A.I.R. 1926 All. 55=23 A.L.J. 891=89 Ind.Cas. 404=48 All. 27. In *Ram* v. *Ramzan,* 59 Ind.Cas. 676=38 P.L.R. 1921, the court observed : "It is clear that the order superseding the arbitration was not one which affected the decision of the case with reference to the merits of it, and I hold, therefore, that even if the order was wrong, the error could not be made a ground of objection in the appeal from the final decree." Section 19 enacts "where an award has become void under sub-section (3) of section 16 or has been set aside, the court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred." Now by this clause appeal is allowed in all cases of supersession of arbitration agreement. Clause (*a*) of sub-section (1) of section 104 refer to orders superseded and not to order refusing to do so. *Ma Nagwe* v. *U min Sui,* 163 Ind.Cas. 590=A.I.R. 1936 Rang. 240. No appeal lies from

an order allowing leave to revoke the authority of an appointed arbitrator under S. 5 of the Arbitration Act. The order is not an order superseding the arbitration such as could be appealed against under this section. *Bhaiyala* v. *Sawai Singhal,* I.L.R. (1944) Nag. 447=A.I.R. 1944 Nag. 152. An order superseding on the ground that there is no valid reference to arbitration is not an order under the Act as it does not come under Ss. 19, 25 or 30 of the Act; no appeal therefore lies from such an order. *Devi Das* v. *Mitha Shah,* 205 Ind.Cas. 319=A.I.R. 1943 Pesh. 8. Order passed under section 33 is not appealable. *Abdul Karim* v. *Maniram,* A.I.R. 1954 Pat. 6. No appeal lies to a Divisional Bench from the order of a single judge of High Court. A.I.R. 1953 Mad. 395. The judge sitting for hearing revision petition is not a different Court from a Division Bench hearing appeals. All the judges constitute members of the same court and both are parts of the same institution. Accordingly no appeal lies against an order passed by a single judge of the High Court under section 115 of the Civil Procedure Code whereby a reference to an arbitration has been superseded and a suit is directed to be tried. *Muthuram Chetiar, In re,* (1953) 1 M.L.J. 142=65 Mad.L.W. 9=A.I.R. 1953 Mad 395. Where a party in an application to the court prays that "steps may be taken under S. 14 (2) for having the award filed in court" and the court after going to the matter holds that there was no award at all, the order is appealable. Section 14 (2) requires the arbitrators, when so directed by the court, to file award and the court has to give notices to the parties of the filing of the award. This necessarily leads to further steps culminating either in a judgment or decree in accordance with the award under S. 17 or the supersession of the award under S. 19. Hence although only the filing of the award by the arbitrator is mentioned in the application, the order of the judge is one refusing the relief sought by the applicants and can form the basis of an appeal if it comes within the operation of S. 39(1). *Jagadish* v. *Sundar,* A.I.R. 1949 Pat. 393.

An order refusing to file an award, as distinct from an order refusing to file an arbitration agreement, is not among the appealable orders. Hence no appeal lies from an order refusing to file an arbitration award under S. 14 (2). *Narayan* v. *Mohanlal,* A.I.R. 1951 Nag. 297.

1539. Clause (ii)—Award stated in the form of a special case.—This clause corresponds to clause (*b*) of sub-section (1) of section 104 of the Civil Procedure Code, 1908. The parties to a suit agree to refer their dispute relating to the properties in suit to the arbitration of two persons; and a chamber Judge's order was obtained. The two arbitrators differ on a question of law arising in the arbitration. The two arbitrators each expressed his opinion on the question and referred it for opinion to the High Court in the form of a special case under Civil Procedure Code, Schedule II, rule 11, and the Indian Arbitration Act, S. 10. It was decided by a chamber judge : *Held* no appeal lay, since the special case was in no sense an award. *Purshottumdas* v. *Ramgopal,* 12 Bom.L.R. 852=8 Ind.Cas. 171=35 Bom. 130. In the above case *Scott, C.J.* said : "It is conceded that if the arbitrators are merely stating a case for the opinion of the court before they have made an award no appeal lies, as has been decided, in England with reference to section 19 of the Arbitration Act of 1889, in *In re, Knight and Tabornacle Permanent Building Society,* (1892) 2 Q.B. 613 and *In re, Holland Steamship Company and Bristol Steam Navigation Company,* (1906) 93 L.T. 769. It is, however, contended that this special case is an award in the form of a special case which the arbitrators were competent to submit either under rule 11

of the 2nd Schedule of the Civil Procedure Code or section 10 of the Indian Arbitration Act, and that an appeal is expressly provided by section 104 of the Civil Procedure Code.

"With reference to the scope of section 10(*b*) of the Indian Arbitration Act, it is material to note that in the English Arbitration Act, upon which the Indian Arbitration Act was based, there are two sections providing for references to the court by arbitrators, namely section 7(*b*), which permits the arbitrators to state an award as to the whole or part thereof in the form of a special case for the opinion of the court, and section 19, which permits them to state, in form of a special case for the opinion of the court, any question of law arising in the course of reference. It appears to us, that the legislature in framing section 10(*b*) of the Indian Arbitration Act has deliberately followed the wording of section 19 of the English Act and in framing rule 11 of the 2nd Schedule of the Civil Procedure Code has followed the wording of section 7(*b*) of the English Act.

"According to the decision of the Court of Apfeal in England in *In re, Knight and Tabornacle Permanent Building Society, supra* and *In re Kirkleathan Local Board and Stochton & Middles Borough Water Board,* (1893) 1 Q.B. 375, an appeal lies from the opinion of the court expressed upon an award stated in the form of a special case, and that is provided for by S. 104 of the Civil Procedure Code.....

"Now, the special case discloses a difference of opinion between the arbitrators, and there has been no reference to any umpire.....The special case is in no sense an award.....There is, therefore, no award which can be adopted by the court by the mere expression of its opinion, and the case can only be, as it expressed to be in clause 14, a statement of question of law for the opinion of the court.

"We are of opinion that this is not a case which falls under rule 11 of the 2nd Schedule of the Civil Procedure Code ; but that it falls under section 10 of the Indian Arbitration Act in so far as it relates to the agreement which was not the subject of the courts' order of the 16th July 1909 ; and that, therefore no appeal lies."

1540. Clause (iii)—modifying or correcting an award.—The provision in this clause that an appeal shall lie from an order modifying or correcting an award, does not confer an unrestricted right of appeal ; and when an order has been made modifying an award, the validity of the whole award cannot be called in question in an appeal preferred against the order, but the appeal is allowed against the order only in so far as it modified the award. *Rajbans Sahay* v. *Soorja Lal,* 15 Ind.Cas. 519=17 C.W.N. 617 ; *Kalu* v. *Kahir,* 13 P.R. 1906=33 P.L.R.=45 P.W.R. 1906 ; *Tejpal Marwari* v. *Kedar Nath,* A.I.R. 1939 Pat. 598=(1939) P.W.N. 703=20 Pat.L.T. 700. The appeal must be limited to the modifications and corrections only and no other grounds can be urged in the appeal. *Kaikabad* v. *Khambata,* 124 Ind.Cas. 339=31 P.L.R. 668=A.I.R. 1930 Lah. 26 ; *Ghulam Jilani* v. *Muhammad Hassan,* 25 P.R. 1902 (P.C.) ; *Guranditta* v. *Pakkar Ram,* A.I.R. 1927 Lah. 362=8 Lah. 693 ; *Bansi Lal* v. *Gopal Lal,* A.I.R. 1933 Lah. 139=141 Ind. Cas. 72=34 P.L.R. 34. Where the appellant being misled by the only reported decision on the point preferred an appeal from a decree based on a modified award, it may be converted into an appeal from the order modifying the award. *Nilmoni* v. *Dakshineswar Pal,* 138 Ind.Cas. 848=36 C.W.N. 1069=A.I.R. 1932 Cal. 713.

1541. What amounts to correcting or modifying an award.—

Where the court directs the office to make necessary adjustment in the award as agreed to be the parties and an abjection is taken to the amendments made by the office, the order deciding the objection is not open to appeal and being an interlocutory order is not open to revision as well. *Ram Gopal* v. *Ram Shankar,* A.I.R. 1941 Oudh 598=1941 O.W.N. 1077=(1941) O.L.R. 695=196 Ind.Cas. 496. In the above case, the court observed : "The appellant contends that he is entitled to appeal under s. 104, Clause (*c*) which provides for an appeal from an order modifying or correcting an award. The order dated 15th November, 1937, it not in our opinion an order modifying or correcting an award. It is only an order deciding an objection made by the plaintiff to the amendment of the award made by the office. The order of the 12th July directing that necessary adjustment be made in the award might have been an order correcting or modifying an award had it been passed separately from the order directing that a decree be prepared in terms of the award." Where a decree is passed in terms of an award but costs are refused, the order in effect modifies the award of the arbitrator and is appealable but there is no right of Second appeal. *Mani Lal* v. *Sajjad Hussain,* 13 O.L.J. 144 =93 Ind.Cas. 272=A.I.R. 1926 Oudh 370. See also, *Ananta Ram* v. *Gurdit Mal,* 27 P.L.R. 541=8 Lah.L.J. 460=91 Ind.Cas. 336=7 Lah, 327 =A.I.R. 1926 Lah. 519.

1542. Clause (iv)—Filing or refusing to file an arbitration agreement.—This clause corresponds to clause (*d*) of sub-section (1) of section 104 of the Civil Procedure Code. The provisions of this sub-section are general and are not restricted to refusal to file an agreement on any particular grounds. Where the agreement was rejected on the preliminary question of jurisdiction, *held,* that the order was appealable. *Nihal Chand* v. *Jai Ram Das,* 132 Ind.Cas. 218=32 P.L.R. 464=A.I.R. 1931 Lah. 673. An order filing an agreement to arbitrate presented by certain parties in a suit and making an order of reference thereon is appealable under the old as well as under the new Code of Civil Procedure. *Venkatanchellam* v. *Runigiah,* 10 M.L.T. 248=(1911) M.W.N. 249=12 Ind.Cas. 372=36 Mad. 353. In the above case the court observed : "The learned vakil for the respondent took the preliminary objection that under the old Civil Procedure Code, no appeal lay against such an order and that, although the order was passed after the new Code came into force yet, inasmuch as the objection to file was presented under the old Code, section 104(*d*) of the new Code cannot be given retrospective effect. It is unnecessary to discuss the somewhat knotty point involved in the latter part of this contention, inasmuch as we are clearly of opinion that there was a right of appeal even under the old Code. This is laid down by their Lordships of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan,* 29 Cal. 167 (P.C.)=20 I.A. 51=25 P.R. 1902=4 Bom.L.R. 161=6 C.W.N. 226=12 M.L.J. 77, which has been followed by a Full Bench of this court in *Tallenpragodda* v. *Sarbaya,* 9 M.L.T. 251=21 M.L.J. 263=2 M.W.N. 151=9 Ind.Cas. 173 and also in *Thiruvengodathingar* v. *Vaidianathan Iyer,* 29 Mad. 303. This latter case deals with an order filing an award under section 525 of the old Code of Civil Procedure (paragraph 20 of Schedule II). But orders on such an application under section 523 (paragraph 17 of Schedule II) are dealt with on the same footing by the Privy Council in *Ghulam Khan* v. *Muhammad Hassan, supra* and the opinion is expressed that the order in each case is a decree. If a decree, it is indisputably appealable."

Where an application for reference to arbitration is made in a pending case and the court, finding one of the defendants unwilling to have the case sent to arbitrators, rejects the application, despite the plaintiff's readiness to discharge the unwilling defendant from the array of parties, no appeal lies from such an order of rejection. *Janki Prasad* v. *Balmakund*. 27 Ind.Cas. 721. In the above case the court observed : "The learned counsel for the appellant has tried to convince me that the order against which he is appealing is one falling under section 104, sub-section (1), clause (*d*), but that cannot be so. It seems to me perfectly clear that the order referred to in clause (*d*) is an order passed in proceedings taken under paragraph 17 of the Second Schedule to the Code of Civil Procedure, that is to say, a case *in which the parties having agreed out of court to submit a case to arbitration the court is asked to file the agreement*. Then again it is said that the order was one under section 104, sub-section 1, clause (*e*),but here again the appellants are met with the difficulty that a suit as is described in clause (*e*) pre-supposes that there has been an agreement to refer." Where an agreement was filed in court and after that the parties agreed to refer the matter to arbitration again and subsequently the arbitrators' award was set aside by the court on the ground of misconduct, no appeal is competent under this clause. *Shamsuddin* v. *Muhammad Hussain*, 68 P.W.R. 1916=33 Ind.Cas. 494. In a suit for determination of standard rent of premises referred to arbitrator a decree of court in terms of award has the effect of an order filing the award and is appealable, *Rewa Chand* v. *K. C. Kappor*, A.I.R. 1954 Ajmer. 9. An order of the court filing an arbitration agreement is appealable, and if by the time the appeal is instituted nothing practical has been done by the arbitrator and no award has been given the right to appeal is not affected by what happens subsequently. *Shiv Ram* v. *Rakha*, A.I.R. 1951 Pepsu. 45=6 D.L.R. (Pepsu.) 13.

1543. Clause (v)—Staying or refusing to stay legal proceedings where there is an arbitration agreement.—This clause corresponds to clause (*e*) of sub-section (1) of section 104 of the Civil Procedure Code. This clause relates to an order passed under s. 34 of the Arbitration Act, is complete in itself and is not affected by rules as to appeal laid down in the Code. *Punjab Marwari Chamber* v. *Ram Mal*, 132 Ind.Cas. 850= A.I.R. 1931 Lah. 644. See also, *Kacha* v. *Wali*, 22 A.L.J. 1031. Under this clause an appeal lies from an order granting or refusing stay of a suit, where there is an agreement to refer to arbitrator whether under Civil Procedure Code or under the Arbitration Act. *Kodumal* v. *Volkart Bros.*, 12 S.L.R. 34=48 Ind.Cas. 434. Where the court below did not approach the question of defendants' willingness for arbitration from the correct point of view, the High Court can interfere with the discretion exercised by the court. *Union of India* v. *Sri Nath*, 1957 B.L.J.R. 234=A.I.R. 1957 Pat 697. Where the discretion has been exercised by the trial court in a manner which cannot be considered to be arbitrary, the appellate court will not interfere with a decision which is neither injudicial nor otherwise improper, even where the appellate court might have come to a different conclusion. As regards the interpretation of the terms of an arbitration agreement, it is proper for the court to decide. *Union of India* v. *Narayan*, I.L.R. (1957) Punj. 1576=59 Punj. L.R. 413=A.I.R. 1958 Punj. 24 ; see also (1893) 1 Ch. 228 ; A.I.R. 1948 Cal. 257 ; (1913) A.C. 241. An arbitration agreement is to be construed according to its language and in the light of circumstances in which it is made to determine if the dispute is covered by it. *Punjab* v. *Maji*, 59

Punj. L.R. 567=A.I.R. 1957 Punj. 223; (1947) 2 All. E.R. 265; (1886) 84 L.T. 596.

The matter of stay is entirely within the discretion of the court, and if that discretion has been exercised in accordance with the well established principles governing such cases, there is no reason for the High Court to examine too nicely the reason given by its courts below in support of its order refusing to stay the suit. *Central* v. *Brijnath,* A.I.R. 1956 Nag. 61=I.L.R. (1955) Nag. 686=1956 Nag. L.J. 529=1956 M.P.L.J. 37 For further notes on this topic *vide* notes under section 34 under topics "Appeal" and "Court of appeal when can interfere," *supra.*

1544. Clause (vi) Setting aside or refusing to set aside an award.— This clause has been substituted for clause (vi) of sub-section (1) of section 104, under which an appeal lay against an order filing or refusing to file an award in an arbitration without the intervention of the court. An appeal was competent against an order filing an award in arbitration without the intervention of the court even after a decree is made upon the award. *Khetranath* v. *Ushabati,* 22 Ind.Cas. 391=18 C. W. N. 381. In that case the court observed : 'In two cases in this court, an appeal was *held* to lie against an order directing the award to be filed notwithstanding that a decree had been made in accordance with the award. See *Ganesh Narayan Singh* v. *Malida Koer,* 10 Ind.Cas. 450=13 C.L.J. 399 and the case of *Sabitri Debi* v. *Promoda Prosad Chatterjee,* 19 Ind. Cas. 941.....The decree based upon the award is no doubt final if it is in accordance with the award but the validity of the decree depend on the validity of the order directing the award to be filed, and if the latter is set aside the decree must be declared inoperative." See also, *Kesho Lal* v *Laxman,* A.I.R. 1940 Nag. 386=I.L.R. (1940) Nag. 659=(1940) N.L.J. 393; *Badri* v. *Ram,* 14 O.L.J. 481=A.I.R. 1931 Oudh 345; *Ramdas* v. *Ram sarup,* 119 Ind.Cas. 236=A.I.R. 1929 All. 799; *Mahomed* v. *Abdul,* 4 Pat. 670=A.I.R. 1925 Pat. 810; *Lachmi* v. *Sheo Nath,* 42 All. 185=18 A.L.J. 78=54 Ind.Cas. 443; *Hari Kumar* v. *Lakshmi Ram,* 35 Ind.Cas. 833=14 A.L.J. 481=38 All. 380; *Jagat Pande* v. *Sarwan Pande,* 47 All. 743=A.I.R. 1925 All. 404=23 A.L.J. 440=88 Ind.Cas. 76; *Soudamini* v. *Gopal Chandra,* 28 Ind.Cas. 557; *Ghulam* v. *Halima,* 21 Ind.Cas. 298=310 P.L.R. 1913=176 P.W.R. 1913; *Ramditti* v. *Amar Singh,* 10 Ind.Cas. 512=12 P.R. 1912. So under the repealed clause an appeal was competent against an order setting aside or refusing to set aside an award in an arbitration "without the intervention of the court." The words "without intervention of the court" in section 104(1) (*f*) of the Civil Procedure Code, refer only to those proceedings which are taken under paragraphs 20 and 21, and not to proceedings taken under paragraphs 17 to 19 of the 2nd Schedule to the Civil Procedure Code. Therefore a decree, passed in accordance with an award, as the result of proceeding under paragraphs 17 to 19 is not appealable. *Jagannath* v. *Nanak Chnd,* 16 Ind.Cas. 996. See also, *Thelamal* v. *Dhana Mal,* 60 Ind.Cas. 590. But there was a conflict of opinion whether an appeal lay against an order of refusal to file an award under the Indian Arbitration Act. In *G. P. Gunnis* v. *Amanmal Tulsidas,* 79 Ind.Cas. 920=A.I.R. 1925 Sind 218=5 S.L.R. 61, the Sind Judicial Commissioners Court *held* that no appeal lay against an order under the Arbitration Act, setting aside for refusing to set aside an award. See also, *Kewalram* v. *Donald,* 5 S.L.R. 61=10 Ind.Cas. 211; *Ghumanmal* v. *Doyal Kanji,* 1 S.L.R. 86; *Campbell* v. *Jeshraj,* 45 Cal. 502=46 Ind.Cas. 682; *Jainarain* v. *Narain-das,* A.I.R. 1922 Lah. 369=3 Lah. 296=69 Ind.Cas. 583; *Ripley* v.

Nahapat, 17 Ind.Cas. 902=6 L.B.R. 88=5 BurL.T. 155. But in the case of *Abdus Shakur* v. *Muhammad Yusuf,* 62 Ind.Cas. 426=43 All. 456, the High Court of Allahabad allowed an appeal from the District Judge of Cawnpore, refusing to file an award. See also, *Nain Sukh Das* v. *Gajanand,* 43 All. 348=A.I.R. 1921 All. 273=19 A.L.J. 132=61 Ind. Cas. 269; *Kachari Mal* v. *Wali Muhammad,* A.I.R. 1925 All. 154=22 A.L.J. 1031=85 Ind.Cas. 341. An order refusing to file an award on the ground that there was no award to file under para. 15 of Schedule II is not appealable. *Shidgonda* v. *Bhimgonda,* A.I.R. 1935 Bom. 78= 36 Bom.L.R. 1222=154 Ind.Cas 332. But order setting aside an award though not appealable can be taken as a ground in appeal if it amounts to a defect or inequality affecting the decision of a case. *Harbhajan* v. *Mewa Singh,* A.I.R. 1928 Lah. 753=110 Ind.Cas. 748. So an order of a court setting aside an award on the ground of its invalidity on account of misconduct of the arbitrators was appealable. *Ram Autar* v. *Deoki,* 29 Ind.Cas. 411=13 A.L.J. 653=37 All. 456. So it is clear that no direct appeal lay from an order setting aside an award or refusing to set aside an award. *Narpat Rai* v. *Debi Das,* 9 Ind.Cas 385; *Munshi* v. *Gulzar* 29 C.W.N. 795=95 Ind.Cas. 773; *Behari Lal* v. *Khan Chand,* 47 Ind. Cas. 171. The Civil Justice Committee in para, 22 of Chapter 12 of their report said: "It would appear that an order setting aside an award under paragraph 15 of the Second Schedule to the Code may result in unlimited litigation notwithstanding the provisions of section 104, sub-section (2) of the Code. The summary given below of proceedings which arose out of an order of the Munsif of Fatehpur in the Cawnpore Judgeship is well worth study. We are told that the properties involved are two shops worth about four to five hundred rupees. The litigation as will be seen arose from the circumstances that an arbitrator who had been given time till 30th January 1918 filed his award on the 31st. 'The correctness of the order setting aside his award as made out of time was canvassed on appeal from the Munsifs' decree in the suit. The case has taken seven years and is now before the High Court of Allahabad. The case is not uninstructive as regards some of the points discussed in the chapters of the report which deal directly with appeals'."

Under s. 39, while an appeal lies against an order refusing to set aside an award, no appeal lies against an order refusing to modify or correct an award, though an appeal does lie against an order modifying or correcting an award. It therefore follows the High Court cannot in appeal order refusing to set aside award, consider the point raised by the Appellant that the court below should have gone into the question whether the award should be modified or not. *Mahomed* v. *Subramanyam,* A.I.R. 1957 Mys. 78. Where in an appeal it is found that it is not maintainable in respect of a part, the appeal in respect of that part cannot be treated as revision. It is not appropriate to deal with a part of the matter as an appeal and another part on the footing that it comes under revision. *Ibid.*

There is a distinction between an appeal under s. 39 of the present Act against an order passed under s. 30 and an appeal against decree passed under s. 17 of the Act. Section 39 is a specific provision which provides for an appeal against certain orders of the court, one of which is an order refusing to set an award. The scheme of the Act provides that an appeal shall lie against the orders enumerated in s. 39 and from none others on the one hand, and that no appeal shall be against a decree which is made in accordance with an award. The grounds on

which an appeal is allowed against an order refusing to set aside an award are limited and the merits of the litigation between the parties cannot be raised. The provisions of section 17 merely state that where a court refuses to set aside the award it shall pronounce judgment in accordance with it with a decree following, and no appeal shall lie against such a decree. *Indian Minerals* v. *Northern India,* A.I.R. 1958 All. 692.

Held that the court's refusal to hold that the respondent had notice of passing of the award did not amount to setting aside the award, and that as the question whether a decree should be passed in terms of the award was pending adjudication before the lower court, it could not be said that there was any order by which the award had been set aside. The provisions of section 39(1) (vi) of the Act were not, therefore, attracted and no appeal lay from the order. *Balakrishna* v. *Karumutha,* (1956) 1 M.L.J. 293=A.I.R. 1956 Mad. 396. Order of refusal to set aside an award under consolidation of Holding Act is appealable. *Sarju Prosad* v. *Civil Judge,* 1959 A.L.J. 382=1959 All. W.R. (All) 352=A.I.R. 1959 All. 717. It is quite true that a ground of law, particularly one which goes to legal validity of the entire prodeedings, can be taken for the first time at any stage, but when a party has raised such a ground in the trial court and then deliberately abandoned it, he cannot be allowed to raise again before the court of appeal. *Prem Chand* v. *Fort Gloster,* A.I.R. 1959 Cal. 620.

An appeal lies against an order refusing to set aside an *ex parte* decree passed in an application under Schedule II, para 20 of the Civil Procedure Code. The allowing of shch an appeal involves setting aside not only the *ex parte* decree but also the order filing the award *i.e.,* all the *ex parte* proceedings. *Selvarayan* v. *Amalorpavanadham,* A.I.R. 1928 Mad. 969 (2)=55 M.L.J. 262. Section 104(1) (*f*) contemplates only final order and an order remitting an award to the arbitrators with the direction that they should make a fresh award in compliance with the agreement of reference does not amount to refusal to file an award under s. 104(1) (*f*) and is not appealable. *Fazal Din* v. *Dial Singh,* A.I.R. 1926 Lah. 658=96 Ind.Cas. 779. An appeal is competent under s. 104 sub-section 1, clause (*f*) of the Civil Procedure Code, from an order filing an award, and the mere fact that no express order filing the award was made, does not take away the right of appeal as against the order. The right conferred by the legislature cannot be defeated by the absence of an express order for filing the award. *Shanker Das* v. *Amir Chand.* 7 Lah.L.J. 91=26 P.L.R. 466=88 Ind.Cas. 533=A.I.R. 1925 Lah. 321. Where an order directing an award to be filed and a decree in accordance with the award were not separately passed but the court disposed of the whole case by a single order, *held* that the appeal was in substance an appeal from an porder directing the award to be filed, and as such was competent. *Jagat Pande* v. *Saswan Pande,* 23 A.L.J. 440=88 Ind.Cas. 376=47 All. 743=A.I.R. 1925 All, 404. Order refusing to set aside an award on the ground that application for filing objections was out of time is appealable. *Holaram* v. *G. G. in Council* A.I.R. 1957 Sind 145. In the above case it was held that the knowledge of the filing of an award acquired in a way other than that laid down by s. 14 cannot be deemed to be proper service of notice of the award and statutory provisions relating to service of a notice of the filing of the award upon a party cannot be dispensed with because it has been established that a party had a notice of the filing of the award in some way or another, otherwise not in accordance with s. 14. Whatever may

be the reasons for the court not setting aside the award, the order still remained an order refusing to set aside the award, as such an appeal lay under s. 39(1)(vi). *Swastika* v. *Union of India,* 55 P.L.R. 137=A.I.R. 1953 Punj. 129; see also *Bholanath* v. *Chandrasekar,* A.I.R. 1950 Cal. 53; *Sheocharan v. Sanichar,* 26 Pat. 115; *Khetranath* v. *Ushabala,* 18 C.W.N. 381; *Trailokya* v. *Sukumar,* 44 C.W.N. 1934; *Mofizuddin* v. *Alimuddin,* A.I.R. 1950 Ass. 191. An appeal against a decree passed in a suit for enforcement of an award is maintainable under S. 39(1) (vi) of this Act, where in the defence filed in the suit by a petition of objection the defendant expressly made a prayer that the award be set aside. On the face of that petition it cannot be said that there was no prayer in the suit for setting aside of the award and in that view of the matter the court's decree overruling the defendant's objection and decreeing the plaintiffs' suit is substantially one refusing to set aside an award. *Hind Constructions* v. *Dwarka Nath.* 55 C.W.N. 248; An order passed by the High Court in appeal rejecting the defendant's objection to the award and making the award a rule of the Court and directing a decree to be prepared in accordance with the award is an order which amounts to one refusing to set aside the award and is as such appealable under s. 39(1) (vi). *Kanpur Nagar Mahapalika* v. *Narain Das,* 1963 All. L.J. 179=A.I.R. 1964 All. 25 Where an application under S. 14(2) is dismissed by the court on the ground that the award alleged to have been made was not true and that there was no arbitration as alleged, the order is an order setting aside the award, as one refusing to act on the award, or as one refusing the relief sought by the applicant, and hence an appeal lies against such order, under section 39(i) or (vi) of the Act. *Jagdish* v. *Sunder,* 27 Pat. 86=A.I.R. 1949 Pat. 393.

The award was filed in trial court under s. 14 and objections are invalid. Objections are filed and the court adjudicated on those objections and dismissed the application for filing the award. The order amounts to an order setting aside the award and hence appealable. *Nawab Syed* v. *Nawab Askari,* A.I.R. 1959 All. 777=I.L.R. (1959) 2 All. 328. Where no party filed objection praying for the setting aside of the award, no question of refusing to set aside can arise and therefore no appeal is maintainable under s. 39 (i)(vi) which allows an appeal against an order refusing to set aside an award, against the order of the court ordering the award to be filed. *Nilkanta* v. *Kasinath,* A.I.R. 1962 S.C. 666=(1962) 1 S.C.J. 88; See also, *Sitaram* v. *Balkaram,* 1963 M.P.L.J. (Notes) 23 *Union of India* v. *Pratap,* A.I.R. 1964 Asam 141.

1545. Ss. 17 and 39—Order remitting an award.—There is no right of appeal against the order of the court remitting the award to the arbitrator. The court has jurisdiction to remit an award, only on the one of grounds specified in S. 16 and under no other ground. Where, therefore the court remits an award on any ground other than those specified in S. 16 such an order will be without jurisdiction. In such a case one of the grounds on which a revised award can sought to be set aside is that it was the result of an invalid order of remittal. And on this view an an appeal from the decree based on the revised award is competent. *R. T. Pernnal* v. *John,* 72 Mad.L.W. 609=I.L.R. (1959) Mad. 859=A.I.R. 1960 Mad. 43; *Hiralal* v. *Kashrimal* 1959 M.P.L.J. (Notes) 23; see the above first noted case in connection with Ss. 16 and 17, where it has been held that the procedure to be followed when revised award is received by court after it was remitted under S. 16 is not clear. See also *Abdul* v. *Besant,* A.I.R. 1955 All. 678=1955 All.L.J. 504. An order dismissing an application for filing an award under s. 17 as being not maintainable is not one covered

by any one of six clauses. *Nawabzada* v. *Nawabzada,* I.L.R. (1963) 2 All. 289=A.I.R. 1964 All.185=1963 All.L.J. 581.

1546. Ss. 39, 14—Order held amounted to seeting aside an award and is appealable.—An application under S. 14 was filed in the trial court. The award was filed in court as a result of that application, and objection to the said award was invited. Thereafter one of the parties filed objections another court adjudicated on those objections after going into the matter. The court finally dismissed the application for filing the award. *Held,* that the order of the trial court amounted to an order setting aside the award and would therefore be appealable. *Nawab* v. *Nawab,* A.I.R. 1959 All. 777.

1547. Ré-eonstruction—lost record.—There is an inherent power in every court to reconstruct its own records, which are lost or destroyed by accident. An award of arbitrator which is filed under S. 14, into court is a part of court record. So also the copy of the award which had been accepted by the courts below as being a true copy of the award was ordered to be treated as the original itself by reason of the reconstruction. The refusal to reconstruct the award and pass a decree in terms thereof amount to setting aside an award and an appeal lies therefrom. *Kattam* v. *Irrinki,* (1957) 2 Andhra W.R. 280.

1548. Objections not taken in trial court cannot be taken.—An appeal from the order of the trial disallowing objections taken to the validity of the award must ordinarily be confined to such objections as has been taken in that court and to no other. The position might be different if the appeal is preferred from the whole decree passed in terms of the award. *Madan Lal* v. *Nabi Baksh,* A.I.R. 1947 Lah. 177.

1549. Failure to appeal against order rejecting application—'Res judicata'.—Where an application raising objections to an award and praying that it may be set aside is rejected, the order is in effect a refusal to set aside the award and is appealable under clause (*vi*) of this section. The consequence of not appealing against such an order would be that it would operate as *res judicata* and bar a revision against the decree in terms of that award. *Beni Madho* v. *Ram Autar,* (1945) A.W.R. Rev. 203=1945 R.D. 425.

1550. Powers of court of appeal.—In an appeal against it order refusing to set aside an award and passing a decree in terms of the award, the decision of the arbitrators given on points referred to him cannot be reviewed at large and the appellate court cannot construct an award for the arbitrators. All that it has to see whether an award can be challenged on the ground of excess of jurisdiction, incompleteness or misconduct as understood in law. *Choutmal* v. *Ram Chandra,* I.L.R. (1955) Nag. 126=A.I.R. 1955 Nag. 126. In an appeal against an order directing an award to be filed, the court of appeal would be acting with material irregularity if it acted as a court of appeal from the arbitrator. The powers of such court or of the court first instance are limited having been confined to the grounds mentioned in para. 14 or para. 15 and where there is no suggestion that any of the grounds mentioned in para. 14 apply, the first court shall order award to be filed, and the court of appeal cannot interfere with such an order. *Tulsiram* v. *Jhanaklal,* A.I.R. 1936 Nag. 197=19 N.L.J. 151=I.L.R. (1936) Nag. 44=165 Ind.Cas. 556. See also, *Shiam Lal* v. *Purshottom Das,* A.I.R. 1920 All. 45=58 Ind.Cas. 585=42 All. 277=18 A.L.J. 241; *Adams* v. *Great North of Scotland Ry. Co.,* (1891) A.C. 31. The effect of section 104(1)(f) the Civil Procedure Code is to give a right of appeal against the decision of the court whether

the award should be filed or not. A court dealing with an application to file an award has no power to go into the merits of the decision contained in the award. It is clearly limited to the three questions whether there has been a reference whether there has been an award and whether any ground such as is mentioned in paragraph 14 and 15 of the Second Schedule to the Civil Procedure Code, has been proved. *Maung Tun* v. *Maung Po*, 76 Ind.Cas. 504=1 Rang. 265=A.I.R. 1923 Rang. 199. See also, *Abdulla* v. *Bahvan*, A.I.R. 1935 Pesh. 69=155 Ind. Cas. 1022. No court is entitled to add to the grounds of remittal set forth in S 16 and where the order of remittal is made on grounds not provided therein, the remittal must accordingly be *held* to be invalid. Since there is no appeal against that order, because none is provided for by the statute, it is competent for the aggrieved party to plead irregularity of the remittal in an appeal against the order of the court upholding the award. *Vengu Ayyar* v. *Yegyam Ayyar*, A.I.R. 1951 Mad. 414.

1551. S. 39(2)—Appeal to Supreme Court—Application for leave under.—Section 39 cannot confer any jurisdiction on the Supreme Court which that court does not possess under the Consitution itself. The section mentions His Majesty in Council and it has now been adopted so as to substitute a reference to the Supreme Court. But the section has only been "adopted," which means it has been brought into conformity with the Constitution. The Indian Parliament has not yet legislated and conferred some further jurisdiction on the Supreme Court. Therefore, the petition purporting to proceed under the provisions of the Arbitration Act for a certificate of High Court for leave to appeal to Supreme Court is misconceived. *Union of India* v. *Natend*, 95 C.L.J. 160=A.I.R. 1955 Cal. 257.

1552. Sub-section (2).—This sub-section corresponds to sub-section (2) of section 104 of the Civil Procedure Code. This section refers to appeals to High Courts in British India and does not forbid appeals to His Majesty in Council when they comply with the conditions laid down in Ss. 109 and 110 of the Civil Procedure Code. *Mahabir Singh* v. *Lala Ambika*, 148 Ind.Cas. 1202=11 O.W.N. 577=A.I.R. 1934 Oudh 291. A decree is in accordance with an award within the meaning of para. 16, Schedule II, if it is in accordance with the award as modified under para. 12, though it may not be in accordance with the original award. Para. 16 lays down that the court shall proceed to pronounce judgment according to the award. When an award is modified under para. 12, the only award according to which the judgment can be pronounced is the modified award. No second appeal therefore lies from the decree on such award there being no decree in excess of the award. *Mazhar Ali* v. *Fateh Din*, A.I.R. 1930 Lah. 219=120 Ind.Cas. 673=31 P.L.R. 337. The prohibition against a second appeal from an order filing or refusing to file an award contained in S. 104(2), Civil Procedure Code is not removed even though the validity of the reference to arbitration itself is challenged. *Trailakya Nath* v. *Sukumar*, 44 C.W.N. 1034. No appeal lies against the appellate order of the District Judge dismissing an application for filing an award. *Brij Lal* v. *Rosan Lal*, A.I.R. 1929 Lah. 507. No second appeal is competent against appellate order passed under clause (*f*) section 104 (1). *Mumtaz Ali* v. *Allah Banda*, 92 Ind.Cas. 600. The decision of the court of first instance under sub-section (1) is only an order and not a decree. So where an appeal was preferred under S. (1)(*f*), a further appeal was prohibited by the terms of S. 104, subsection (2). *Ahmed Din* v. *Atlas Trading* 66 P.R. 1915=146 P.W.R. 1915. See also, *Makyang* v. *Shwe Thin*, 7 L.B.R. 277=25 Ind.Cas. 7=8 Bur.L.T. 44.

The appellate order of a District Judge upholding the modification of an award is final and not appealable. *Nanak Chand* v. *Ramkishen,* A.I.R. 1933 Lah. 139=141 Ind.Cas. 72=34 P.L.R. 34. Sub-section (2) was intended to take away any right of appeal which was given under any other enactment and therefore the right of appeal given by cl. 15 of the Letters Patent is by necessary implication taken away by S. 39 (2) of the Arbitration Act. After the enactment of S. 39 (2) there is consequently no further right of appeal under the Letters Patent when a single judge of the High Court disposes an appeal under 39 (1) of the Arbitration Act. *Madhavdas* v. *Vithal Das,* I.L.R. (1952) Bom. 570= 54 Bom.L.R. 94=A.I.R. 1952 Bom. 229; but see *Banwari Lal* v. *Board of Trustees,* A.I.R. 1949 East Punjab 165; *Hanuman Chander* v. *Jaisaram,* 19 P.L.R. 230=A.I.R. 1948 Lah. 64. S. 39 is a specific provision which provides for an appeal against certain orders of the court, including an order setting aside an award, and cl. (2) provides that no second appeal lies from an order passed in appeal under this section. There is a clear distinction between an appeal from an order as mentioned in S. 39, and an appeal against a decree as mentioned in S. 17 of the Act. Where the first court found that the award was not invalid and pronounced judgment in terms of the award, but on appeal the award was *held* invalid, no second appeal would lie against such an appellate order. *Sheocharan* v. *Sanichoo,* 26 Pat. 11=A.I.R. 1948 Pat. 207; see also *Mamraj* v. *Mt. Kishni,* 6 D.L.R. (Simla) 16=A.I.R. 1951 Sim. 183.

Where the court neglects to pass an explicit order filing the award and passes a decree upon the award an aggrieved party can only appeal from the whole decision. Such an appeal must be treated as an appeal from an implied order filing the award even though a decree upon the award has already been passed. The appellate order in such a case falls within the purview of S. 104(2) C.P.C. *Trailakhya* v. *Sukumar,* A.I.R. 1941 Cal. 202=44 C.W.N. 1034=I.L.R. (1940) 2 Cal. 551=194 Ind.Cas. 610. No appeal lies from a decree made in accordance with an award by a Munsif on the ground that the reference to arbitration was without jurisdiction; nor does a second appeal lie to the High Court in such a case. Parties are entitled to ask the High Court to interfere under S. 115 C. P. Code, and set aside an order made by an appellate court without jurisdiction. *Achiram* v. *Babur Ali,* I.L.R. (1944) I Cal. 619=A.I.R. 1945 Cal. 156=79 C.L.J. 123. In delivering the judgment in the above case the court observed: "The contention of the appellant is that the appeal in the lower appellate court was incompetent. There has been a great divergence of judicial opinion on the question whether in such a case a second appeal lies.....My own view is, as I have stated previously on many occasions that no appeal lies. I find it difficult to persuade myself that a second appeal can be created by something done in a District Court without jurisdiction of any kind. One of the main reasons for the enactment of S. 115 of the Code is to deal with matter of his kind. Parties are entitled to ask the court to interfere under S. 115 and set aside an order made by an appellate court without jurisdiction.

"The question there is whether the appeal in the lower appellate court was competent. Unfortunately on this point there has been a conflict of judicial opinion. The main objection to the decree of the Munsif was the reference to arbitration was without jurisdiction. The conflicting views are illustrated in the judgments given by *Mukerji* and *Mitra, JJ.* in *Golemer Bibi* v. *Abdus Samed,* A.I.R. 1931 Cal. 211=58 Cal. 628=130 Ind.Cas. 209. In view of the opinion of the other High

Courts, the weight of authority is certainly in favour of the opinion expressed by *Mukherji J.* It appeals to me to be set at rest by the decision of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan,* 29 Cal. 167=29 I.A. 51.....Their Lordships pointed out that it would be doing violence to the plain language and the obvious intention of the Code to hold that an appeal lies on other grounds. These observations apply with equal force as to the provisions of Sch. 2, para. 16. Now it is not enough for the petitioners in revision to show merely that the order of the lower appellate court was made without jurisdiction. They must go further and show that the plaintiff would have failed if, instead of filing an incompetent appeal, he had applied to this court in revision under S. 115."

An order by single Judge of the High Court in an appeal from a decision or order of a Judge of the City Civil Court in a matter falling under the Arbitration Act is not open to appeal under cl. 15 of the Letters Patent (Madras). in view of S. 39 (2) of the Arbitration Act. Though cl. 15 of the Letters Patent, if it stood alone would allow an appeal, in view of cl. 44 of the Letters Patent. S. 39 of the Arbitration Act must prevail over clause 15 of the Letters Patent and hence no appeal lies. *Krishnamurtty* v. *Ethirajalu,* I.L.R. (1945) Mad. 564=1945 M.W.N. 164 (2)=A.I.R. 1945 Mad. (184)=(1945) 1 M.L.J. 54.

1553. Cost of appeal.—A person who was a party to arbitration even if successful in appeal in challenging the reference as being without jurisdiction is generally deprived of costs. *Sukkal Sarder* v. *Issurdas,* A.I.R. 1942 Cal. 230=I.L.R. (1941) 2 Cal. 266=199 Ind.Cas. 740.

1554. Letters patent appeal—old law.—This section does not control the provisions of the Letters Patent. *Puramasivam* v. *Ramaswami,* 56 Mad. 915=145 Ind.Cas. 449=(1933) M.W.N. 850=38 L.W. 96=A.I.R. 1933 Mad. 570=65 M.L.J. 22 (F.B.). but see *Radha Krishnamurti* v. *Ethirajulu,* I.L.R. (1945) Mad. 564=A.I.R. 1945 Mad. 184=(1945) 1 M.L.J. 54. The appeal under clause (15), of the Letters Patent is a special jurisdiction within the meaning of S. 4, Civil Procedure Code, and cannot be affected by S. 104, Civil Procedure Code ; a judge of the High Court is not a court sub-ordinate to the High Court within the meaning of S. 104, Civil Procedure Code. *Vaman Ravji* v. *Nagesh Vishnu,* I.L.R. (1940) Bom. 426=189 Ind.Cas. 656=42 Bom.L.R. 428=A.I.R. 1940 Bom. 216. See also, *Ruldu Singh* v. *Sanwal Singh,* 3 Lah. 188=67 Ind.Cas. 388 ; *Toolsee Money* v. *Sudevi,* 26 Cal. 361 ; *Sobha Pathi* v. *Narayanasami,* 25 Mad. 555=11 M.L.J. 346 ; *Secretary of State* v. *Jehangir,* 4 Bom.LR.. 342. The right of appeal conferred by cl. 10 of the Letters Patent (Punjab) has not been taken away by S. 39 of the Arbitration Act. *Mohindra* v. *G.-G. in Council,* 56 Punj.L.R. 199=A.I.R. 1954 Punj. 24. *reversed in Union of India* v. *Mohendra Supply Co.* (1962) 2 S.C.J. 179= A.I.R. 1962 S.C. 256, when it was held that s. 39(2) expressly prohibits a 'second appeal' from an order passed in appeal under s. 39(1) (including the letters patent appeal) except an appeal to the Supreme Court. See also, A.I.R. 1962 Mad. 52 (F.B.) which was overruled.

1555. Decree based on award—second appeal.—Section 17 deals with the finality of the clause based on award. It no doubt provides for an appeal where the decree is in excess of or not otherwise in accordance with the award but it does not contemplate a second appeal. Chapter VI, Arbitration Act which deals with appeals also forbids a second appeal to the High Court. Section 1 (a) Arbitration does not mean that apart from the provisions of that Act appeal will lie under

Ss. 96, 100 or104, C. P. Code. *Gopal* v. *Sundari,* A.I.R. 1955 Pat. 277 = 1955 B.L.J.R. 52.

1556. Appeal to Privy Council—Old Law.—Sub-section (2) refers to appeal to High Courts in British India and does not forbid appeals to His Majesty in Council when they comply with the conditions laid down in sections 109 and 110 of the Civil Procedure Code. *Mahabir* v. *Lal Ambika,* 148 Ind.Cas. 1202 = 11 O.W.N. 577 = A.I.R. 1934 Oudh 291 ; *Ranchod Das* v. *Ratanji,* 207 Ind.Cas. 400 = 45 Bom.L.R. 384 = A.I.R. 1943 Bom. 196. The provisions in sub-section (2) of section 104 deal with internal appeals within the limits of British India. The application to file an award may be made in the court of the subordinate Judge. If any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with S. 100, which limits second appeals from appellate decrees by District Judge. That section deals with decrees only while the decisions on arbitration questions are styled orders. There is nothing therefore in S. 104 to take away the general right of appealing to the crown given by S. 109. *Ram Lal* v. *Kisanchandra,* 51 Cal. 361 = 26 Bom.L.R. 586 = 22 A.L.J. 386 = 19 L.W. 549 = 20 N.L.R. 33 = 7 N.L.J. 62 51 I.A. 72 = 28 C.W.N, 997 = A,I,R, 1924 P,C, 95 = 46 M.L.J. 628.

1557. Revision.—No appeal is provided for against an order dismissing an application under S. 17 of the Arbitration Act and as such only a revision would lie to the High Court. Even the existence of a right of appeal does not take away the jurisdiction of the High Court to correct orders under S. 115, C. P. Code though he would hesitate to do so normally. *Poppalla* v. *Nagadi,* 69 Mad.L.W. (Andhra) 163 = A.I.R. 1957 Andhra 11. Where no appeal lies, appeal can be treated as revision if there are proper grounds. A.I.R. 1957 Ker. 18. Section 39 does not ban revision by High Court under S. 115, C. P. Code. *Baleka* v. *Kedar,* A.I.R. 1956 All. 372 ; see also A.I.R. 1945 All. 146 ; A.I.R, 1932 All, 65 (F.B.).

Where a party to an award who was given an opportunity to file objections to the award did not avail himself of the opportunity and a decree was passed in terms of the award it was held that the party was debarred from subsequently challenging the award in revision unless it could be shown that the court had acted without jurisdiction in passing a decree in terms of the award. *Jivanand* v. *Ram Kishan,* A.I.R. 1958 Him.Pra. 1. Where in a suit for determining standard rent for premises is referred to arbitration a decree of court in terms of an award has the effect of an order filing the award and is appealable ; as such revision against the judgment and decree is incompetent. *Rewa Chand* v. *Kapoor,* 1953 A.M.L.J. 134 = A.I.R. 1954 Ajmer 9(2). As regards revision against dismissal of application for filing award, *vide* A.I.R. 1954 Punj. 606.

Where the court refused to extend time under section 28 on the ground that Arbitrators having allowed withdrawal of reference had lost seisin of the matter, the order would be set aside in revision as the court had wrongly exercised its discretion. *R. N. Rice Mills* v. *State,* I.L.R. (1958) Cut. 348 = A.I.R. 1959 Orissa. An order refusing to set aside an award being expressly appealable under section 39(1), a revision petition against that order is incompetent. *Hiralal* v. *Keshrimal,* 1959 M.P.L.J. (Notes) 35. Where it is open to a party to appeal against an order a revision

does not lie. An application in revision cannot be treated as an appeal where an appeal filed on the date which the application in revision bears would be beyond time. *Jageshar Singha* v. *Thakur Jawala,* 1 O.W.N. 802. It is within the competence of the High Court to entertain a petition in revision against the order dismissing an application for filing an award and passing a decree thereon. *Shamji Mal* v. *Sefton,* A.I.R. 1954 Punj. 190; see also *Sashi Kanta* v. *Nasiapad,* A.I.R. 1936 Cal. 136=163 Ind.Cas. 849; *Jiban Prosad* v. *Secy, of State,* A.I.R. 1935 Pat. 86=154 Ind.Cas. 103. Objection to the validity of award not taken before Appellate Court cannot be raised in revision under section 115 C. P. Code. *Hari Shanker* v. *Amraoti,* 46 P.L.R. 106=A.I.R, 1944 Lah. 280. Where a court acts in contravention of this salutary principle, it acts with material irregularity in the exercise of its jurisdiction or powers under S. 34 and interference in revision would be justified. There is nothing in section 39 or S. 41 to deprive the High Court of the powers conferred by S. 115 C. P. Code. *Charan Das* v. *Gur Saran,* I.L.R. (1945) All. 162=1945 A.L.J. 77=A.I.R. 1945 All. 146; see also *British India* v. *Shanti,* A.I.R. 1935 All. 310=57 All. 816; *Achisan* v. *Babar Ali,* A.I.R. 1945 Cal. 156; *Tirath Singh* v. *Isher Singh,* 49 P.L.R. 129=A.I.R. 1948 Lah. 50; *Tropical Insurance* v. *Superintendent,* A.I.R. 1942 Lth. 267=I.L.R. (1943) Lah. 601=203 Ind.Cas. 395; *Abdul Aziz* v. *Punjab Government,* A.I.R. 1942 Lah. 186=I.L.R. (1943) Lah. 677=201 Ind.Cas. 739; *Bengal Theatres* v. *Gurcharan,* A.I.R. 1937 Lah. 206=39 P.L.R. 423=172 Ind.Cas. 432; *Indo Persian Trading Firm Parmanand,* A.I.R. 1936 Sind 205=166 Ind.Cas. 541.

It was held by the Punjab Chief Court in *Ram Saran Das* v. *Muhd. Nawaj Khan,* 23 Ind.Cas. 950=114 P.L.R. 1914 and *Thakurdas* v. *Ram Das,* 49 Ind.Cas. 979=31 P.W.R. 1919 that a decree passed on the basis of a private award is not open to revision. But see *Khanhaialal* v. *Naran Singh,* 31 Ind.Cas. 700=28 P.R. 1916.

1558. Limitation Act, Art. 182 (2) (new Art. 136)—Arbitration Act Ss. 17, 39.—The expression "where there has been no appeal" must be read with the words in column 1 of Act 182 (Art, 136 of the Limitation Act, 1963) viz. "for the execution of a decree or order of any civil court." An appeal has to be made against the order or decree sought to be executed to give a fresh start of limitation under cl (2) in col. 3 of Art. 182. An appeal against a decree which imperils the decree sought to be executed would not furnish a fresh start of limitation. An appeal was filed against dismissal of objections to an award but no appeal was filed against the decree passed on award. The appeal was dismissed for default. The decree-holder took out execution of the decree. *Held,* that limitation began from the date of the decree and not from the date when the appeal against the dismissal of objections against award was dismissed for default. *Kripal* v. *Harkishan,* A.I.R. 195(Punj. 273. But See now Art. 136. Column 2 and 3 of the Limitation Art 1963.

1559. Section 39, 46 and 47.—Section 12(6) of U.P. Construction of Holdings Act is no bar to an appeal because the decision of the arbitrator is final under sub-section (6) of S. 12 only after the award has been made a rule of the court. Therefore no writ application lies. *Sayed* v. *Temporary,* 1959 A.L.J. 47=1959 330.

CHAPTER VII

MISCELLANEOUS

Small Causes Court not to have jurisdiction over arbitrations save arbitrations in suits before it.

40. *A Small Causes Court shall have no jurisdiction over any arbitration proceedings or over any application arising thereout save an application made under section 21.*

1560. N.B.—This section is new. It has the effect of providing that Small Causes Courts shall not deal with arbitrations other than arbitration in suits before it.—*Notes on Clauses.*

1561. Jurisdiction of Small Causes Court.—Where a suit is brought on the Small Causes side, the trial court has no jurisdiction to give a decree on the basis of an award. *Keshri Mal* v. *Ganesh Das,* A.I.R. 1951 Ajmer. 59(1). But where a suit is pending before a Small Causes Court, the Small Causes Court is the authority to whom application for stay under section 34 of the Arbitration Act has to be made, and such authority may pass an order staying the suit. The Small Causes Court is not deprived of the jurisdiction to pass the stay order by the provisions of S. 40 of the Act. Strictly interpreted S. 40 only means that the Small Causes Court shall have no jurisdiction over the proceedings of the arbitration which have started nor will it have any jurisdiction for any application which may arise out of these proceedings. The stage at which an application for stay is made and stay order is passed is not any part of the arbitration proceedings. Exercising jurisdiction to pass stay order is not exercising jurisdiction over arbitration proceedings. *Basanti Cotton* v. *Dhingra Bros.,* A.I.R. 1949 Cal. 684. A Small Causes Court has jurisdiction to entertain a suit to enforce an award. The jurisdiction of the Small Causes Court to entertain such a suit is not barred by this section. *Nanhelal* v. *Singhai,* A.I.R. 1944 Nag. 24=I.L.R. (1944) Nag. 340=210 Ind.Cas. 473. The decision of arbitrators rendered outside court during the pendency of a Small Cause suit, cannot strictly be likened to a decision of a Court. *Sayyaparaju* v. *Nekkante,* A.I.R. 1951 Mad. 525. Where the matters fall under S. 14 read with S. 31 of the Arbitration Act, the jurisdiction of the Small Causes Court is barred under this section read with section 2(c) 1959 M.P.L.J. (Notes) 107. The order of showing irregularity was on the Chief Engineer. *Union of Indian* v. *Joginer Singha,* I.L.R. (1961) Cal. 544.

Procedure and powers of Court.

41. *Subject to the provisions of this Act and of rules made thereunder—*

(a) the provisions of the Code of Civil Procedure, 1908. shall apply to all proceedings before the Court, and to all appeals, under this Act, and*

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court :

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

1562. N.B.—Section 41 confers generally the same powers as the courts enjoy under the Code of Civil Procedure and with the Schedule adds certain special powers in relation to arbitration on the lines of section 8(1) of the 1934 Act of Parliament.—*Notes on Clauses.* "We have substituted the expression 'arbitration proceedings' for the work 'a reference' in order to cover the various kinds of proceedings which the Bill contemplates."—*Report of the Select Committee.* For powers of Court *vide* Second Schedule *infra.*

1563. Scope.—This section relates to matters, subsequent to an application to the Court to file an agreement. The proper interpretation of this section is that provisions as to notice under s. 80 C. P. Code, which section must be strictly construed, do not apply to the application to file an agreement in court under s. 20 of the Arbitration Act. *Ram Chand* v. *G. G. in Council,* A.I.R. 1947 Sind 147. The operative part of this section is prefaced by the words "subject to the provisions of this Act" and therefore the Code of Civil Procedure is applicable only subject to the provisions of ss. 23(2) and 32. As those provisions forbid interference and award save as provided for in the Act, to that extent the Code of Civil Procedure is excluded. The scope of the section is thus restricted to attracting the procedural rules of the Code to proceedings before the court under the Arbitration Act. This section attracts the Code of Civil Procedure to proceedings under the Act which are very different from a suit. Hence this section cannot make applicable to such proceedings that provisions of Order 23, Rule 3 which in terms are inapplicable to anything but a suit. Nor can s. 141, C. P. Code make Order 23, Rule 3 applicable since a proceeding arising of objections to an award is not proceeding original in character. *Prafulla* v. *Panchanan,* A.I.R. 1946–427 ; but see *Attar Singh* v. *Bishan Singh,* A.I.R. 1945 Pesh. 41. Under s. 41 the court can make an order for *interim* injunction although an arbitration proceeding is not actually pending under this section and with the fourth item in the Second Schedule, this power is conferred on the court "for the purpose of or in relation to arbitration proceedings." It is not in terms of "pending arbitration proceedings." Further where an application for injunction has been made in a suit which is pending and which has not been stayed, the court has power, apart from s. 41, to make an order for interim injunction in a pending suit under the C. P. C. as well as in the exercise of its inherent powers. Even if the court thinks fit to exercise its discretion by granting a stay of proceedings that fact does not oust the jurisdiction of the court to give auxiliary relief ; *e.g.,* by appointment of a receiver or by granting an injunction. The court can in its discretion grant such relief and then stay the action as regards all other matters. *Chedilal* v. *Brit-Over Ltd.,* 52 C.W.N. 45. Clause (*a*) of s. 41 makes the provisions of the Code of Civil Procedure applicable to all proceedings before the court and to all appeals, except where such application is expressly excluded by that Act or by any of the Rules framed by the High Court under s. 44. The words "subject to the provisions of this Act" therein mean that the Code of Civil Procedure is applicable only subject to provisions of s. 23(2) and s. 32. These provisions forbid interference with the reference and award, save as provided for in the Act and to that extent only the Code of Civil Procedure is excluded. The provisions of Order 6, R. 17. C. P. Code are fully

available to the Civil Judge and the Civil Judge can at any stage before reference is made to the arbitrator, allow either party to attest or amend his pleadings in such manner and on such terms as are just and necessary for the purpose of determining the real questions in controverty between the parties. *Indian Minerals* v. *Northern Indian,* A.I.R. 1958 All. 692. Service of notice on party's counsel is sufficient. *Ram* v. *Peary,* A.I.R. 1957 All. 265=1957 All, W.P. (H.C,) 177(2).

1564. Powers of Court.—Powers of court where application for stay was made by defendants and stay order was granted but plaintiff was allowed full costs of suits, *held* the plaintiff should not be granted full cost of the suit A.I.R. 1958 1 All. 522.

1565. Pleadings in cases under the Arbitration Act.—The pleadings have got to be scanned with extreme rigour in cases under the Arbitration Act and no party can be allowed to raise a point, if he has not given sufficient notice of it, in this affidavits. *Bharat Construction* v. *Union of India,* A.I.R. 1954 Cal. 606.

1566. Ss. 17 and 41.—In case of appeal against order refusing to set aside award pending, court does not lose jurisdiction to pass judgment upon award till disposal of appeal. *Scottish Union* v. *Saraswati,* A.I.R. 1960 Cal. 22.

1567. Clause (b).—The court has jurisdiction to appoint a receiver in arbitration proceedings as soon as an application under s. 20 of the Act is made, even though notice of the application has not been given to the parties concerned. *Nagar Chand* v. *Surendranath,* 24 Pat. 616=223 Ind.Cas. 571=A.I.R. 1946 Pat. 70. The Second Schedule which is incorporated into the provisions of clause (*b*) of S. 41 contains five items and this is purely to prevent a party to the arbitration proceeding secreting the properties and defeat any award that may be passed. *S. V. Seshmull* v. *S. N. Umaji & Co.* 75 Mad. L.W. 351=(1962) 2 M.L.J. 417=A.I.R. 1962 Mad. 436.

1568. S. 41)b) and Sch. II.—The powers of the court under Schedule II of the Arbitration Act can be exercised even in a case when the reference to arbitration has been made without the intervention of the court and no proceedings are pending in connection therewith in any court. *Daulat Ram* v. *Shriram,* 1964 Jab.L.J. 580=A.I.R. 1964 M. P. 219.

42. *Any notice required by this Act to be served otherwise than through the Court by a party to an arbitration agreement or by an a arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either—*

Service of notice by party or arbitrator.

(a) by delivering it to the person on whom it is to be served, or

(b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in India and registered under Chapter VI of the Indian Post Office Act, 1898.†*

1569. N.B.—Section 42 makes provision for the service of notice under

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*In India for the words "the Province" the word "India" has been substituted by the adaptation of Laws Order, 1950 †V of 1898.

the Act between parties or between arbitrator and parties.—*Notes on Clauses.* "We have omitted the provision that substituted service may be effected by leaving a notice at the usual or last known abode of a person."—*Report of the Select Commitee.* This section is based on section 16(5) of the English Arbitration Act, 1934.

Cf. 29(3) of the English Arbitration Act of 1950 which runs as follows:

"(3) Any such notice as is mentioned in sub-section (2) of this section may be served either—(*a*) by delivering it to the person on whom it is to be served; or (*b*) by leaving it at the usual or last known place of abode in England of that person, or (*c*) by sending it by post in a registered letter addressed to that person at his usual or last known place of abode in England; as well as in any other manner provided in the arbitration agreement; and where a notice is sent by post in manner prescribed by paragraph (*c*) of this sub-section, service thereof shall, unless the contrary is proved, be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post."

1570. Otherwise than through court.—This section makes provision for service of notice without the intervention of court. Where notice is to be served through the intervention of court, the procedure laid down in order 5 of the Procedure Code, 1908 is to be followed. Where there is a procedure of serving notices given in the arbitration agreement, that procedure is to be followed. Where notices are necessary under this Act, *vide* ss. 8, 9 (*b*), 14(1), 35(1) and 37(3).

1571. Sections 42 and 14.—Section 42 may apply to notice referred to clause (1) of s. 14, but it can have no application to the notice which is to be given by the court under clause (2) of s. 14. *Ram* v. *Peary*, A.I.R. 1957 All. 265=1957 All. W.R. (H.C.) 177(2); A.I.R. 1927 Cal. 619; A.I.R. 1927 Pat. 135; A.I.R. 1926 Bom. 312. Section 42 provides the procedure for notice which is required to be served otherwise than through the court. So far as proceedings in court are concerned, the High Court is empowered to make rules under s. 44. In the absence of such rules the ordinary procedure under the Code of Civil Procedure shall be followed. The only aim is to bring the proceedings to the notice of the persons concerned and where such persons had already due notice there is no need to issue a formal notice can be adopted. *Kawal Singh* v. *Baldeo Singh*, A.I.R. 1957 Nag. 57=I.L.R. (1956) Nag. 680=1957 M.P.L.J. 382 and 413.

All that section 42 requires is that a notice has to be sent by post to person's place of business. Therefore, a notice sent by post to a person to his last known place of abode and business is a good or proper notice. *Firm Kahur* v. *Raj Kumar*, A.I.R. 1935 Punj. 235.

Notice under s. 8 sent by one party to the other party delivered through the attorney of the letter: *Held* that the service of notice was in accordance with s. 42, *Ranjan* v. *Union of India*, 92 Cal. L.J. 220=A.I.R. 1954 Cal. 462.

Power of Court to issue process for appearance before arbitrator.

43. *(1) The Court shall issue the same processes* to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it.

(2) Persons failing to attend in accordance with such

process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the *reference*, shall be subject to like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court.

(3) In this section the expression, "process" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

1572. N.B.—Section 43 follows paragraph 7 of the Second Schedule to the Code in requiring the court to assist the arbitrator to enforce the production of evidence empowering the court to punish default or contempt before the arbitrators as if it were committed before the court. —*Notes on Clauses.* Sub-section (3) has been newly added. See s. 12(4) of the English Arbitration Act, 1950.

1573. Scope of the section.—The arbitrators had no power to summon witnesses and procure their attendance when the arbitrators were acting under the provisions of the Arbitration Act. In case of private arbitration under the Act it was for the parties to produce their witnesses before the arbitrators. *Bulchand* v. *Thakurdas,* A.I.R. 1933 Sind 300; *James Mackintosh* v. *Scindia Steam Navigation,* 75 Ind.Cas. 221=24Bom.L.R. 853=A.I.R. 1922 Bom.444=47 Bom. 250. But under this section there is no such disability.

1574. Sub-section (2).—The words "refusing to give their evidence" in this section refer to the case if a person who refuses to give evidence when placed on oath and is required to answer questions put to him, and to a case where a person elects not to produce any evidence in shis case. *Janan* v. *Narain,* 11 Ind.Cas. 259=8 A.L.J. 929. Where a defendant does not appear before the arbitrators to whom the dispute has has been referred for arbitration and the arbitrator makes an award, the court cannot pass a decree on the basis of such award without issuing notice to the defendant under para. 10, Sch. II, C.P. Code and the the failure to issue such notice is fatal to the decree. *Thakur Singh* v. *Kandhai,* 158 Ind.Cas. 904=1935 A.I.J. 986=A.I.R. 1935 All. 852. But to have an *ex parte* award set aside the defaulting party must show sufficient cause for non appearance. *Motharam* v. *Mayaram,* A.I.R. 1925 Sind 150=19 S.L.R. 251=78 Ind.Cas. 521.

1575. Sub-section (3).—Under the old law when when parties to a dispute referred it to a private arbitration without the intervention of a court of law, the court has no jurisdiction to issue a commission for the examination of witnesses in the matter referred to arbitration. *James Mackintosh* v. *Scindia Steam Navigation,* 75 Ind.Cas. 221—24 Bom.L.R. 853=A.I.R. 1922 Bom. 444=47 Bom. 250; *In re Shaw and Ronaldson,* (1892) 1 Q.B. 91; *In the matter of an arbitration of Dreyfus and Sons,* (1843) T.L.R. 358. But under this sub-section even in cases of private arbitration, the court is competent to issue commission. But under this sub-section even in cases of private arbitration, the court is competent to issue commission. But when a case is referred by court it is competent to issue commission for examination of witnesses. *Ralia Bai* v. *Rahima Bai,* 7 Bom.L.R. 560.

Under sub-section (3) which is newly added a commission for examina-

tion of witnesses can be ordered by the court in arbitration proceedings. "The court has the same power of making orders" says Russell "for examination of witnesses out of the jurisdiction as it has for the purpose of and in relation to an action or matter in the court." *Russell* 15th Edn., p. 160.

Power to High Court to make rules.

44. The High Court may make rule consistent with this Act as to—

(*a*) the filing of awards and all proceedings consequent thereon or incidental thereto ;

(*b*) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto.

(*c*) the staying of any suit or proceeding in contravention of an arbitration agreement ;

(*d*) *the forms to be used for the purposes of this Act* ;

(*e*) generally, all proceedings in Court under this Act.

1576. N.B.—This section reproduces with small changes section 20 of the 1899 Act and empowers High Court to make rules.—*Notes on Clauses.* For rules framed under this section by various High Courts *vide* Appendix *infra.* Power to High Court to make rules includes the power to add, to amend, vary or rescind rules. *Vide s.* 21 *of the General Clauses Act* (*X of* 1897). If rules of the High Court framed under the Indian Arbitration Act be not in accordance with the Act, they are inoperative and no effect can be given to them. *Baijnath* v. *Ahmed Musaji* 40 Cal. 219. Where no rules have been framed by the High Courts under this section, the ordinary procedure usually adopted under the statutory rule of the Code may be followed. *Nainsukh Das* v. *Gajanand,* 43 All. 348=19 A.L.J. 132=61 Ind.Cas. 269. See also, *Kachauri Mal* v. *Wali Muhmmad,* 85 Ind.Cas. 341=22 A.L.J. 1031=47 All. 179=A.I.R. 1925 All. 154 ; A.I.R. 1957 Nag. 57. Rule 10 framed under s. 44 which contemplates filing of award by a party is not inconsistent with the Act and is valid. Application by a party to an award to make it a rule of court and to pass a decree in accordance with it is competent under s. 17 read with Rule 19. *Ganga* v. *Radha,* A.I.R. 1955 Punj. 145=57 Punj. L.R. 253. Rule 373(a) framed by the Bombay High Court no doubt appears to contemplate an application under S. 17 of the Act. But the rule has to be read with the substantive provision and the application contemplated is really in the nature of a motion. *Basappa* v. *Chanabasappa,* A.I.R. 1960 Mys. 190.

Government to be bound.

45. The provisions of this Act shall be binding on the Government.

1577. N.B.—Section 45 repeats section 27 of the 1899 Act and binds the Crown—*Notes on clauses.*

1578. Scope.—This section corresponds to section 23 of the English Arbitration of 1889. That section runs as follows :—

"This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which Her Majesty the Queen, either in right of the Crown, or of the Duchess of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the court or a Judge to order any proceedings to which His Majesty or Duke or

Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown." So under that section the arbitrator has no power to award costs to the claimants without the consent of the Crown. *Swift* v. *Board of Trade* (No. 2), 95 L.J.K.B. 834. See also, *R.* v. *Arch-Bishop,* (1902) K.B. 503; *John* v. *R.,* (1904) A.C. 812=29 T.L.R. (709) P.C. But that rule is not applicable under this Act.

Application of Act to statutory arbitrations.

46. *The provisions of this Act, except sub-section (1) of section 6 and sections 7, 12, 36* and 37 shall apply to every arbitration under any other enactment for the time being force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so for as this Act is inconsistent with that other enactment or with any rules thereunder.*

1579. N.B.—This section applies with certain exceptions the provisions of the Act to statutory arbitrations, and is based on section 20 of the 1934 Act of Parliament.—*Notes on Clauses.* Now see s. 3(1) of the English Arbitration Act of 1950.

1580. For the time being in force.—"For the time being in force" refer to law actually in force when the Act was passed. A.I.R. 1954 Cal. 41.

1581. Scope.—The Arbitration Act, 1940 is exhaustive so far as the subject dealt with it except as provided by ss. 46 and 47. *Bithal* v. *Srinath,* A.I.R. 1949 All. 360 (see *infra*).

1582. Statutory arbitration.—A statute is an instrument in writing. The bye-laws framed by the East Indian Cotton Association under the Bombay Cotton Contracts Act of 1922, making reference to arbitration compulsory as regards the transactions in cotton, coupled with the agreement between the parties to abide by them amount to submission in writing within the meaning of s. 4. The bye-laws have a statutory effect having regard to the Bombay Cotton Contract Act. *Rambaksh* v. *Bombay Cotton Company,* A.I.R. 1931 Bom. 81=32 Bom.L.R. 1451=128 Ind.Cas. 881. Statutory arbitrations are not arbitrations by virtue of arbitration agreement between the parties but by virtue of some provision in the statute.

1583. Some of the Acts where provision for arbitration has been made.—The following list gives the names of some of the Act where provision for Arbitration has been made :—

IMPERIAL ACTS.

(1) The Land Acquisition Act, (1) of 1894)—*vide* ss. 11, 12, 18, 26.
(2) The Religious Endowment Act, 1863 (XX of 1863)—*vide* ss. 16, 17.
(3) The Trustees and Mortgagees Powers Act, 1866 (XXVII of 1866)—*vide* s. 38.
(4) The Indian Trusts Act, 1882 (11 of 1882)—*vide* s. 43.
(5) The Presidency Towns Insolvency Act, 1909 (IX of 1909)—*vide* s. 68(h).

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*Inserted by Act 25 of 1942.

(6) The Indian Electricity Act, 1910 (IX of 1910)—*vide* s. 52.

(7) The Co-operative Societies Act, 1912 (II of 1912)—*vide* s. 43(2) (h). See also *Babu Ram* v. *Co-operative* A.I.R. 1954 All. 490.

(8) The Companies Act, 1956 (I of 1956)—*vide* s. 389, which has since been omitted by Art. 65 of 1960.

(9) The Provincial Insolvency Act, 1920 (V of 1920)—*vide* s. 52 (h).

(10) The Cantonment Act, 1924 (II of 1924)—*vide* ss. 260—265.

(11) The Trade Disputes Act, 1929 (VII of 1929)—*vide* ss. 3 to 14.

(12) Railways Act (XX of 1890) *vide* ss. 46, 46A, 46B and 48.

1584. Provision in clause 6(3) of Schedule to Electricity Act is deemed to an arbitrations agreement by virtue of this section.—Where in a suit by an Electric Company against a Municipal Committee to recover the cost of service lines, the parties have not *qua* clause 6(3) of the Schedule to the Electricity Act, entered into an arbitration agreement, but by virtue of s. 46 the provision in clause 6(3) is to be deemed to be an arbitration agreement and to be applied as such and the provision has existed prior to the institution of the suit, a dispute having clearly arisen between the parties to which it applies, an application by one party that the Court should apply this provision is, in the circumstances, equivalent to an application under sub-section (1) of section 20, sub-section (2) and (3) may also be deemed to be satisfied for the application need not in a pending suit be numbered and registered as a suit, nor is it necessary that separate notice of it should be given to the parties who are already upon the Court, and there is no reason why sub-section (4) which is the operative part of section 20, should not apply to the case, for the statute cannot be defeated by showing cause, and the arbitrator is a person specified in the enactment *viz.*, clause 6(3). The Court must therefore make the reference to this person, namely the Electric Inspector. *Municipal Committee, Fazilka* v. *Fazilka Eleciric Supply* Co., A.I.R. 1957 Lah. 309.

1585. Other Statutory Arbitrations.—It is doubtful whether this section, covers an arbitration under the Madras Town Planning Act. It is true that the Town Planning Act speaks of "the arbitrator" but it does not require him to give an award. He is required to give a decision which is appealable. *Ranganathan* v. *Krishnayya,* A.I.R. 1946 Mad. 504 =227 Ind.Cas. 14=(1946) 1 M.L.J. 255. The bye-laws framed by the East India Cotton Association under the Bombay Cotton Contracts Act by virtue of s. 4(7) read with ss. 5 and 6 of that Act, are statutory bye laws, and therefore are excepted from operation of the Arbitration Act by this section. *Chrichandrai* v. *Panno,* I.L.R. (1943) Bom. 280=Ind.Cas. 627=45 Bom.L.R. 392=A.I.R. 1943 Bom. 197. Assuming that s. 46 of the Arbitration Act is applicable to arbitration under the rules framed under s. 43 of the Co-operative Societies Act, s. 17 and Sch. I para. 3 of Act are inapplicable to such an arbitration as the machinery and the procedure of arbitration indicated by Rule 22 of the rules framed under s. 43 of the Co-operative Sodieties Act are totally inconsistent with the provision of the Arbitration Act. *Nanda Kishore* v. *Bally Co-operative,* 47 C.W.N. 478=A.I.R. 1943 Cal. 255=208 Ind.Cas. 146,

1586. Limitation Act—Applicability to arbitration proceedings.—

The Limitation Act primarily applies to suits, appeals and applications and it has no direct application to arbitration proceedings. Therefore the arbitrators are not bound to apply the law of limitation to the claim in and by a society and failure to do so is not an objection to the legality of the award within the meaning of s. 54A of the Bombay Co-operative Societies Act. *Savitra* v. *Nagar,* 59 Bom.L.R. 425=A.I.R. 1957 Bom. 178.

1587. Award as adjustment of pending suit.—An award made on reference by agreement between the parties but without the intervention of the courts in a pending suit cannot be recorded as an adjustment of the suit unless the parties have consented to the same after it was made. *Mohammad* v. *Abdul,* 1957 B.L.J.R. 14=1956 Pat.L.R. 516 =A.I.R 1957 Pat. 258.

1588. Sections 46 and 47.—"The Arbitration Act, 1940, is an exhaustive Act on the subject except as provided by ss. 46 and 47, inasmuch as the U. P. Land Revenue Act, 1901, makes no provisions for the filing of the award made without the intervention of the court or with its intervention but not in a pending suit. the award before us cannot be filed in the revenue court and the order of the lower court directing the plaint to be returned for proper presentation was erroneous. The term "Civil Court' occurring in s. 2(*c*), Arbitration Act, 1940, does not include revenue courts and the revenue courts can deal only with references for arbitration made through their intervention in pending cases." *Bithal Das* v. *Shri Nath,* A.I.R. 1949 All. 360.

The provisions of para. 3 Schedule I, are inapplicable to a proceeding for arbitration of disputes under the Co-operative Societies Act. *Nand Kishore* v. *Bally Co-operative,* 47 C.W.N. 478=A.I.R. 1943 Cal. 255= I.L.R. (1943) 2 Cal. 431=208 Ind.Cas. 146.

1589. Arbitration under s. 66, Bombay Industrial Relations Act.—Section 46 deals with those statutory arbitrations where the statute itself is looked upon as an arbitration agreement. An arbitration under s. 66, Bombay Industrial Relations Act where parties by a written submission go to the arbitration of a private party is not a statutory arbitration, *Textile Labour* v. *Labour Appellate,* 58 Bom.L.R. 26=I.L.R. (1956) Bom. 247=A.I.R. 1956 Bom. 746.

47. *Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder.*

Act to apply to all arbitrations.

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

1590. N.B.—Section 47 applies, subject to section 46 of the Act to all arbitrations, and renders an award obtained otherwise unenforceable. This section replaces section 89 of the Code of Civil Procedure, 1908, which this Act replaces—*Notes on Clauses.* "This clause has been redrafted in order to remove the dangers of the provision that an arbitration award obtained otherwise than in accordance with all the provisions of

the Act should be unenforceable for any purpose. The effect which this section as redrafted is designed to produce is that arbitrations shall not be conducted in any way repugnant to the Act and that any arbitration award may with the consent of the parties be used for the purposes of rule 3 of order XXIII of the Code of Civil Procedure."—*Report of the Select Committee.*

1591. Scope of the section.—The Arbitration Act of 1940 does not apply to an arbitration made before that Act comes into force. It only applies to an award made under it. *Manji* v. *Mehta,* A.I.R. 1943 Bom. 463=45 Bom.L.R. 940=I.L.R. (1943) Bom. 750=211 Ind.Cas. 61.

1592. Scope of the proviso.—The Civil Justice Committee in para 20 of their report says : "As regards arbitration in suits, the chief question which requires attention is the question whether it is advisable to permit parties to a suit referring their dispute to arbitration otherwise than by the procedure provided by Articles 1—16 of the Second Schedule to the code. Whether the language of the Second Schedule or of section to the the Code amounts to a prohibition of arbitration in suits otherwise than by the means described in the Schedule is a matter upon which judicial opinion is divided. The High Court of Bombay in *Manilal Motilal* v. *Gokul Das Moolji,* I.L.R. 45 Bom. 245, has held that an arbitration in a suit, without any order as required by the Second Schedule, may be enforced as an adjustment of the suit under order 23, rule 3. We consider that it would be advantageous if all arbitration in suits, except as provided by the Second Schedule were made void ; *the awards should only be recorded as adjustments of the suits when the court is asked to do so by all parties."* The case of *Moni Lal Mitilal* v. *Gokuldas, supra, was* followed by a Full Bench of the High Court in the case of *Chanbassappa* v. *Basalingaya,* A.I.R. 1927 Bom. 565=51 Bom. 1908 (F.B.). See also, *Ram Devi* v. *Ganeshe Lal,* A.I.R. 1926 All. 501=24 A.L.J. 480=95 Ind.Cas. 416=48 All. 475 ; *Ganga* v. *Thakur,* A.I.R. 1938 All. 46 ; *Gajendra Singh* v. *Dugra Kumari,* 88 Ind.Cas. 768=23 A.L.J. 561=A.I.R. 1925 All. 503=47 All. 637 (F.B. ; *Subbaraju* v. *Venkataramaraju,* A.I.R. 1928 Mad. 1025=55 M.L.J. 429=51 Mad. 800=28 M.L.W. 321=113 Ind.Cas. 632 ; *Nanjappa* v. *Nanjappa,* 23 M.L.J. 290=16 Ind.Cas. 478=(1912) M.W.N. 1091 ; *China Venkata* v. *Venkataswami,* 42 Mad. 625=36 M.L.J. 291=51 Ind.Cas. 827=(1919) M.W.N. 221 ; *Belagodu Lal* v. *Kalyani,* A.I.R. 1926 Mad. 1211 ; *Alagu* v. *Veluchami,* A.I.R. 1923 Mad. 576 ; *China* v. *Venkanna,* A.I.R. 1925 Mad. 50 ; *Ayyanamma* v. *Ramaswami,* A.I.R. 1927 Mad. 1126 ; *Narayandas* v. *Kalyanji,* A.I.R. 1928 Nag. 173 ; *Namadhar Khan* v. *Nanhoo,* A.I.R. 1926 Nag. 405=23 N.L.R. 100 ; *Bhimraj* v. *Munio,* A.I.R. 1935 Pat. 243=16 P.L.T. 280=156 Ind.Cas. 1050=14 Pat. 799 ; *Basaoo* v. *Jagan,* A.I.R. 1931 Oudh 127=8 O.W.N. 71=131 Ind.Cas. 443, *Manghanmal* v. *Thwerdas,* A.I.R. 1935 Sind 184 =158 Ind.Cas. 60 ; *Haji Umar* v. *Shivdas,* 81 Ind.Cas. 653=16 S.L.R. 174 (F.B.) ; *Laljee Serang* v. *Chander,* A.I.R. 1931 Rang. 58. But the last named case was overruled by the full bench case of *Maung Hlay* v. *U. Ge,* A.I.R. 1939 Rang. 300=1939 Rang.L.R. 280=183 Ind.Cas. 343=12 R.R. 71. In this full bench case the view of the Calcutta High Court was adopted. In Calcutta the leading case is that of *Amarchand* v. *Banwari Lal,* A.I.R. 1922 Cal. 404=49 Cal. 608, a decision of *Rankin J.* sitting as a single Judge, in which he followed an earlier decision of his own. This was followed in *Guimoni* v. *Tarini,* A.I.R. 1927 Cal. 887=104 Ind.Cas. 360=47 C.L.J. 59. See also, *Degari Tea* v. *Assam Bengal*

Railway, A.I.R. 1921 Cal. 238=61 Ind.Cas. 919=25 C.W,N, 127; *Rohini Kanta* v. *Rajani Kanta,* A.I.R. 1934 Cal. 643=38 C.W.N. 648=151 Ind.Cas. 761. In the last named case, the court observed : "The learned advocate for the petitioner has cited the case *Dekari Tea* v. *Indian General Steam Navigation,* A.I.R. 1927 Cal. 238=61 Ind.Cas. 919; *Amarchand* v, *Banwari Lall, supra,* and *Guimoni Dasi* v. *Tarinicharan,* A.I.R. 19227 Cal. 887=104 Ind.Cas. 360 in support of the proposition that an award made on a reference to arbitration without the intervention of the court during the pendency of a suit cannot be enforced unless consented to by both parties.....Reference to arbitration and an award given by the arbitrators which award is not accepted by the parties do not appear on a plain view to come within the meaning of order 23, rule 3." *Muhammad* v. *Osman,* A.I.R. 1935 Cal. 239=60 C.L,J, 173= 39 C.W.N. 480=62 Cal. 229=155 Ind.Cas. 915; *Hari Prosad* v. *Soogini Devi,* AI,R, 1921 Lah. 232; *Nihal Singh* v. *Artavakar,* A.I.R. 1930 Lah. 860. In subsequent cases it has been held by the Lahore High Court that an award made during the pendency of the suit, provided the parties consent before the court to be bound by the award, is valid and binding upon the parties. *Gurdesi v. Gujar Mal,* A.I.R. 1931 Lah. 594=131 Ind.Cas. 126; *Jainarain* v. *Narain Das,* A.I.R. 1922 Lah, 369=69 Ind. Cas. 583=3 Lah. 296. In enacting this proviso the legislature has followed the decision of the Calcutta High Court and the full bench decision of the Rangoon High Court in *Maung Hlay* v. *U. Ge, supra,* where all the earlier cases for and against have been thoroughly discussed and the meaning of the words "any other law for the time being in force" in s. 89 have been rightly construed.

1593. Proviso, scope of—continued.—*Prima facie* s. 47 of the Arbitration Act governs references to arbitration by parties in a pending suit without reference to or knowledge of the court. The Act does not provide for arbitration in pending suits except through court. According to the proviso to section 47 an award on the footing of an arbitration in a pending suit may only form the basis of a decree by consent. *Ramaya* v. *Venkata Chettam,* (1953) 1 M.L.J. 572=A.I.R. 1953 Mad. 834. Under the proviso an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit; no decree based thereon can be passed under order 23, rule 3. That the parties had consented to the reference is not such a consent. *Abdul Raman* v. *Muhammad,* A.I.R. 1953 Mad. 781=(1953) 1 M.L.J. 795=I,L,R, (1953) Mad. 677=66 Mad.L.W. 480=1953 C.W.N. 443 (F.B.). In the above case the court observed : "It should be remembered that under the Arbitration Act there is no machinery provided for going into the question of validity of awards passed in private references in pending suit. Section 47 renders the provision of the Act as such inapplicable to them. What then happens if the award is attacked on the ground of legal misconduct. It was observed in *Ammu Cam* v. *Bala Subramania,* A.I.R. 1945 Mad. 294. "Of course a party cannot be compelled to accept an award which is unlawful. The agreement to accept an award yet to be made presupposes that it will be a lawful award ?

"But the question is whether the binding character of the award could be gone into proceedings under Order 23 rule 3. It is no doubt laid down therein that the compromise should be lawful. Does that contemplate an enquiry into the validity of the award when it is challenged on the ground of misconduct of the arbitrator. There is ample

authority for the proposition that the word 'lawful' in Order 23, Rule 3 has reference to the terms of the agreement and not to its binding character. *Vide Kuppaswami* v. *Pavanambai,* A.I.R. 1950 Mad. 728=(1950) 1 M.L.J. 524 and *Surappa Raju* v. *Venkataratnam,* A.I.R. 1936 Mad. 347. Enquiring into legal misconduct would on this principle be outside the scope of Order 23 Rule 3. There is also no provision for the court remitting an award for reconsideration ; it can only either record it as an adjustment or reject it. The parties to such an award therefore, have not the same rights with reference thereto as parties to the awards in the arbitration proceedings which fall within the scope of the Act ; and the successful party to such an award would be in a better position, and the successful party in a worse position than if the award had been made in a reference through court. It is difficult to believe that all this was intended by the Legislature.

"It is also significant that the proviso requires the consent of the 'parties interested.' If the consent contemplated by the proviso is merely to the agreement to refer to arbitration, then the words 'consent of parties' simply would have been sufficient and appropriate'. If the consent required is for the award itself, then the use of the words 'parties interested' becomes apt and intelligible.

"Turning next to the authorities bearing on the question, disagreement with the decision in A.I.R. 1945 Mad. 294, was expressed by *Happell and Govindrarajachari JJ.* in referring judgment in C.M.A. No. 623 of 1946, by *Viswanath Sastri J.* in *Palaniandi Chetti* v. *Kandappa Goundan,* A.I.R. 1951 Mad. 281=(1950) 2 M.L.J. 372, and by *Mac J.* in C.M,A. No. 15 of 1950. In the Orissa High Court in *Indramoni* v. *Nilmoni,* A.I.R. 1950 Orissa 169, and the Patna High Court in *Raghunandan Sahai* v. *Sukhlal Rai,* A.I.R. 1952 Pat. 258 have held that having regard to the proviso to section 47, an award in a private reference in a pending action cannot be regarded as a compromise under Order 23, Rule 3, and the decision in A.I.R. 1945 Mad. 294 was dissented from. A single Judge of the High Court of Allahabad held in *Shiam Kishore* v. *Ramnarain Singh,* A.I.R. 1947 All. 178=I.L.R. (1947) All. 221, that an award passed in an arbitration with reference to a matter pending in succession certificate proceedings could, by reason of s. 46 of the Act, be regarded as an adjustment under Order 23, Rule 3, Civil P. C. and reliance was placed on the decision in *Dular Koeri* v. *Payag Koeri,* A.I.R. 1942 All. 145=I.L.R. (1942) All. 357 (F.B.). But then the award in question in that case had been made before the enactment of the Arbitration Act, and the learned Judge merely observed : "We need not go into the merits of the dispute because it is sufficient for us to say that for all practical purposes the difficulty has now been removed by S. 47 if the new Arbitration Act 1940 which not only repeals s. 89 of the Code, but replaces it by a new section which makes the matter quite clear.....

"We are accordingly of opinion that under the provisio to s. 47, an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit ; that no decree can be passed thereon under the provision of Order 23, Rule 3 ; and that the decision in A.I.R. 1945 *Mad.* 294 *should be overruled.* But if after the award is made, the parties thereto agree to accept it, that will compromise and a decree based thereon could be passed under Order 23 Rule 3". The joint consent of all parties interested is necessary at the point of time when the court is to make the award into consideration as a compromise or adjustment. Antecedent consent is immaterial just as antecedent invalidity does not

debar the court from recognising it as compromise by common consent. The proviso does not render the award valid nor does it make it enforceable as an award *proprio vigore*. *Jugaldas* v. *Pursottam*, 92 C.L.J. 181 = A.I.R. 1953 Cal. 690. In the case of private partition in a pending suit where the arbitrators differ from each other and no consent of parties is available, the only course left for a court is to ignore the arbitration and to decide the case on its merits. *Ramayya* v. *Borra venkatachallam*, (1953) 1 M. L. J. 572 = A.I.R. 1953 Mad, 834 ; but see *Pagammal* v. *Kashi*, A.IR. 1951 Mad. 387 which seems to have been overruled by A.I.R. 1953 Mad. 781 (F.B.).

It is clear that, under the proviso to section 47 it is not open to the court to record any arbitraion award under Order 23, Rule 3, C. P. Code, as an adjustment or compromise of a pending suit, if objection is made to so recording it by any party to the suit. *Raghunandan* v. *Sukhlal*, 30 Pat. 985 = A.I.R. 1952 Pat. 258 ; *Ziauddin* v. *Abdur Rafique*, A.I.R. 1952 Pat. 66 = 6 D.L.R. . (Pat.) 6 ; *Indermani* v. *Nilmoni*, A.I.R 1950 Orissa 169. Where a dispute with respect to matter in pending in a court of law and the parties refer the said matter to an arbitrator who gives an award in respect thereof without the intervention of the court, it is not open to the court to accord recognition to the said award unless all the parties interested therein give their consent to it. *Juman* v. *Miyabus*, 1957 All. L.J. 192 ; see also *Humminarayan* v. *Venkata*, A.I.R. 1958 Andhra. Pra. 679 = (1958) 2 Andh. W.R. 254. See also *Kumhun* v. *Kumhipathumma*, 1958 Ker L.J. 269 = 1958 Ker L.T. 207 = A.I.R. 1959 Ker. 414.

Where subsequent to the making of the award without the intervention of the court the parties agree to accept it and abide by it, the award no longer remains merely a division of the arbitrators themselves but it becomes a compromise or an adjustment by the parties themselves of a matter in dispute between them. Such a subsequent agreement is always enforceable as a compromise under Order, 23, Rule 3, C. P. Code. Section 47, Arbitration Act has no application in such a case. The proviso to the section does not say that the consent of he parties must be to the award itself and expressed in open court. *Tulsabai* v. *Jagannath*, 1957 M.P.C. 649. An award following a reference to arbitration without the intervention of any court, although the litigations were there pending, may be accepted as an adjustment of the suit or may be approached as if it were a compromise. *Man Singh* v. *Lal*, A.I.R. 1955 All. 261. As between the parties to a compromise or an award or person claiming under rival parties the title of each party prior to the award or compromise cannot be set up so as to defeat a title acquired under the compromise or award. If persons bind themselves by any valid contract supported by consideration they cannot resile from the contract. *Ibid.* ; see also *Moradhwaj* v. *Bhudhar*, A.I.R. 1955 All. 353 = 1955 A.L.J, 56 = 1955 All. W.R. 163 (F.B.). Under this section all arbitrations have to be conducted according to the provisions of the Act, and an arbitration in violation of the provisions of the Act will become invalid. An arbitration of a dispute which is the subject-matter of a pending suit, without intervention of the court is not provided and such an award by the provisions of s. 47 is not valid. The proviso, however, saves an award otherwise obtained for a limited purpose. But the court will not take into consideration an award otherwise obtained, if all the parties do not consent that it should be taken into consideration as a compromise or

adjustment. *Phool Narain* v. *Madan Gopal.* A.I.R. 1955 Rajas. 162; A.I.R 1950 Orissa 169; A.I.R. 1952 Pat. 66. The principles applicable to suits could be applicable to execution proceedings. *Jagjivan* v. *Doshi,* 8 Sau. L.R. 102=A.I.R. 1955 Sau. 88. Where the parties orally agreed to refer the dispute to the arbitration of *panchas* and the *panchas* after hearing the parties gave an oral award such an award cannot be recorded between the parties in view of the provision of s. 47 of the Arbitration Act. *Ashrafi* v. *Ram Das,* A.I.R. 1960 Pat. 52=1959 B.L.J.R, 551.

So there is no legal bar to the dispute which is the subject-matter of the pending suit being referred to arbitration without intervention of the Court. The award made in pursuance of such an arbitration may, with the consent of the parties interested be taken into consideration as a compromise or adjustment of a suit under s. 47 by any court before which the suit is pending. *Lakshmi* v. *Ram,* A.I.R. 1953 All. 9. The arbitration contemplated by proviso to s. 47 may include a joint arbitration relating to the subject-matter of a pending suit and the matter which is not the subject-matter of a suit without the intervention of the court, then there is no legal bar to the parties agreeing to refer all the disputes between them to arbitration without the intervention of the court and then to place the award made in pursuance of such an arbitration before the court concerned for consideration as a compromise or adjustment of a suit. *Ibid.* As regards the application of Rule 7 of Order 32, C. P. Code, the court observed: "When *Kishen Lal,* father of the minor, entered into the agreement of reference in question, he was acting as the father and natural guardian of the minor and not his guardian for the suit. In the latter capacity he could not refer other disputes to arbitration,—that he could do only in his former capacity. He was entitled to adjust the matters in suit out of court by direct agreement between the parties or through intervention of a arbitrator or reference and have the adjustment recorded in court with the leave of the court. In my opinion, therefore, in a case of the nature mentioned above, the leave of the court was, for the reasons stated earlier, not necessary."

1594. Second Appeal.—No second appeal lies from an order recording an award as compromise, but the appeal may be treated as revision. *Nihal Singh* v. *Ashtawaker,* A.I.R. 1930 Lah. 860=31 P.L.R 225=127 Ind.Cas. 705; but see *Ganga Prosad* v. *Thakur,* A.I.R. 1938 All. 46=172 Ind.Cas. 967=(1937) A.L.J. 1133=1937 A.W.R. 1080.

48. *The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall, notwithstanding any repeal effected by this Act, continue to apply.*

Saving for pending references.

1595. N.B.—This section saves references pending at the commencement of this enactment; such references will continue to be governed by the existing law.—*Notes on clauses.* An application made under the Arbitration Act of 1899 must be governed by that Act only even though the new Act of 1940 had come into operation at the time when the application was heard. *Rupchand* v. *Pannalal,* A.I.R. 1941 Cal. 415. Any award which is the result of a reference which was pending at the date of commencement of the New Arbitration Act of 1940 is saved from the application of the new Act and the provision of

the new Act do not apply to such an award. *Apooli Mills* v. *Babibhai,* 45 Bom. L.R. 904=A.I.R. 1944 Bom. 12 ; see also *Laxman* v. *Ram* A.I.R. 1952 V. P. 25. But an appeal under the Act is competent when the award was made prior to the passing of the Act but judgment was passed subsequently. *Sher Bahadur* v. *Ram Narain,* 1944 O.W.N. 416=A.I.R. 1945 Oudh. 1. The words "entering upon the reference" are not mentioned in s. 48. All that is stated is that the reference to the arbitration is pending. A reference begins to proceed the moment the agreement has been placed in the hands of the chosen arbitrators and they signified their assent to deal with the matter. *Chouth Mal* v. *Ram Chandra,* A.I.R. 1955 Nag. 126=I.L.R. 1955 Nag. 126.

49. *Repeals and amendments* [Rep. by Act V of 1945].

1596. Effect of repeal.—Where an Act expired or was repealed it was formerly considered to have never been in existence except as to matters or transactions past and closed. *Per Lord Tunterdon in Surtels* v. *Ellison,* 2 B. & C. 752 ; *Churchill v. Crease,* 5 Bing. 177. A repeal does not affect any right, privilege, obligation, or liability acquired accrued or incurred under any enactment so repealed. *Lewis* v. *Hughes,* (1916) 1 K. B. 813 C.A.

THE FIRST SCHEDULE

(*See section* 3).

IMPLIED CONDITIONS OF ARBITRATION AGREEMENTS.

1. *Unless otherwise expressly provided*, the reference shall be to a sole arbitrator.

1597. N.B.—This paragraph corresponds to para 1 of the First Schedule of the Indian Arbitration Act, 1899, which again is drawn from para. (*a*) of the First Schedule of the English Arbitration Act of 1889.

1598. Applicability of Sch. 1.—It is extremely doubtful if the provisions of Schedule I can be brought into force where the arbitration is through the intervention of the court in a pending suit. *Ganeshi* v. *Banwari,* 61 Punj. L.R. 392=A.I.R. 1959 Punj. 593. Where the agreement is silent upon the point the reference is to a single arbitrator and the court has a power of appointment in default of agreement between the parties. *Russell* 15th Edn., p. 174. See also *Serimaglio* v. *Thornett,* (1924) 131 L.T. 174. It is extremely doubtful if the provisions of Sch. I can be brought into force where the arbitration is through the intervention of court. *Ganeshilal* v. *Firm Banwari Lal,* 61 Punj. L.R. 392=A.I.R. 1959 Punj. 593.

1599. Scope.—*In the matter of an Arbitration between Eyre and Corporation of Leicester,* (1892) 1 Q.B. 136, in the contract there was a provision for arbitration and in the contract the words used were "by other the arbitrator or umpire." In that case the question was whether s. 5 of the English Arbitration Act was applicable to the case. *Lord Esher M.R.* said : "In this case I agree with the Divisional Court that there was a submission to a single arbitrator. It seems to me that the only possible construction of the words is that the expression 'arbitrator or umpire' is tautologous." It is not possible to conceive of an agree-

ment which will come under rule 1 and yet to be an agreement for appointment of arbitrators otherwise than by consent of all the parties. Where therefore, the rule applies, it can no longer be said that the agreement does not provide for appointment of the arbitrator by consent of the parties and for that reason invalid. *India Hosiery* v. *Bharat Woollen*, 92 C.L.J. 7=A.I.R. 1953 Cal. 488.

2. If the reference is to *an even number of arbitrators, the arbitrators shall* appoint an umpire *not later than one month from the latest date of their respective appointments.*

1600. N.B.—This paragraph corresponds to para. 2 of First Schedule of the Indian Arbitration Act, 1899, which again is based on para (*b*) of the First Schedule of the English Arbitration Act of 1889. Para 2 of the First Schedule of the Indian Arbitration Act was as follows : "If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award" Para (*b*) of the First Schedule of the English Arbitration Act, 1889 as amended by s. 5 of the English Act of 1934 is as follows : "If the reference is to two arbitrators, the two arbitrators shall appoint an umpire immediately after they are themselves appointed". See also *Shriram* v. *President*, A.I.R. 1954 Nag. 236 ; *Firm Jaidev* v. *Kanhaiyalal*, A.I.R. 1953 Ajmer 49.

1601. Sch. I, para. 2 and s. 3.—According to s. 3 of the Arbitration Act an arbitration agreement shall be deemed to include the provisions set out in the first schedule in so far as they are applicable to the reference unless a different intention is expressed in the agreement. Where there is a clear provision in the agreement of reference to arbitration that the arbitrators would be entitled to appoint an umpire only if they happened to disagree, it means that the power to appoint an umpire was contingent on their disagreement and could not be exercised before they had agreed to disagree. This provision in the agreement must be held to contain an intention different from what has been expressed in para. 2 of Schedule 1 and hence its provisions could not be attracted to the particular reference. *Sukhlal* v. *Mamchand*, 219 Ind.Cas. 162=A.I.R. 1945 Lah. 34. See now s. 8(1) of the English Arbitration Act of 1950. Cl. (2) (i.e., Para 2) of the First Schedule comes into play in the absence of any provision in the term of reference as regards the appointment of an umpire. In other words it is equally open to the parties to the reference to refuse to have an umpire. *Ratnwa* v. *Gurushiddappa*, A.I.R. 1962 Mys. 135.

1602. Umpire.—There is a technical meaning which is often applied to the word "umpire." It is used to denote a person (often appointed by the arbitrators themselves) who is to settle any difference that may arise between the arbitrators. *In re Eyre etc.*, (1892) 1 Q.B. 136 (139) ; *Gulab Singh* v. *Dhuni Chand*, 46 P.R. 1889 ; *Jumma* v. *Mubarik*, 30 Ind.Cas. 87=55 P.R. 1915=17 P.W.R. 1915. The ordinary meaning of the word umpire is a person who is to decide upon disagreement. *Louis Dreyfus* v. *Hemandas*, A.I.R. 1940 Sind 37. A committee of an association may constitute an umpire. *Heeralal* v. *Joakim*, A.I.R. 1927 Cal. 647=31 C.W.N. 730=103 Ind.Cas. 648=55 Cal. 180 ; *Re Vari Pati* (1914) W.N. 208 ; *In re Keighley*, (1893) 1 Q.B. 405=62 L.J.Q.B, 105. The word "umpire" cannot mean "umpire or any higher domestic tribunal upon which the parties may agree." *Heeralal* v. *Joakim*, 31 C.W.N. 446.

1603. Scope of the rule.—The Arbitration Act does not say that when the reference is to an even number of arbitrators the failure

to appoint an umpire vitiates the award. The intention of clause (2) of Sch. I, appears to be that the umpire whose function it is to decide on a difference between the arbitrators should normally be appointed before any difference arises between them. Whatever may be the result in a case of a disagreement between the arbitrators, where no disagreement arises between the arbitrators and there is no need for an umpire, to regard the omission to appoint him is fatal to the validity of all the proceedings would only result in general inconvenience without promoting any object considered essential by the statute. The statute in such a case could be complied with by the arbitrators appointing an umpire just before delivering their award. But such a compliance though fictitious is purposeless. When the objector cannot point to any prejudice because of the omission to appoint an umpire, the omission does not vitiate the award. *Tikaram* v. *Hansraj,* A.I.R. 1954 Nag. 241 *Louis Dreyfus* v. *Hemandas,* A.I.R. 1940 Sind 37 (40)=187 Ind.Cas. 262. But in *Jawala Prasad* v. *Amarnath,* A.I.R. 1951 All. 474, the court observed : "It is clear that the arbitrator, where there is a reference to an even number of arbitrators, are under a statutory obligation to appoint an umpire not later than one month from the latest date of their respective appointments. It strikes us that the arbitrators had no option in the matter of the appointment of an umpire. The provisions of para. 2 of schedule 1 are of a mandatory character and it was clearly the duty of the arbitrators to appoint an umpire. This of course, is on the footing that there was no express provision to the contrary in the agreement. We may also refer to para. 1 of Sch. 1 which is in the following terms : 'Unless otherwise expressly provided, the reference shall be to a sole arbitrator.' The point is that it was open to the parties by their agreement to waive this condition, about the appointment of an umpire.....That being our view, it is clear that in the circumstances of this particular case, the award made is not valid." Where the umpire took up the burden of umpirage following the disagreement, the arbitrators would have nothing further to do with the reference and it would be the umpire who functioned alone in lieu of the arbitrators. *New Great Insurance* v. *Behari Lal,* 1958 B.L.J.R. 488. Consequently the arbitration in a case cannot proceed unless the arbitrators had appointed an umpire before they entered upon the reference. Where this was not done, the whole proceeding before the arbitrators was illegal and void, even though the award was unanimous. *Ibid.* But see the next topic.

1604. Appointment of umpire whether mandatory.—The word "shall" in cl. (2) does not make the provision mandatory in the sense that the breach will vitiate the entire arbitration proceeding and make the award illegal. *United Printing* v. *Kishorilal,* 97 Cal. L.J. 267=98 Cal. L.J. 73=A.I.R. 1956 Cal. 593. See also *Union of India* v. *Allied Trading,* A.I.R 1956 Punj. 7 where it has been held that even if cl. 2 supersedes or supplements the arbitration clause in the contract, the failure to appoint an umpire within a month of the appointment of the arbitrators, perhaps because they were too busy to get together earlier, is a mere irregularity which does not render the appointment of an umpire invalid or deprive him of jurisdiction or invalidate the subsequent proceedings. The rules laid down in the first Schedule comes into application only where a different intention does not exist. Where the arbitration agreement clearly shows that the intention of the parties was that the two arbitrators out of the three be perfectly within their rights to make an award it cannot be said that they had no jurisdiction to make the award

for failure to appoint an umpire under para. of Sch. I. *Ismail* v. *Hansraj*, A.I.R. 1955 Raj. 153.

Where the arbitrators fail to appoint an umpire and the parties do not follow the procedure prescribed by s. 8(1) (*c*) and para. (2) of Sch. I but appears before the arbitrators and produce all their evidence, they must be deemed to have waived the irregularity and are estopped. *Shambhu Nath* v. *Hari Shankar*, 1954 All. W.R. (H.C.) 250=1954 All. L.J. 322= A.I.R. 1954 All. 673. No universal rule can be laid down for the construction of the Statutes as to whether mandatory enactments shall be construed as directory only or obligatory with the implied nullification for disobedience. The intention of R. 2, Sch. I, appears to be that the umpire whose function is to decide on a difference between the arbitrators should normally be appointed before any difference arises between them. *Tikaram* v. *Hansraj*, 1954 Nag. L.J. 204=I.L.R. (1945) Nag. 584 =A.I.R. 1954 Nag. 241. The provision of this rule is merely directory in character. *Chacko* v. *Chacko*, 1958 Ker. L.T. 930=1958 Ker. L.J. 1165= A.I.R. 1959 Ker. 149; but see A.I.R. 1959 Bom. 93=1958 Nag. L.J. 333. See *Ram Krishna* v. *Raj Narain*, A.I.R. 1963 All. 23 where it was held that under the provision of para 2 of Sch. 1 which are of a mandatory character, it is open to the arbitrators to appoint an umpire within one month.

1605. How appointment is made.—The appointment of an umpire by arbitrators is a judicial act; they must therefore meet and exercise the power together. *Re Hopper's Arbitration* (1867) L.R. 2 Q.B. 367 (376); *Re Lord and Lord*, (1855) 5 E. & B. 404, *In re Cassel*, 9 B. & E. 624 (628). They owe a duty to the parties to select a fit and proper person as umpire; they must not, therefore, leave the selection to chance, but as between several persons whom they both consider fit and proper persons to discharge the duty of umpire they may select by lot whom they will appoint, *Halsbury* Val. I, p. 457 citing, *European and American Steamship* v. *Crosskey*, 8 C.B. (N.S.) 397; *Prescod* v. *Prescod*, (1887) 58 L.T. 76. See also, *Hopper In re* 8 B & S. 100=36 L.J.Q.B. 100; *Morgan* v. *Bolt*, 7 L.T. 671; *Neale* v. *Ledwer*, 16 East. 51 *Ford* v. *Jones*, 3 B. & Ad. 248 =1 L.J.Q.B. 104; *Cassell, In re*, 9 B. & C, 624=7 L.J.K. 329; *Young* v. *Miller*, 3 B. & C. 407; *Harris* v. *Mitchell*, 2 Vern. 485. But where arbitrators, after tossing up for the choice, abandoned the choice made, and afterwards one of them, by consent of the other, appointed the umpire, held that the appointment was good. *Vennikum In re*, 10 L.J. B. 128. But an umpire may be appointed by lot, if the parties to the reference assent to such a mode of election. *Taylor* v. *Backhouse*, 2 L. M. & P. 70; *Tunno In re*, 5 B. & Ad. 488; *Greenwood In re*, 1 P.& D. 463; *Jamieson, In re* 4 A. & E. 945; *Morgan* v. *Boult*, 11 W.R. 265. *Tindal C.J.* said: "Now the grounds relied upon here are, first; that the umpire were decided by lot. Undoubtedly the mind and understanding of the two arbitrators should concur in the selection of the person who is to act as umpire, but it appears to me that the case falls within that of *Re Tunno and Bird, supra*, where it was held that a party to an arbitration cannot object to the award that the arbitrators chose an umpire by lot, if he expressly agreed to or acquiesed in that mode of choice." *James* v. *Attwood*, (1839) 7 Scott. 843. An appointment of an umpire, by lot consented by the attorney's clerk, but not by the attorneys themselves, or their client, is bad, although the parties, in ignorance of the mode of appointment, had attended the arbitrator. *Hodson, In re*, 7 D.P.C. 569. Where two arbitrators appointed by an umpire by lot,

and the agent and solicitor of A, a party to the reference, upon being told who had been appointed, and the mode of appointment, raised no objection, and approved of the person appointed, who made his award, held that he was not entitled to have the award set aside upon the ground that the umpire had been irregularly appointed. *Blythe and Tyne Ry In re,* 11 W.L. 705. The signing of the appointment of an umpire is not a judicial act and therefore need not be done by the arbitrators at the same time or together. *Hopper, In re* 8 B. & S. 100. "Appoint" means concur in appointing. *In re Eye* (1892) 1 Q.B. 139. The arbitrators cannot delegate the power of appointment conferred on them by the contract. *J. G. Smith* v. *Ludha,* 17 Bom. 129; but see, *Shankar Lal* v. *Jainy,* 53 All. 384. Where the terms of a reference provide for the appointment of an umpire before the arbitrators enter upon the reference, until the umpire is appointed, the reference cannot proceed. *Chooni Lal* v. *Madhoram,* 36 Cal. 388; *Hurdwary Muli* v. *Ahmed Musaji* 13 C.W.N. 63; but see *Bombay Company* v. *National Jute Mills,* 39 Cal. 669; *Louis Dreyfus* v. *Hemandas,* A.I.R. 1940 Sind 37. The Act recognises no award by a tribunal superior to the umpire. *Heeralal* v. *Joakim,* 31 C.W.N. 446. The court has no jurisdiction to appoint some body as umpire if the arbitrators differ, when the deed of reference to arbitration filed by the parties makes no provision for this contingency but expressly states that the court should then decide the matter. *Ramzani* v. *Nur Ahmadi,* 189 Ind. Cas. 446=42 P.L.R. 1940 Lah. 276. Where the agreement of reference to arbitration provides that the arbitrators would be entitled to appoint an umpire only if they happen to disagree, it is not incumbent on the arbitrators, to appoint an umpire within 30 days of their own appointment as provided for by this para. Such a provision in the agreement must be held to contain an intention different from what has been expressed in this para, within the meaning of s. 3 of the Act. *Sukh Lal* v. *Mamchand,* 46 P.L.R. 348=219 Ind.Cas. 162=A.I.R. 1945 Lah. 34. In case of appointment of an umpire approval of the parties is not necessary. *Oliver* v. *Collings,* 11 East. 367. But appointment of an umpire is not effectual unless he accepts the office. *Ringland* v. *Lowndes* (1863), 15 C.B.N.S. 173 (196).

1606. Commencement of authority.—If the arbitrators cannot agree to an award on any of the matters referred, the umpire should decide on all of them and only upon those as to which the arbitrators disagree. *Tollit* v. *Saunders,* (1821) 9 Price 612; *Wicks* v. *Cox.* (1847) 11 Jus 542; *Winterinwham* v. *Robertson,* 27 L.J.Ex. 301, *Russell,* 15th Edn., p. 130. An express admission of the arbitrators that they cannot agree is not necessary to give the umpire jurisdiction to make an award. *Hill* v. *Marshall,* 5 L.J.O.S. C.P. 161. If one of the arbitrators insist upon producing further evidence, and the other refuses to allow it to be done, that is sufficient disagreement between the arbitrators to authorise the interference of the umpire. *Cudliffe* v. *Walters,* 2 M. & Rob. 232; see also *Winteringham* v. *Robertson, supra.* There may be circumstances in which an umpire may join in an inquiry with the arbitrators before the time of his acting arrives. *Elliot and South Devan Ry., In re* 2 Deg. & Sm. 17. "An appointment of an umpire which has become effectual by acceptance of the office exhausts the power of appointment, and the appointers have no power to revoke the appointment made or to make a fresh appointments in place of it."—*Russell,* 13th Edn. 317.

1607. Procedings before umpire.—In order to save the delay and

expense of two investigations of evidence, it is often arranged that the umpire shall sit with the arbitrators and hear the evidence once for all. If without any special arrangement the umpire sits with the arbitrators and hears the evidence, that is no ground of objection to the award, but the umpire ought not in such a case to interfere with the arbitrators when they discuss the case. *Russell* 15th Edn., p. 127. If the arbitrators failed to agree then and then only the umpire can make an award. *Flag Lane* v. *Sunderland* (1859) 5 Jur. N.S. 894 ; *Ellison* v. *Ackroyd* (1850) 1 L. M. & P. 806. If the arbitrators failed to make their award within time then, also the umpire can step in and make his award, which he considered as a valid one. *Ellison* v. *Ackroyd, supra.* Before expiry of time fixed for arbitrators' award or before disagreement between them any interference by the umpire would make the award liable to be set aside. *Potter* v. *Newman* (1835) 4 Dowl. 504. According to *Russell* notice of disagreement can be given by the arbitrators even after a mere discussion of the case and before hearing evidence. *Russell,* 15th Edn., p. 128. As regards meaning of the word disagreement, *vide Issifoglu* v. *Conmantaros,* (1947) 1 K.B. 396. An umpire may make his award on the notes of the arbitrator if no objection is taken. *Jenkins* v. *Heggs,* 11 L.J.Q.B. 71. Where an umpire refuses, on express request, either to hear evidence already given before the arbitrators, or to examine new witness, the court will set aside the award. *Ibid.,; Salkeld, In re,* 12 A & E. 767. Their not insisting on this objection at the time of making the award does not amount to a waiver. *Jenkins* v. *Heggs, supra,* but see, *Salkeld In re, supra.* The fact that the arbitrators were not present at the sitting held by the umpire or that they have not signed the award does not vitiate the award or render it illegal. *Louis Dreyfus* v. *Tarachand,* A.I.R. 1926 Sind 242=95 Ind.Cas. 378 ; but see, *Winteringham* v. *Robertson,* 27 L.J.Ex. 301 ; *Beddal* v. *Page,* 5 L.J. (O.S.) K.B. 101 ; *Flaglane* s. *Sunderland,* 5 Jur. N.S. 894. An umpire or single arbitrator occupies a judicial position and is bound so far as practicable to follow legal rules. *Enoch and Zaretzky, In re,* (1910) 1 K.B. 327=79 L.J.K.B. 363. An umpire is not entitled in the course, of an arbitration, when their side objects to his doing, himself to call a witness and examine him. *Ibid. ; contra Coulson* v. *Disborough,* (1894) 2 O.R. 316 (318). As regards disqualification or otherwise of arbitrator to give evidence before umpire *vide Bourgeois* v. *Weddel,* (1924) 1 K.B. 539 ; *Haridas* v. *Baidya,* 21 C.W.N. 895 ; *Brojendra* v. *Purna,* 58 Cal. 895.

3. The arbitrators shall made their award *four* month after entering on the reference or after having been called upon to act by notice from any party to the *arbitration agreement or within such extended time as the Court may allow.*

1608. Scope.—The provision in paragraph 3 that unless a contrary intention is expressed in the arbitration agreement, the arbitrators should make their award within four months after entering on the reference or after having been called up to act by notice in writing from any party to the arbitration agreement, is expressed in mandatory terms and its contravention involves avoidance of the award. *Abdul Hakim* v. *Chairman,* A.I.R. 1950 Lah. 32=Pak. L.R. (1949) Lah. 789. An arbitration agreement stands on the footing of any other agreement. It is binding upon the parties unless it is tainted with fraud, coercion, undue influence etc., in which case it can be avoided like any other agreement. Once there is a valid reference to arbitration the parties cannot resile from

it merely because the arbitrators have allowed their time to expire without making any award or that they have neglected or refused to act. *Sonelal* v. *Latta,* A.I.R. 1955 M.B. 91=I.L.R. (1954) Madh. B, 31. An award would be within time if the arbitrator who entered on the reference has made the award within four months of the date of his entering on the reference. Where upon the refusal of the first arbitrator to act, as such, after having entered up the reference, another arbitrator was appointed in the terms of the agreement and this arbitrator makes the award within four months of his entering upon the reference, the award cannot be thrown out on the ground that it was given beyond limitation. The date of entering on the reference cannot be taken to be the date when the first arbitrator entered upon the reference. *Nawab* v. *Nawab,* A.I.R. 1959 All. 777. This paragraph differs from para. 3 of the First Schedule of the Indian Arbitration Act of 1899 in two respects. According to the repealed paragraph the arbitrators were bound to make their award within three months after entering on the reference or after having been called on to act by notice in writing from any party to the submission but under this paragraph four months' time is given to him. Under the repealed paragraph the arbitrators could by any writing signed by them, from time to time, enlarge the time for making the award , but now by this paragraph that power is taken away from the arbitrator and the power of extending time now vests in court. Para. 3 of the First Schedule of the Indian Arbitration of 1899 was taken verbatim from para. (*c*) has been repealed by s. 2C and Third Schedule of the English Arbitration Act of 1934. Section 6(3) of the English Act enacts : "subject to the provisions of sub-section (2) of section 10 of the principal Act and to anything to the contrary in the arbitration agreement, an arbitrator or umpire shall have power to make an award at any time." Now the law is that if the reference is made through court, the court is to fix time in the order of reference. (*Vide* s. 23). If it is not made through court, and if no time is fixed in the arbitration agreement in that case four months' time is given to the arbitrators to make their award. The power of extending any time is retained by the court. See also *Ramnath* v. *Nanju,* A.I.R. 1953 Cal. 787. This paragraph has got nothing to do with reference being made by the party alone. *Om Prakash* v. *Union of India,* I.L.R. (1963) 1 All. 86=1962 All. L.J. 1006=A.I.R. 1963 All. 242.

1609. Whether applicable to disputes under the Co-operative Societies' Act.—The provisions of para. 3, Sch. I, are inapplicable to a proceeding for arbitration of a dispute relating to Co-operative Societies. *Nand Kishore* v. *Bally Co-operative ;* 47 C.W.N. 478=A.I.R. 1943 Cal. 255=I.L.R. (1943) 2 Cal. 431=208 Ind.Cas. 196.

1610. Make their award.—For meaning of 'making their award', *vide* notes under section 23.

1611. Entering on the reference etc.—In *Sardar Mal* v. *Sheo Baksh,* 66 Ind.Cas. 907=20 A.L.J. 272, the court observed : "We are of opinion that the provisions 'entering on the reference' and 'having been called upon to act by notice in writing' are alternative in this sense, that where no reference is entered upon at all, then the time runs from the notice calling upon the arbitrators to act. But, on the other hand, even although the arbitrators may be called upon to act by entering upon the reference, if they enter upon the reference, they have three months from the moment for making their award.....To hold otherwise

would seem to strike out from clause (3) the words "within three months after entering on the reference' in a sense where one of the parties happened to call upon the arbitrators to act before they began the reference.

"This clause was considered by the English Court of Appeal in *Baring Gould* v. *Sharpington Combined Pick and Shovel Syndicate,* (1899) 2 Ch. 80=68 L.J.Ch. 429. And the view which we take seems to be that which was laid down by the Master of the Rolls, that late *Lord Lindley* in a passage contained in page 91 of the report. In addition to that, under the old clause in England, which was slightly different in form, an equally strong court came to the conclusion in *Baker* v. *Stephens,* (1867) 2 J.B. 528=36 L.J.Q.B. 236, that 'entering upon the reference' means 'not when an arbitrator accepts the offce, or takes upon himself the duty but when he actually enters upon the matter of reference, when the parties are before him, or under some peremptory order compelling him to conclude the hearing *ex parte.*" *Vide* A.I.R. 1950 Lah. 174 noted under Article 4. It may be going a bit too far to hold that the moment the arbitrator accepts an appointment he enters upon a reference. He must do some act which is referable to his position as an arbitrator and to nothing else before it can be said that he enters upon the reference. In any event the arbitrators must take upon himself and exercise the functions of an arbitrator. The exercise of a function does not necessarily mean hearing the matter on the merits. *Babu Bhai* v. *Prabhod,* 58 L.R. 917=A.I.R. 1956 Bom. 146 ; (1941) 1 K.B. 396.

The word 'act' in the 2nd clause of Sch. I R. 3 is more comprehensive than the words 'entering on the reference' in the first clause of that rule. *Hari Shankar* v. *Shambhu Nath,* I.L.R. (1961) 2 All. 469=1961 All. L.J. 748=A.I.R. 1962 S.C. 78. It is always a question of fact on what date the arbitrator or the umpire as the case may be actually entered on the reference. *Ram Sahai* v. *Harichandra,* 1963 M.P.L.J. 1121=A.I.R. 1963 Madh. Pra. 143.

1612. Month.—"Month" shall mean a month reckoned according to the British calendar. *Vide* s. 3 (33) of the General Clauses Act of 1897.

1613. How four months are to be calculated.—If matters are referred to an arbitrator on the 29th of June, and he is to make his award within five calendar months after the matter is referred to him, the 29th June is excluded in the computation of time, and an award made on the 29th of November is good as being within the limited period. *Russell,* p. 112 citing, *Higham* v. *Jessop,* 9 Dowl. 203. If he has "until" a day named to make his award, the word "until" may be constructed either inclusive or exclusive ; and the construction put upon it, *ut res magis valeat quam pereat*, the arbitrator will have the whole day named included, and may make his award at any time during that day. *Russell,* p. 112 citing *Kerr* v. *Jeston,* Dowl. N.S. 538 ; *Kuon* v. *Symmonds,* 3 Bro. Ch. Cases, 358 ; *Dakins* v. *Wagner,* 3 Dowl. 535 ; *R.* v. *Steavens,* 5 East. 244. If however within the period of 4 months of being called upon to act the arbitrator enters upon the reference the limitation begin to run from the date on which the arbitrator enters upon the reference. *Ghasilal* v. *Biswanath,* A.I.R. 1964 Cal. 466.

1614. Award beyond time.—*Vide* s. 28 and notes thereunder. Where parties parties attend and recognise that the arbitrator has jurisdiction to continue the arbitration, even though the time for making the award has expired, they are estopped by their conduct from seeking to impugn the award on the ground that it was invalid by reason of being filed out

of time. *Patto Kumari* v. *Upendranath,* 50 Ind.Cas. 52=P.L.J. 265. The failure of the arbitrator to make his award within four months does not automatically result in the cancellation of arbitration agreement. *Shiv Ram* v. *Ram Rakha,* A.I.R. 1951 Pepsu 45=6D.L.R. (Pepsu) 13.

1615. S. 3 and Sch. 1, Rule 3—Applicability.—The parties may exclude the provisions of the Schedule, of they so desire, by expressing a contrary intention. *Vide commentary to section* 3 *supra.* Where the arbitration court is the Bengal Chamber of Commerce, the parties are bound by the Rules of Commerce. This article was article not applied in such a case. *Baranagar Jute* v. *Hulaschand,* 62 Cal. W. N. 734=A.I.R. 1958 Cal. 490.

1617. Limitation of four months—Starting point.—Deed of agreement was executed by the parties referring the dispute to arbitration on 9-5-1952. The deed was handed over to the arbitrators on 16-8-1952 and an award was made on 23-10-1952. *Held,* that the period of four months was to be counted from 16-8-1952 and therefore the award made on 22-10-52 did not offend against Rule 3. *Abdul* v. *Thakur,* 1958 B.L.J.R. 681. If the arbitrators have entered on the reference then the award must be made within 4 months from the date. If they have not entered on the reference the arbitrators may be called upon by notice in writing to act and in that case the period of four months is to be counted from the date of notice. *Shambhu* v. *Hari Sankar,* 1954 All. W.R. (H.C.) 250= 1954 All. L.J. 332=A.I.R. 1954 All. 673. *See also Union of India* v. *Sri Nath,* 1957 B.L.J.R. 234=A.I.R. 1957 Pat. 697.

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the *arbitration agreement* or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.

1618. Scope.—This paragraph corresponds to para. IV of the Indian Arbitration Act of 1899 which again is based on para. (*d*) of the English Arbitration Act of 1889 and to para. 9 of the Second Schedule of the Civil Procedure Code of 1908. When the umpire's power is to commence on the disagreement of the arbitrator, to justify the umpire in interferring there must be such a difference between the arbitrators as renders their agreement in an award hopeless. *Cudliff* v. *Walters,* 2 Moo. & Rob. 23. Whether there has been such an essential difference is a question of fact to be decided by a court. *Russell,* page 180. Before the English Arbitration Act of 1889, it was held that when one of the arbitrators, after some meetings, declined to proceed further in the case, or where one insisted on further evidence being produced, which the other refused to allow, there arose such a disagreement as to call there umpire's powers into existence. *Cudliff* v. *Walters,* 2 Moo. & Rob. 232; *Tunno and Bird, In re,* 5 B. & Ad. 488; *Winteringham* v. *Robertson,* 27 L.J.Ex. 301. There may be circumstances in which an umpire may join in an inquiry with the arbitrators before the time of his acting arrives. *Elliot and South Debon, In re,* 2 Deg. & Sm. 17=12 Jur. 445. An umpire may enter into work where before the expiry of the period two of the arbitrators retired. *Niaz Ahmed* v. *Abdul,* 1 A.L.J. 29= (1904) A.W.N. 49. *Prima facie* the duties of an umpire are the same as those of the arbitrators. *Sitaram* v. *Sushil,* 46 Ind.Cas. 706. An umpire

can act without arbitrators. *Ram Lagan* v. *Phatangan,* A.I.R. 1928 All. 674=(1929) A.L.J. 31=111 Ind.Cas. 559. If there is disagreement between the arbitrators there is no award and the jurisdiction of the umpire is attracted. In the absence of a contrary provision in the arbitration agreement the umpire must adjudicate upon the whole case even if the arbitrators disagree on one point. It is really for the umpire to decide if there is compromise or a withdrawal of the reference which cannot be retracted. Even if there is a compromise the umpire may make an award in accordance with the compromise. In fact that umpire ought to embody the admitted claim or compromise in the award unless the parties invite him not to do so. *Probodh Kumar* v. *Union of India,* 56 C.W.N. 436. Where the umpire enters upon the reference in lieu of the arbitrators, all the matters referred fall to be decided by him, and not merely the matters in respect of which the arbitrators have disagreed. *Russell,* 15th Edn. 6. 130.

5. The umpire shall make his award within *two months* of entering on the reference or within such extended time as the Court may allow.

1619. N.B.—This paragraph corresponds to para. V of the Indian Arbitration Act of 1899 which again is based on rule (e) of the English Arbitration Act of 1899. This para (e) been repealed by the Arbitration Act, 1934, third Schedule.

1620. No difference between the arbitrators—Applicability of Rule 5.—The umpire takes action only if there be any of the circumstances mentioned in R. 4, if the two arbitrators disagree in their opinion, the matter will be referred to the umpire and then the umpire enters on the reference in lieu of the arbitrators and he has to make his award within the meaning of R. 5 within two months of such entry on the reference. Where there has been no disagreement between the arbitrators and hence the umpire was not called upon to act under R. 5. Rule 5 has no application. *Abdul* v. *Thakur,* 1958 B.L.J.R. 681.

1621. Entering on reference.—An umpire enters on the reference when he enters upon the matter of arbitration (*i.e.*) when the parties are before him or under some peremptory order he is compelled to conclude the hearing *ex parte.* He cannot be deemed to have entered on the reference on the day when he merely directed that no further notice need be sent to one of the parties without beginning an enquiry into the case. *Abdul Majid* v. *Bahawal,* A.I.R. 1950 Lah. 174=Pak L.R. (1950) Lah. 323; see also *Sardar Mal* v. *Sheo Baksh,* A.I.R. 1922 All. 106=44 All. 432.

6. The parties to the reference and all persons claiming *under* them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in *difference* and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for and do all other things which during the proceedings on the reference, the arbitrators or umpire may require.

1622. Scope.—This paragraph corresponds to para. VI of the

Indian Arbitration Act of 1899 and para. (f) of the English Arbitration Act of 1899. *Vide* notes under s. 13, *supra*

7. *The award shall be final and binding on the parties and persons claiming under them respectively.*

1623. N.B.—This para is new

1624. Para. 7.—*Vide* notes under S. 14.

8. The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client.

1625. Scope.—This paragraph corresponds to para. 9 of the Arbitration Act of 1899 which again is based on para. (i) of the English Arbitration Act of 1899. See now section 18 of the English Arbitration Act of 1950. The arbitrators have power over the costs of reference and award under their provisions of this para. *Williams and Stepny, In re,* 60 L.J.Q.B. 639=(1891) 2 Q.B. 257. The effect of this para is to make arbitrators judges in their own cause in the matter of costs. When the submission does not express a contrary intention, the arbitrator or umpire may himself fix the amount of his remuneration, and may include it in his award. If he includes it in his award, there is no means of turning or otherwise disputing the amount so fixed by him, unless the amount is so unreasonable and excessive that the court would hold him guilty of misconduct, and on that ground set aside the award under s. 30 of the Arbitration Act. *Gobind Singh* v. *Pohumal,* I.L.R. (1944) Kar. 354=219 Ind.Cas. 195=A.I.R. 1945 Sind 41. It may be of use to note the distinction between costs of the cause, costs of reference, and costs of the award. When a cause is referred the costs of the cause comprise the costs incurred in the cause up to the time of the submission, the costs of the order of reference, and the costs of ulterior proceedings in the cause, if any after the award. *Russell,* p. 234, citing *Goodall* v. *Ray,* 4 Dowl. 1; *Clark* v. *Owan,* 2 H. & W. 324. Ordinarily, the expense incurred by the parties of the whole inquiry before the arbitrator, whether with respect to the matters in the cause or the matters out of it, are costs of reference. *Russell,* p. 235; *In re Autothreptic,* 21 Q.B.D. 182. The "costs of the reference" include all the expenses properly incurred by the parties in the cause of the whole inquiry before the arbitrator. They may include the costs of negotiating and settling terms of the submission, and of any fresh submission, between the parties. The costs of a special case stated in the course of reference under clause (*a*) of section 13 are included within the terms of costs of reference and ought (in so far as the court has no already dealt with them) to be dealt with be the arbitrator in his award. *Maritime Insurance* v. *Assecuranz Union* (1935) 52 L.I.L. Rep. 16; but see *Higham* v. *Havant,* (1951) 2 T.L.R. 87 cited in *Russell,* 15th Edn., p. 232. Special expenses incurred by the arbitrators in connection with the arbitration with the consent of the parties are to be regarded as costs of reference. *Ibid.; Re Autotherptic Steam Boiler,* (1882) 21 Q.B.D. 182. The costs of the award are the amount of the arbitrators' charges which are usually paid to him when the award is taken up. *Russell,* p. 235. See *Brazier* v. *Bryant,* 2 Dowl. 600; *Dosset* v. *Gingell,* 2 M. & G. 870. Where after writ in an action "all matters in difference between the parties"

are referred to an arbitrator, and the order of reference contain a clause that "the costs of the said cause, and the costs of the reference and award, shall be costs in the cause," the arbitrator has power to deal with all costs, and may order the successful plaintiff to pay the defendant's costs. *Hayward* v. *Mors,* 49 J.P. 248. An arbitrator can only exercise his power of fixing the amount of the costs by the award itself. *Pregble* and *Robinson, In re* (1892) 2 Q.B. 602=67 L.T. 267.

On questions of costs, if the arbitration clause itself makes any provision, then that provision is supreme and effect should be given to it unless the parties have altered the same by subsequent agreement. *N. F. G.* v. *Union of India,* A.I.R. 1956 Cal. 11. There is a distinction between costs of the causes, costs of reference, and costs of award. So when a cause is referred the costs of the cause comprise the costs incurred in the cause upto the time of submission, the costs of the order of reference and the costs of ulterior proceedings in the cause, if any, after the award. And there is also the rule that when "all the matters in difference between the parties" including the question of costs are referred to an arbitrator, he has the power to deal with all the costs of the cause. Even assuming that the arbitrator has no power to deal with the costs incurred upto the reference, the court has still jurisdiction to make appropriate provision in this regard in the decree giving effect to the award. *Vulson* v. *Ktlukutty,* 1958 Ker. L.J. 965=1958 Ker. L.T. 577= A.I.R. 1959 Ker. 174. When the provisions of this paragraph are deemed to be included in the arbitration agreement, or the agreement states that the costs of the reference or award are to be in the discretion of the arbitrator, he should give some direction in his award respecting costs, otherwise the award may be bad as not being final. *Russell,* 13th Edn., p. 441 citing *Morgan* v. *Smith,* 9 M. & W. 427 ; *Richardson* v. *Worsely,* 5 Ex. 619 ; *Williams* v. *Wilson,* 9 Ex. 90. Where an arbitrator fails to deal in his award with costs which are left to his discretion, the court may refer the matter back to him for dealing with the same. *Warbury & Co., M'Kerrow Co., &* (1904) 90 L.T. 644 ; *Becker Shillon & Co., In re* (1921) 1 K.B. 391. Cost may be awarded by the arbitrator in lump. *Bradshaw* v. *Air Council,* (1926) Ch. 329=95 L.J.Ch. 499. But the arbitrator must exercise judicial discretion in awarding cost. *Lloyd Del Pacific* v. *Board of Trade,* 46 T.L.R. 476. Cost should not be awarded by arbitrators disregarding agreement between the parties. *Mansfield* v. *Robinson,* (1928) 2 K.B. 353=97 L.J.K.B. 466. Arbitrator's award regarding cost, where discretion has been used should not be disturbed. *Gray* v. *Ashburton,* (1917) A.C. 26 ; *In re Fearon and Flinn,* (1869) L.R. 5 C.P. 34. Arbitrator has power to direct taxation of cost. *Blair* v. *Harradine,* 7 Ex. 269 ; *Morgan* v. *Smith,* 9 M. & W. 427 ; *Roulstone* v. *Alliance,* 4 L.R.Ir. C.L. 457 ; *Burtle* v. *Musgrawe,* 1 *Dowl.N.S.* 325 ; *In re Dublin Electric Supply,* 51 Ir.L.T. 109. The arbitrator may ask the successful party to pay the cost if he has exercised his discretion. *Re Fearon and Flinn,* (1869) L.R. 5 C.P. 34.

THE SECOND SCHEDULE

(*See* section 41)

POWERS OF COURT.

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may

arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunction or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

1626. Notes.—*Vide* Notes under s. 41.

THE THIRD SCHEDULE—[See Section 49 (1)]. [Rep. by Act VI of 1945]. Enactments Repealed.

THE FOURTH SCHEDULE—[Rep. by Act VI of 1945]. (See Section 49 (2) Enactments Amended.

The repealed Third and Fourth Schedules were as follows:—

THE THIRD SCHEDULE

[*See* Section 49(1)]

ENACTMENT REPEALED.

Year 1	No. 2	Short Title 3	Extent of Repeal 4
1899	IX	The Indian Arbitration Act, 1899.	The whole.
1908	V	The Code of Civil Procedure, 1908.	Section 89, clauses (*a*) to (*f*) (both inclusive) of sub-section (1) of section 104 and the Second Schedule.

THE FOURTH SCHEDULE—(*Contd.*)

[*See* Section 49 (2)]

ENACTIMENTS AMEUDED

Year 1	No. 2	Short Title 3	Amendments 4
1863	XX	The Religious Endoment Act, 1863.	(*a*) In section 16— (*i*) for the words and figure "Chapter VI of the Code of Civil Procedure" the words and figure "Chapter IV of the Arbitration Act, 1940" shall be substituted ; (*ii*) for the words and figure "section 312 of the said Code" the words and figure "section 21 of the said Act" shall be substituted. (*b*) In section 17, for the words and figurt "section 312 of the said Code of Civil Procedure" the words and figure "section 21 of the Arbitration Act, 1940" shall be substituted.
1877	I	The Specific Relief Art 1877.	In section 21— (*i*) for the words and figure "Code of Civil Procedure and the Indian Arbitration Act, 1899," the words and figure "Arbitration Act 1940, shall be substituted ;

THE FOURTH SCHEDULE—(*Contd.*)

Year	No.	Short Title	Amendments
1	2	3	4
			(*ii*) after the words "but if any person who has made such a contract" the words "other than an arbitration agreement to which the provisions of the said Act apply" shall be inserted.
1908	IX	The Indian Limitation Act, 1908*.	(*i*) for Article 158 †the following shall be substituted ; namely : 158. Under the Arbitration Act, 1940, to set aside an award or get an award remitted for reconsideration. —Thirty days.—The date of service of the notice of filing of the award.
			(*ii*) In Articles 159 and 179, for the words "Same Code" in the first column the words and figure "Code of Civil Procedure, 1908" shall be substituted ;
			(*iii*) for Article 178 †the following shall be substituted, namely :—
			In tht First Schedule— 178. Under the Arbitration Act, 1940, for the filing in Court of an award. —Ninety days.—The date of service of the notice of the making of the award.
1910	IX	The Indian Electricity Act, 1910.	In section 52, for the figure "1899" the figure "1940" shall be substituted.
1913	VII	The Indian Companies Act, 1913.	(*ii*) In sub-section (3) the words "other than those restricting the application of tht Act in respect of the subject-matter of the arbitration" shall be omitted.

* See now the Limitation Act 1963 (36 of 1963)—

†See Art. 119 of the Limitation Act (36 of 1963) which reads as follows :—

119. Under the Arbitration Act, 1940,—		
(*a*) for filing in court of an award,	Thirty days	The date of service of the notice of the making of the award.
(*b*) for setting aside an award or getting an award remitted for reconsideration.	Thirty days	The date of service of the notice of the filing of the award.

1627. Effect of repeal and amendments by Act VI of 1945 Savings.—Section 4 of Act VI of 1945 says "The repeal by this Act of any enactment shall not affect any Act or Regulation in which enactment has been applied, incorporated or referred to; and this Act shall not affect the validity, invalidity, effect or consequences of any thing already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt,penalty, obligation, liability, claim or demand or any indeminity already granted, or the proof of any past act or thing; nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction, exemption, office of appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed; nor shall the repeal by this Act of any enactment revive or restore any jurisdiction office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force."

Where there is a repeal of an enactment, the consequences laid down in s. 6 of the General Clauses Act will follow unless as the section itself says, unless a different intention appears. In the case of simple repeal there is scarcely any room from expresion of a contrary intent. *State of Punjab* v. *Mohar Singh,* A.I.R. 1955 S. C. 45.

The Arbitration (Protocol and Convention) Act, 1937

(Act No. VI of 1937.)

Received the assent of the Governor-General on the 4th March, 1937.

An Act to make certain further provisions respecting the law of arbitration in India.

Whereas India was a State signatory to the Protocol on Arbitration Clauses set forth in the First Schedule, and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule, subject in each to a reservation of the right to limit its obligations in respect thereof to contracts which are considered as commercial under the law in force in India.

And whereas it is expedient, for the purpose of giving effect to the said Protocol and of enabling the said Convention to become operative in India, to make certain further provisions respecting the law of arbitration ;

It is hereby enacted as follows :—

Short title, extent and operation.

1. (1) This Act may be called the Arbitration (Protocol and Convention) Act, 1937.

(2) It extends to the whole of India.

(3) The provisions of this Act, except this section, shall have effect only from such date as the President may, by notification in the Gazette of India, appoint in this behalf, and the President may appoint different dates for the coming into effect of different provisions of the Act

Scope.—The Arbitration (Protocol and Convention Act, VI of 1937) has force in India after 26-1-1950. India being a State signatory to the Protocol on the Arbitration clauses set forth in the First Schedule to the Arbitration (Protocol and Convention) Act. 1937, and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule to that Act, the obligations undertaken thereunder continue to bind India after India was constituted a Dominion and they continue to bind India thereafter. *Francisco* v. *Goraldhram*, 61 Bom. L, R. 1195 = A.I.R. 1960 Bom. 91.

Statement of Objects and Reasons.—"The Government of India have had for sometime past under consideration the question, of India's adherence to the Geneva Protocol on Arbitration Clauses (1923) and the International Convention on the Execution of Foreign Arbitral Awards (1927). The object of these Instruments is to meet the widely expressed desire of the commercial world that arbitration agreements should be ensured effective recognition and protection. A large number of countries including many of first class commercial and industrial importance, e. g. the United Kingdom, France, Germany, the Netherlands have adhered to these Instruments.

After consulting local Governments, High Courts and commercial bodies, a majority of whom were formed to be in favour of India's accession to these Instruments, the case was placed before the Commerce Department Standing Advisory Committee of the Legislature who recommended that India should adhere to the Instruments. These have accordingly been signed at Geneva on behalf of India, subject to reservations limiting India's obligations under the Instruments to commercial contracts and excluding the Indian States from the scope of the Instruments.

The Instruments provide for their ratification by a contracting party before they are enforced in respect of that party. Prior to ratification it is necessary to enact legislation to implement certain obligations contracted under these Instruments, and the present Act incorporates the legislation needed in this respect."—*Vide Gazette of India, 1936, Part V. Page 10.*

Enforcement of foreign award in England.—"Certain awards of certain foreign tribunals may be enforced, in the same way as an English award (Vide Part II of the English Arbitration Act, 1950 given in the Appendix L) either by obtaining leave to enforce under section 26 (with consequent right to enter judgment) or by action. "*Even where Part II of the Act does not apply, however, there would seem to be no reason why an award upon an arbitration conducted abroad, or founded upon a submission governed by a foreign law, should not be enforceable under section 26 in the same manner as an award having no foreign element. There is also a right of action upon most of such awards*", *Russell* 15th Edn. p. 260. See also *Protabmull* v *Shethia*, 64 C.W.N. 616.

As regards enforcement under Part of the English Act of 1950.—Russell says: "For an award to be enforceable under Part II of the Act, the following conditions must be satisfied :—1. The award must have been made pursuant to an arbitration agreement which is one to which the 1923 Protocol applies, which is made between the parties subject to the jurisdiction of states declared by order in Council to be the parties to the convention, and which is a valid a reement—valld, that is, by its proper law, which must not be English. The 1923 Protocol is obscure : it covers agreeing to refer future disputes connected with the contracts containing those clauses (provided the parties are subject respecting to the jurisdiction of different contracting states) but probably does not cover bare submission of existing disputes. It does not require a written arbitration agreement, and nor does Part II, unless writing is prescribed by the agreement's proper law. It would probably be held that the law of any territory which had adopted the English law of arbitration will require writing for validity in the sense of section 37 (1) (*a*).

2. The award must have been made in a territory declared by Order in Council to be one to which Part II applies, and must have heen made in conformity with the law governing the arbitration procedure. This last phrase may probably be taken to mean for most purposes, that the award is a proper award by the law of the territory where the arbitration took place.

3. The Tribunal making the award must have been constituted according to the agreement or in manner agreed upon by the parties.

4. The award must have become final in the country in which it was made ; and an award is not final for this purpose if proceedings are pending in that country for the purpose of contesting its validity. An award has been annulled in the country in which it was made is unenforceable under the Act.

The award must be in respect of matters which in English law, may be lawfully referred to arbitration, and the enforcement must not be contrary to English law or English public policy.

Further in proceedings for enforcing an award under the Act, the award itself may be challenged. If the party against whom enforcement is sought establishes that he was not given proper opportunity of arguing his case, or that the award deals with matters beyond the scope of the arbitration agreement, enforcement must be refused. If it is established that the award does not deal with all the questions referred, the court must either refuse enforcement, or postpone enforcement, or order the giving of security by the party seeking to enforce. If the validity of the award is challenged upon any other ground, the court has a discretion to allow enforcement, or refer it, or adjourn the hearing to allow bringing of proceeding to annul the award in an appropriate foreign court."—Vide *Russel*, 15th Ed., pp. 260-61.

An award made by foreign arbitrators, which requires an enforcement order to render it enforceable by the local law, is not a judgment of a foreign tribunal which can be enforced by action in English courts. *Merrifield* v. *Liverpool Cotton.* (1911) 105 L.T. 79. An award which is complete and could be enforced in the country where it was made is enforceable in England at common law, quite apart from any rights given by Part II of of the English Arbitration Act, 1950. *Norke* v. *London General Insurance*, (1927) 43 T.L.R. 541. See also *Brewer* v. *Drewreoy*, (1933) 1 K.B. 753 ; *Russel*, 15th Edn., 262. See also 64 C.W,N. 616.

Interpretation.

2 In this Act "foreign award" means an award on differences relating to matters considered as commercial under the law in force in India, made after the 28th day of July, 1924,—

(*a*) in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applies, and

(*b*) between persons of whom one is subject to the jurisdiction of some one of such Powers as the President, being satisfied that reciprocal provisions have been made, may, by notification in the Gazette of India, declare to the parties to the convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of Powers aforesaid, and

(*c*) in one of such territories as the President being satisfied that reciprocal provisions have been made may by like notification, declare to be territories to which the said Convention applies,

and for the purposes of the Act an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Foreign award—Essential conditions—Clause (2) of Sch. 1.—Clause (2) of the First Schedule to the Act requires that the constitution of the Arbitral Tribunal should be governed by the will of the parties and that will can be expressed in (he agreement of reference. By the expression of that will in the agreement the Protocol is not excluded. There is nothing in cl. (2) of the First Schedule to the Act which precludes the will of the parties being expressed in the instrument whereby the parties agree to refer dispute that may arise in connection with the contract to arbitration. *Held* that the agreement for arbitration in this case was one to which the Protocol set forth in First Schedule to the Arbitration (Prototol and Convention) Act, 1937 applied and that the award was a foreign award within the meaning of the said Act. *Francesco* v. *Gorakhram*, 61 Bom. L.R. 1195= A.I.R. 1960 Bom. 91.

Where after partition the arbitrator appointed under agreement which was concluded between the parties when India was undivided gave his award and signed it at Karachi the award is a foreign award. A.I.R. 1958 Punj. 258.

Clause 2 of the First Schedule to the Act requires that the constitution of the Arbitral Tribunal should be governed by the will of the parties and that will can be expressed in the agreement of reference. By the expression of that will in the agreement the Protocol is not excluded. There is nothing in cl. 2 of the First Schedule to the Act which precludes the will of the parties being expressed in the instrument whereby the parties agree to refer disputes that may arise in connection with the contract to arbitration. *Froncesco* v. *Gorakhram*, A.I.R. 1960 Bom. 91 ; but see A.I.R. 1950 Cal. 238 ; A.I.R. 1957 Cal 240

Stay of proceedings in respect of matters to be referred to arbitration.

3. Notwithstandsng anything contained in the Arbitration Act, 1899, or in the Code of Civil Procedure, 1908. if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceeding in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filling a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings : and the Court unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

Scope.—"Before filing a written statement" etc. *Vide* S. 34 of the Indian Arbitration Act of 1940 and commentary there under. Before the Court stays any proceedings under this section, the court must be satisfied that there is a submission to arbitration in pursuance of an agreement to which the Protocol applies. This is basic. If the agreement be such to which the Protocol does not apply, then no question of stay under s. 3 of the Act arises. It is open to parties, subject respectively to the jurisdiction of different contracting States who are signatories to the Portocol and Convention, to elect to come either under the Arbitration under the National Statutes or under Arbitration under the Protocol. If by their Arbitration agreement such parties choose Arbitrator under the National Statutes, as for example when the agreement is that the parties should be governed by the English Arbitration Act, there is then no further scope left for invoking the Protocal Arbitration any more. *W. Wood* v. *Bengal Corporation*, 97 C. L. J. 149=60 C. W. N. 578= A. I. R. 1956 Cal. 238. If the applicant himself has sued upon the agreement then the contract itself on which he has sued stands merged in the judgment obtained from the court. Therefore there is no agreement or arbitration which can be said to be still in operation or which is still able to proceed. In other words the agreement or arbitration has become "inoperative" or "cannot proceed." *Ibid.*

Suit against several defendants.—Where a suit was filed against four different defendants, of whom one alone was a party to the arbitration agreement and he applied for stay of the suit : held that the entire suit could not be stayed and at best he could ask for a stay of the suit against himsilf and no others. That was a course which had its peculiar difficulties mainly because that meant trial of a suit piecemeal. Such a procedure was most undesirable and unfair unless there were congent reasons to the contrary. *Bajrang* v. *Commissioner*, A. I. R. 1957 Cal. 240.

Applicability of the section—Conditions of stay.—This section does not require that applicant for stay should prove his own readiness and willingness to go to arbitration. But the applicant can obtain a stay order under this section only if the court is satisfied that

the agreement had not become inoperative or the arbitration could proceed. *W. Wood* v. *Bengal Corporation*, A.I.R. 1959 Cal. 8. Where there has not been any reference to arbitration the prayer for a stay under this section cannot be granted. *Ibid.* This section must be construed as contemplating a case where not only is there an arbitration agreement in force between the parties, but there has also been actual reference to arbitration. A.I.R. 1959 Cal. 8 ; (1956) 2 All. E.R. 721. It is the arbitration agreement made between parties belonging to jurisdiction of different States that the Protocol recognises and what s. 3 of the Act contemplates is obviously an actual reference to arbitration, made in pursuance of one such agreement. - A.I.R. 1959 Cal. 8. Sse also *New Great Insurence Co.* v. *Aktiselskaleat Set* 65 Bom. L.R. 487=1963 Mah. L. T. 768=A.I.R. 1964 Bom. 71 (for discretion of the Court.)

Applicability and Scope.—In order to invoke the provision of s. 3, there must not only be an agreement containing a clause agreeing to submit future disputes to arbitration but there must also be, in addition, an actual submission made in pursuance of such agreement after a dispute has arisen. *Bajrang Electric Steel Co.* v. *Commissioner*, A.I.R. 1957 Cal. 240.

Arbitration agreement—Clause stipulating choice of legal forum in England but not contemplating Protocol.—No doubt when two courts have concurrent jurisdiction to deal with a dispute, the parties may agree by a c ntract that courts of a particular land should decide that dispute. But where the clause was that 'all disputes must be referred to England for settlement, and no legal proceedings shall be taken to enforce any claim except in England, where the underwriters are alone domiciled and carry on business, : *Held*, that the clause only stipula'ed that the dispute should be decided in England and no legal proceeding should be taken to enforce any claim except in England, so that it could act but stipulate for English Arbitration in England or trial of dispute in English Courts of Law in England. It did not contemplate Protocal Convention such as is contemplated by the Arbitration (Protocol and Convention Act of 1937). As the Protocol did not apply application under S. 3 of the Act must fail. The fact that an Indian trader and an English Insurance Company were in the dispute and both the United Kingdom and India happened to be signatories to the Protocol could not determine the construction of the clause. *Bajrang* v. *Commissioner*, A.I.R. 1957 Cal. 240.

Section 3, Sch. 1, Clause : Sch 11, Act 1.—Where there has not been any reference to arbitration the prayer for a stay under s. 3 of the Arbitration (Protocol and Convention) Act cannot be granted. The Second Schedule to the Act and the use therein of the word submission as synonymous with 'argument' do not seem to be relevant, because the Schedule only sets out the conventions which was signed in 1927, four years after the date of the Protocol, and therefore, its vocabulary would not be very germane to a construction of even of the Protocol. Hence in construing s. 3 of the Act liitle assistance can be derived from the language of the convention which is only as part of the Protocol, but is also further apart from the Act.

It is the arbitration agreement made between the parties belenging to the jurisdiction of different States that the Protocol recognises and what section 3 of the Act contemplates is obviously an actual reference to arbitration, made in pursuance of one such agreement. Whatever words may be substituted for the word 'submission' in s. 3, it is impossible to escape the effect of the words "made in pursuance of the agreement to which the Protocol.....applies'. If the agr ement to which the Protocol applies is an agreement for arbitration, there cannot possibly be an agreement in pursuance of that agreement. Section 3 must, therefore be construed as contemplating a case where not only is there arbitration agreemont in force between the parties, but their has been an actual reference to arbitration. *W. Wood & Sons* v. *Bengal Corporation*, A.I.R. 1959 Cal. 8 ; (1956) 2 A,E.R. 721.

Sch. I, clauses 1 and 2—Scope and interpretation of.—What cls. 1 and 2 of the Prototol mean is that agreements for arbitration made between parties who are subject to the jurisdiction of different signatory States will be recognised by those States as valid and that arbitration in pursuance of such agreement shall be as the parties thereto have willed, subject only to the qualification that the law of the country where the arbitration may take place shall have to be observed and complied with in other words, if there is any provision in the agreement relating to the arbitral procedure or the constitution of the arbitral tribunal which is repugnant to the law of the country where the arbitration is to take place, such provisions will be nugatory for the purposes of the arbitration, but otherwise, the will of the parties, as embodied in the agreement, shall prevail. There is nothing in those provisions to suggest that any form of arbitration other than the arbitration provided for in the agreement is cotemplated or that the arbitral procedure, included in the constitution on arbitral tribunal shall have to be determined anew, where the Protocol applied.

The Protocol does not contemplate a case where the arbitration agreement has only provided for arbitration without making provision for the constitution of the tribunal, or the procedure to be applied, so that when a dispute arises, the parties will then elect a

tribunal and prescribe a procedure according to their will. The true view of the Protocol is that it contemplates an ordinary arbitration agreement between parties belonging to jurisdiction of the different signatory States for arbitration by tribunal, to be set up as provided for in the agreement itself, under one or other of the National States. A special form of arbitration by a tribunal specially constituted under the provisions of the Protocol itself is not warranted by anything contained in the Protocol. The fact that the arbitration agreement in the present case provided for arbitration under the English Arbitration Acts does not, therefore, exclude the applicability of either the Protocol or the arbitration (Protocol and Convention) Act. *W. Wood & Sons* v. *Bengal Corporation*. A.I.R. 1959 Cal. 8.

Effect of foreign awards.

4. (1) A foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India.

(2) Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence set off or otherwise in any legal proceedings in India and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Effect of foreign award.—The legal effect of an award in a case in which the rights of the parties in law are governed by the Protocol Act is not affected by the fact that the application for stay was wrongly instituted as one under section 34. *Murray Exportation* v. *Khaitan*, A.I.R. 1956 Cal. 644. Although an award made by an arbitrator at Karachi and signed by him there after the partition is a foreign award in India and it is not one which can be enforced in India under the Arbitration Act of 1940 as such the provisions of the Act will not apply to it. The party in whose favour the award is given can however bring an action on the award in the Indian Courts without going back to the original cause of action. *Lachman* v. *Parmeshri*, A I.R. 1958 Punj. 258 (260).

Foreign award—Arbitration Act s. 32—A foreign award under the Arbitration (Protocol and Convention Act),—A foreign award under the Arbitration (Protocol and Convention) Act can be used as a weapon and as a shield. The party in whose favour the foreign award is made can take steps to enforce it or it can take it as a defence or set off at any legal proceedings in India. The word "award" in section 32 of the Arbitration Act of 1940 means an award made under that Act and not under the arbitration (Protocol and Convention) Act as such that section does not ayply to the Arbitration awards made under Act of 1937. All that section 9 (*a*) of the Protocol Act says is that it will not prejudice the award—holder's right to enforce the award which under s. 4 (1) of the Protocol Act shall be enforceable "as if it were an award made on a matter referred to arbitration in India. An independent action to clear the title or right by challenging the foreign arbitral award on grounds on which such awards are liable to be challenged under s. 2 of the Protocol Act and on no other which are open under the laws of India, is maintainable. *Pratabmul* v. *K. C. Sethia*, 64 C, W. N. 616=A.I.R. 1960 Cal. 702. In the above case *Bose J.* said ; "A person dissatisfied with an award made without the intervention of a court of justice is entitled to bring an action for a declaration that the award is not binding and for delivery up and cancellation of the Award under s. 39 of the Specific Relief Act. The party aggrieved by the award is not bound to wait till his adversary sseks to enforce that award by the summary process prescribed by the Indian Arbitration Act and then contests it by filing such objections as are allowed by the law, for such remedy is not his sole remedy and does not take away the remedy open to him under the provisions of the s. 9 of Civil Procedure. *Jai Narain* v. *Narain Das*, 1. L. R. 3 Lah. 296 and *Kirkwood* v. *Maung Sin*, 52 I.A. 256 followed.

"The award-holder may not take step to enforce the award for a quite considerable time and the party aggrieved by the award may not like to use his business affairs in a state of uncertainty with a haavy liability hanging on the head and wait till the enforcement of the award is barred by limitation. The Court has very wide powers in dealing with a suit, it can, when it think fit, adjorn the suit and ask the parties to have the award annulled by the competent tribunal in the manner envisaged in section 7 (3) of the Act of 1937. The provisions of the Arbitration (Protocol and Convention) Act 1937 cannot therefore be said to constitute a bar to the maintainability of the suit filed by the appellant." *Ibid.*

Section 4 (1) of the Protocol Act, 1937, does not say that a foreign award shall be deemed to be award made under the Indian Arbitration Act, 1940. It is only enforceable in India subject to the provisions of that Act as if it was an award made on a matter referred to arbitration in India. Before a foreign award is filed under the provisions contained in the Arbitration (Protocol and Convention) Act 1937, there are various

requirements of law which have to be satisfied. Merely because a foreign award is enforceable in India as if it were an award made on a matter referred to arbitration in India, it does not make that award an award under the Indian Arbitration Act, 1940. The provisions in conection with the filing of the award under the Indian Arbitration Act are totally different from those contained in the Arbitration (Protocol and Convention) Act, 1937 and an application for filing an award under s. 5 of the Arbitration (Protocol and Convention) Act cannot be treated as an application for filing an award under the Indian Arbitration Act, 1940. Hence an application for filing a foreign award in court and passing a decree in terms thereof made under the Protocol Act is not governed by Art. 178 of the Limitation Act. *Francesco* v. *Gorakhram* A.I.R. 1960 Bom. 91.

Filing of foreign award in court.

5. (I) Any person interested in a foreign award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The court shall direct notice to be given to the parties to the arbitration, other than the applicant requiring them to show cause, within a time specified, why the award should not be filed.

Applicability—Question of law—Where the plaintiff files an application for enforcement of a foreign award, the question whether the matter is governed by the local Arbitration Act or the Arbitration (Protocol and Convention) Act is a question of law and the fact that the applicant plaintiff wrongly instructed the previous application for stay under s. 34 of the Indian Arbitration Act would not alter the legal effect, if in law it is the Protocol Act which governs the rights of the parties. *Murray Exportation* v. *Khaitan & Sons*, A.I.R. 1956 Cal. 644.

Section 5 provides for arbitration of "business disputes" and not of international disputes. What it does say is that business disputes must be of international character. Article 5 on a proper construction means arbitration of business disputes and does not include the dispute between two traders, who are citizens of two different sovereign states. Because the difference is between the citizens of two different states such business dispute assumes international character. The words "international character" in Art 5 qualify the words "business dispute" and do not mean any dispute simpliciter between a nation and another nation. A.I.R. 1956 Cal. 644.

Enforcement of foreign award.

6. (1) When the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Sub-section (1).—This section lays down low foreign awards can be enforced.

Sub-scction (2)—Appeal.—An appeal lies from a judgment and order passed in a proceeding to enforce foreign awards under the provisions of the Arbitration (Protocol and Convention) Act, *Mohd.* v. *Rouraffic*, A.I.R. 1960 Cal. 146 ; see also I.L.R. (1955) 1 Cal. 29, where it has been held that the bar contemplated by s. 6. (2) limiting the ground of appeal, cannot apply where the validity of the reference itself is challenged. An order dismissing the objections to the validity of an award and directing it to be filed determines the rights of parties and amounts to a "judgment" under clause 15 of the Letters patent. Hence it is appealable. I.L.R. (1955) 1 Cal. 29, 32. 33.

Appeal.—An appeal lies from a judgment and order passed in a proceeding to enforce foreign awards under the provisions of the Arbitration (Protocol and Convention) Act. *Mohd Nazim* v. *Rouraffic*, A.I.R. 1960 Cal. 146 ; *Shiva Jute* v. *Hindley*, 57 C.W.N. 573= (1955) 1 Cal. 29.

Conditions for enforcement of foreign awards.

7. (1) In order that a foreign award may be enforceable under this Act it must have—

(*a*) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed,

(*b*) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties,

(*c*) been made in conformity with the law governing the arbitration procedure,

(*d*) become final in the country in which it was made,

(*e*) been in respect of a matter which may lawfully be referred to arbitration under the law of India,

and the enforcement thereof must not be contrary to the public policy or the law of India.

(2) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that—

(*a*) the award has been annulled in the country in which it was made, or

(*b*) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, or

(*c*) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration :

Provided that if the award does not deal with all questsons referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in clause (a), (b) and (c) of sub-section (1), or the existence of the conditions specified in clauses (b) and (c) of sub-section (2), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Suit to enforce foreign award.—When a suit to enforce a foreign award is brought in the Bombay High Court in accordance with the provisions of the Arbitration (Protocol and Convention) Act 1937, under the scheme of section 7 the plaintiffs have to prove that the award is enforceable under the Act and in that connection the plaintiffs have to prove what is referred to in detail in clauses (*a*), (*b*), (*c*), (*d*) and (*e*) of s. 7 (1). The plaintiffs would have further to prove that the enforcements of the award is not contrary to the public policy or the law of India. *Messrs. Sese Oil* v. *M/s Gorakran* 64 Bom. L. R. 113 = 1962 Nag L. J. 709.

Clause (e) of sub-section (1)—The doctrine that no award should be enforced which is against public polity or the law of India, as laid down in s. 7 of the Protocol Act, does not introduce Indian laws of limitation for claims where the parties have chosen by their contract an arbitration in France as a method of settling their dispute. It is well settled that such an agreement is effective in law. The parties may choose for arbitration any forum in the world. The parties in submitting their disputes to a particular forum impliedly consent that the law which is to regulate the decision is the law of the forum. *Murray* v. *Khaitan*, A.I.R. 1956 Cal 644 ; see 1927 A. C. 604. Section 35, Arbitration Act, 1940 does not apply to arbitration of the International Chamber of Commerce where the Arbitration (Protocol and Convention) Act of 1937 applies. *Ibid.* The Arbitration and the Protocol Act are two statutes governing different kinds of arbitration, and to introduce section of one Act to regulate the arbitration under the other Act will be to create confusion and contradiction which was not intended by the Legislature. A. I. R. 1956 Cal. 644.

Foreign awards are dealt with in the Arbitration (Protocol and Convention) Act VI of 1937. Under this Act foreign awards can be enforced by filing them in Indian Courts,

and section 7 lays down the conditions under which they can or cannot be enforced. A foreign award cannot be enforced in this country by an application under the Indian Arbitration Act, 1940 when the provisions of the 1937 Act do not apply to it. *Lachman* v. *Parmeshri*, A.I.R. 1958 Punj 258. Merely because an agreement provides for or an award gives something more than the difference between the contract price end the market price, it cannot be said that the provision of the award is contrary to the law of India. I.L.R. (1955) 1 Cal 29 (36, 37).

Section 7 (1) (c).—The contention that the expression "Arbitration Procedure" in cl. (*c*) of sub-section (1) should be limited only to the procedure prescribed by statutory enactment and that it has no reference to procedure which has its basis on principles of natural justice is not acceptable. The law laid down by judicial decisions is so much a part of the law of the land as the law embodied is in statutes. It is true that courts must not insist upon a too minute observance of the regularity of Forms among persons who naturally by their education or by opportunities cannot be supposed to be.very familiar with legal procedure and some latitude may be permitted to them when they make slips in what is mere matters of form, but the rule is now well settled that the arbitrators must observe the first principles of justice, be the arbitration commercial or of any other kind. Though intending no justice they must observe the fundamental rules which governs judicial proceedings. Thus where, in an arbitration proceeding the umpire dealt with the parties separately, he inspected the goods in dispute, all by himself and the parties were not present at the time of such inspection, the award cannot be said to be in conformity with the law governing the arbitration procedure and cannot therefore, be enforceable in India under the provisions of the Arbitraaion (Protocol and Convention) Act. *S. Mohd* v. *Rouraffic*, A.I.R. 1960 Cal. 146.

Section 7 (1) (d)—'Final' meaning of.—The word 'final' as used in s. 7 (1) (d) was meant to refer to an award which is made a rule of Court. An award would be final within the meaning of s. 7 (1) (d) even if it is made a rule of the Court. *M/S Se. Se-Oil* v. *M/S Gorakran Kokalchand*, 64 Bom. L. R. 113=1962 Nag. L. J. 709.

Section 7 (1) (e).—Where contract provides measure of liquidated damages and arbitration was done in London and the Arbitrators awarded maximum amount named in the award. held that such award can be enforced in india as there is nothing in ss. 73 and 74 of the Contract Act which made the award of such liquidated damages illegal. *Shiva Jute* v. *Hindley Co. Ltd.* A.I.R. 1959 S.C. 357=(1969) S.C.J. 35.

Evidence.

8. (1) The party seeking to enforce a foreign award must produce—

(*a*) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made ;

(*b*) evidence proving that the award has become final ; and

(*c*) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in clauses (*a*), (*b*) and (*c*) of sub-section (1) of section 7 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient aecording to the law in force in India.

Saving

9. Nothing in this Act shall—

(*a*) prejudice any rights which any person would have had of enforcing in India any award or of availing himself in India of any award if this Act had not been passed, or

(*b*) apply to any award made on an arbitration agreement governed by the law of India.

Rule-making power of the High Court

10. The High Court may make rules consistent with this Act as to—

(*a*) the filing of foreign awards and all proceedings consequent thereon or incidental thereto :

(*b*) the evidence which must be furnished by a party seeking to enforce a foreign award under this Act ; and

(*c*) generally, all proceedings in Court under this Act.

THE FIRST SCHEDULE

PROTOCOL ON ARBITRATION CLAUSES

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions :

1. Each of the contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of difierent Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting States reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure. including the constitution of the Arbitral Tribulal, shall be governed by the will of the parties and by the law of the country in whose territory ihe arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differenccs.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid by virtue of the said article and capable of being carried into effect, shall refer tne parties on the application of cither of them to the decision of the arbitrators.

Such refercnce shall not prejudice the competence of the judicial: tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signatue by all States, shall be ratified. The ratification shall bo deposited as soon as possible with the Secretary-General of the Leaguo of Natlons. who shall notify such deposit to all the Signatory States.

6. The present Protecol will come into force as soon as two ratifications have been deposited. Thereafter it wiil take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of lts ratification.

7. The present Protocol may bo donounced by anr Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the Legue, who wlll immediatcly transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one yoar after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories ; that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said states may subsequently adhere seperately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting State may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

THE SECOND SCHEDULE

CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS.

Article 1,—In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") bovered by the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, shall be

recognised as binding and shall bo enforced in accordance with the rules of the procedure of the territery where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be nocessary :

(*a*) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto ;

(*b*) That tne subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon ;

(*c*) That the award has been made by the Arbitral Tribunal :provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure ;

(*d*) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if is open to opposition, appeal or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending ;

(*e*) That the recognition or enforcement of the awards not contrary to the public policy or to the principles of the law of the contrary in which it is sought to be relied upon.

Article 2.—Even if the conditions laid down in Article thereof are fulfilled. recognition and enfnrcement of the award shall be refused if the Court is satisfied ;

(*a*) That the award has been annulled in the country in which it was made ;

(*b*) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case ; or that, being under a legal incapacity, he was not properly represented ;

(*c*) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitratien or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competant authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant lt subject to such guarantee as that authority may decido.

Article 3.—If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (*b*) and (*c*), and Article 2 (*b*) and (*c*), entitling him to contest the validity of the award in a Court of Law. the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a rcasonable time within which to have the award annulled by the competent tribunal.

Article 4.—The party relying upon an awurd or claiming its enforcement must supply, in particular :

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made ;

(2) Documentary or other evidence to prove that the award has become finnl, in the sense defined in Article 1 (*d*). in the contrary in which it was made ;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragragh 1 and paragragh 2 (*a*) and (*c*), have been fnlfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translations must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5—The provisions of the above articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6.—The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

Article 7,—The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 or Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8—The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9.—The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notificatiens, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have nctified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

Aroicle 10.—The present Convention does not apply to the Colonies. Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The applicaiion of this Convention to one or more of such Colonies, Piotectorates or territorics to which the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, applies can be effected at any time by means of a declaration addressed to the Secretary General of the League of Nations by one of the High Contracting Partics.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above, Article 9:hereof applies to such denunciation.

Article 11.—A certified copy of the present Convention shall be transmitted by the Secrerary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

Title _____

Accession No. _____

Call No. _____

Borrower's No.	Issue Date	Borrower's No.	Issue Date

APPENDIX A.

STATEMENT OF OBJECTS AND REASONS, ETC.

GOVERNMENT OF INDIA.

LEGISLATIVE ASSEMBLY DEPARTMENT.

NOTIFICATION.

Simla, the 22nd July, 1939.

No. F. 131-1/39-A—Under rule 18 of the Indian Legislative Rules, the Governor-General has been pleased to order the publication in the Gazette of India of the following Bill, together with the Statement of Objects and Reasons relating thereto, and the Bill and the Statement of Objects and Reasons are accordingly published for general information.

L. A. BILL NO. 34 OF 1939.

For provisions of the Bill *vide* Gazette of India, dated the 2nd JulJ, 1939, Part V, p.p. 129-139.

STATEMENT OF OBJECTS AND REASONS.

The Law of arbitration in British India is at present substantially contained in two enactments, the Indian Arbitration Act, 1899 (IX of 1899) and the Second Schedule to the Code of Civil Procedure, 1908. The operation of the 1899 Act is limited to the Presidency-towns aud to such other areas as it may be extended by the appropriate Provincial Government: its scope is confined to "arbitration by agreement without the intervention of a Court." The Second Schedule to the Codo of Civil Procedure deals with arbitrations outside the operation and scope of the 1899 Act: it relates for the most part to arbitration in suits, though arbitration without intervention of a Court is also briefly provided for. This Schedule also contains an alternative method whereby the parties to a dispute or any of them may file their arbitration agreement before a Court which after a certain procedure, refers the matter to an arbitrator.

2. The question of amending and consolidating this law is not new. The Civil Justice Committee in 1925, recomended several changes in the arbitration law. The Act of 1899 was based largely on the then English law, to which several substantial amendments have been effected by an amending Act of Parliament in 1934 (24 & 25 Geo. 5, c. 14). In 1938 the Central Government placed an officer on special duty to examine the question, and the present Bill is the outcome of this examination. The existing law, the amended English law and the recommendations of the Civil Justice Committee have been scrutinised together, and the present Bill, which seeks to consolidate and standardise the law relating to arbitration throughout British India, in its detail extracts from the sources referred to those principles of law which, it is considered, are most suitable to British India.

3. More detailed explanations of the several clauses of the Bill are contained in the notes on clauses appended.

SIMLA,
The 18th July, 1939.

ZAFRULLA KHAN

NOTES ON CLAUSES.

Clauses 3, 4 and 5 reproduce with minor alterations the provisions of sections 6, 7 and 5 respectively of the 1899 Act, and deal with the terms of arbitration agreements.

Clauses 6 *and* 7 follow closely sections 1 and 2 of the Arbitration Act, 1934 (24 and 25 Geo. 5, c. 14): their purpose is to standardise the law as to the effect on an arbitration agreement and proceedings of the death of insolvency of a party thereto.

Clause 8 dealing with the Court's power to appoint an arbitrator in certain cases, reproduces with some verbal changes section 8 of the 1899 Act.

Clause 9 amends section 9 of the 1899 Act in the following directions: provision is made to suit mofussil conditions by making it clear that the defaulting party's time for appointing an arbitrator runs only from the *receipt* of notice, and the proviso is elaborated (*a*) to make it clear that it is only in the arbitrator's capacity as sole arbitrator (and not as the arbitrator of the party appointing him) that the Court may set aside the appointment, and (*b*) to permit the Court, on sufficient cause being shown, to allow further time to the defaulting party, or in any event to make such alternative order as it thinks fit.

Clause 10 makes provision for cases in which more than two arbitrators are appointed. The first two sub-clauses follow closely section 4 of the 1934 Act of Parliament.

Clause 11 empowers the Court to remove a dilatory arbitrator or umpire or one who misconducts himself or the proceedings. Section 16 of the 1899 Act and sections 6 and 15 of the 1934 Act of Parliament have been drawn on.

Clause 12 which follows section 3 of the 1934 Act of Parliament makes provisions for the consequences of the removal of arbitrators. (See also clause 36)

Clause 13 sets out the powers of arbitrators : it is based to some extent on section 10 of the 1899 Act and on paragraph 11 of the Second Schedule to the Code of Civil Procedure, 1908.

Clause 14 relating to the procedure In filing an award, reproduces section 11 of the 1899 Act with two small changes in sub-clause (2) : the provision of paragrph 10 of the Second Schedule to the Code, requiring the depositions and documents shall accompany the award, is included. and the notice ef filing is to be issued by Court and not by the arbitrator as in the 1899 Act.

Clause 15 dealing with the Court's powers to correct an award, reproduces without change paragraph 12 of the Second Schedule to the Code.

Clause 16 deals with the Court's powers to remit an award for reconsideration. Sub-clause (1) repeats without change paragraph 14 of the Second Schedule to the Code, and the remaining sub-clauses reproduce the substance of the first sentence of paragraph 15 (1) *ibid.*

Clause 17 follows with minor alterations paragraph 16 of the Second Schedule to the Code. Herein lies one of the substantial points of difference in the existing law : under the Code, judgment is entered in accordance with the award and a decree follows. Under the 1899 Act (following the then English law) an award is executable as a decree but is not a decree for all purposes. The 1934 Act of Parliament has changed the English law in this respect, and by this clause it is proposed to standardise the law in the direction of providing that judgment shall be pronounced in the terms of the award and that a decree shall follow.

Clause 18 —In following the Civil Procedure Code, clause 17 seeks to amend the existing law in places where the 1899 Act is in force in another manner. At present under that Act an award is immediately enforceable as a decree, and one High Court has held that it may be executed under section 15 (1) of that Act even though the notice of filing under section 11 (2) has not been given. This position is at variance both with the Code and with the English law, and it is now proposed to make the decree only after the time for challenging the award has expired or when such a challenge if made has been rejected. This clause, taken from the English rules of Court, is a corollary to clause 17 in the sense that it enables the Court to counter in the interval any action designed to defeat the subsequent execution of the decree.

Clause 19 provides that where an award becomes void or is set aside, the Court may supersede the reference and order that the agreement shall cease to have effect with respet to the particular difference referred. The clause generalises the provisions of paragraph 15 (2) of the Second Schedule to the Code.

Clause 20 deals with jurisdiction. It provides that all the matters relating to a single reference shall be before the same Court, and that where there is a choice of forum, it shall be determined by the first application made to a Court in relation to a reference.

Clauze 21 is based upon paragraph 17 of the Second Scheduel to the Code. It allows the parties to an arbitration agreement or any of them to initiate the reference proceedings with the assistance of the Court.

Clauses 22 to 24 reproduce substantially paragraphs 1 to 3 of the Second Schedule of the Code. They set out the initial steps to be taken for arbitration in a suit.

Clause 25 is a new provision. It is possible that some parties only to a suit may be agreeable to having the differences between them settled by arbitration. This clause will permit this to be done provided that those differences can be separated from the rest of the subject-matter of the suit.

Clause 26 applies with necessary modification certain other provisions of the Bill to arbitrations in suits.

Clause 28 is a new provision, based on the 1934 Act of Parliement, and conferring on arbitrators the power to make an interim award.

Clause 29—Under the 1899 Act the arbitrators or umpire can themselves enlarge their time for making an award, though it seems that they must do so before the time actually expires. Under the Code it is the Court which has the power. The clause proposes that the power should in all cases vest in the Court only, who may extend the time whether the time has expired or not or whether the award has actually been made or not.

Clause 30 makes necessary provision as to interest when the award makes no provision therefor. It is based on a similar provision in the 1934 Act of Parliament (section 11.)

Clause 31 follows paragraph 11 of the Second Schedule to the Code in setting out the grounds on which an award may be set aside.

Clauses 32 *and* 33 provide that an arbitration agreement or award shall be contested only by application and not by suit. This proposal was made by the Civil Justice committee and is in consonance with the general principle that the law of arbitration should provide simple, speedy and cheap settlement of differences.

Clause 34 deals with the staying of a suit where a reference concerning the subject-matter of the suit in between the same parties is pending. It continues the existing law contained in section 19 of the 1899 Act and paragraph 18 of the Second Schedule to the Code.

Clause 35 relates to the effect of subsequent legal proceedings on a pending reference. Such proceedings will not affect the reference unless (*a*) they relate to the whole of the referred matter and (*b*) all the parties to the reference are impleaded in the proceedings. Where these conditions are fulfilled, the legal proceedings will nullify the arbitration proceedings on the expiry of the time with which an application to stay the legal proceedings may be made or on the refusal of such an application.

Clause 36 is based on section 3 (4) of the 1934 Act of Parliamennt, and supplies an omission in the present Indian law. An agreement may contain a clause that no legal proceedings shall be takrn on a certain matter unless the matter has first been made the subject-matter of an award. It is necessary to empower the Court to overrule this provision when the award is set aside or otherwise becomes void.

Clause 37 makes provision as to limitation in arbitration matters and follows closely section 16 of the 1934 Act of Parliament.

Clause 38 deals with disputes as to the arbitrator's fees and costs, and follows generally section 13 of the 1934 Act of Parliaments and paragraph 13 of the Second Schedule to the Code. The Court may require the arbitrator to deliver up the award on the deposit into Court of the amount he claims, and may then investigate the claims, and grant to the arbitrator such sum as fees as it thinks reasonable.

Clause 39 deals with appeals and replaces that part of section 104 (1) of the Code of Civil Procedure, 1908, which this Bill seeks to repeal.

Clause 40 has the effect of providing that Small Causes Courts shall not deal with arbitrations other than arbitrations in suits before it.

Clause 41 *and the Second Schedule* deal with procedure. The clause confers generally the same powers as the Court enjoys under the Code of Civil Proecdure and with the Schedule adds certain special powers in relation to arbitrations on the lines of section 8 (1) of the 1934 Act of Parliament.

Clause 42 makes provision for the service of notices under the Bill between parties or between arbitrator and parties.

Clause 43 follows paragraph 7 of the Second Schedule to the Code in requiring the Court to assist the arbitrator to enforce the production of evidence and empowering the Court to punish default or contempt before the arbitrators as if it were committed before the Court.

Clause 44 reproduces with small changes section 20 of the 1899 Act and empowers High Courts to make rules.

Clause 45 repeats section 22 of the 1899 Act and binds the Crown.

Clause 46 applies with certain exceptions the provisions of the Bill to statutory arbitrations, and is based on section 20 of the 1934 Act of Parliaeut.

Clause 47 applies, subject to clause 46, the Bill to all arbitrations, and renders an arbitration award obtained otherwise. unenforceable. The Clause replaces section 89 of the Code of Civil Procedure, 1908, which this Bill repeals.

Clause 48 saves references pending at the commencement of this enactment : such references will continue to be governed by the existing law.

The First Schedule follows the First Schedule to the 1899 Act. The main differences are (*a*) arbitrators are required to appoint an umpire within a month of their own appointment (*b*) the power to enlarge the time for making the award is transferred to the Court (*cf.* clause 29), and (*c*) item VII is omitted as redundant in view of clause 13 (*a*).

The Third Schedule with clause 49 (1) repeals the existing general arbitration law.

The Fourth Schedule makes certain consequential amendments of which those to the Limitation Act are the most important. The second amendment of the Specific Relief Act, 1877, replaces section 3 of the 1899 Act.

MD. RAFI
Secy. to the Govt. of India

APPENDIX B

REPORT OF THE SELECT COMMITTEE

Published in the Gazette of India, Part V, dated the 10th February, 1949, at pages 35-38

GOVERNMENT OF INDIA

LEGISLATIVE ASSEMBLY DEPARTMENT

The following Report of the Select Committee on the Bill to consolidate and amend the law relating to Arbitration was presented to the Legislative Assembly on the 6th Februsry, 1940 :—

We, the undersigned members of the Select Committee to which the Bill to consolidate snd amend the law relatiting to arbitration was referred, have considered the Bill and the Papers noted in the margin, and have now the honour to submit this our Report, with the Bill as amended by us annexed therto.

Papers I to III-

Clause 1.—We have omitted the word "Indian" from the title as being unnecessary.

Clause 2.—New definitions of "award," "Court" and "legal representative" have been introduced and the definition of "reference" has been simplified.

Clause 3.—The words "but subject to the provisions of this Act" have been omitted as unnecessary.

Clause 6.—The expression "legal representative," for which we have given a definition in clause 2, is substitued for "personal representative."

Clause 8.—We have removed an obscurity from clause 8(1) (*a*) where it was not clear whether failure to concur in any one of the appointment or failure to concur in all the appointments was contemplated. We have omitted the words "or is removed" from clause 8(1) (*b*) and also from clause 9 (*a*) to remove the inconsistency which would otherwise exist between these clauses and clause 12, which gives to the Court and not to the parties power to appoint arbirators in place of arbitrators removed by the Court. In sub-clause (2) we have extended the time for making an appointment to fifteen days instead of seven days from the service of notice under sub-clause (1).

Clause 9.—The first change made in sub-clause (*a*) brings the clause into accord with the working of clause 8(1) (b). The second change has been explained in our remarks on clause 8. In clause 9 (*b*) we have extended the time there given from seven days to fifteen days and have provided that it shall date from service of notice and not receipt of notice in order to relate it to a definite ascertainable point of time by the help of the provisions of clause 42 of the Bill. We have also added an Explanation, applicable to both section 8 and this section, of the expression "neglects or refuses to act".

Clause 10.—In sub-clauses (2) and (3) we have made provision for modification of the terms of these sub-clauses by express provision in the arbitration agreement.

Cluuse 12.—The word "authority" has been substituted for appointment" in vew of the wording of clause 5, and pointing error is corrected.

Clause 13.—We have omitted the words "acting under the arbitration agreement" as being unnecessary and as being inappropriate in certain cases such as when arbitration is under a statue. We have also inserted a provision giving power to the arbitrators make a conditional or alternative award.

Clause 14.—A printing errer has been corrected in sub-clause (2). In sub-clause (1) we have provided that notice to be the parties shall be in writing and in sub-clause (3) that the Court before pronouncing its opinion shall give notice to and hear the parties,

Clause 16.—The alteration made in sub-clause (1) is merely a drafting improvement In sub-clause (2) we have provided for possible extension of the time within which the arbitrator or umpire shall submit his decision.

Clause 18.—The change made is in accordance with the principle followed by rule 1 of Order XXXVIII of the Civil Procedure Code.

Clouse 20—This clause, being of general application, has been transferred to Chapter V and is now numbered as clause 31. In sub-clause (4) we have substituted the word "jurisdiction" for the word "seisin".

Clause 20 (clause 21 in the Bill as introduced)—The change made in sub-clause(5) applies such of the other provisions of the Act as may be applicable to the arbitration proceedings under this Chapter and not merely the provisions of Chapter II.

Clause 21 (*clause 22 in the Bill as introduced*).—The clause as drafted contemplates an agreement in writing to be followed by a subsequent application which must also be in writing. We have provided that there need not necessarily be a preliminary agreement in writing so long as the intention of the parties is exhibited in writing to the Court,

Clause 22 (*clause* 23 *in the Bill as introduced*).—We have omitted the words "to the arbitration agreement" as being unnecessary in view of the wording of clause 21.

Clause 24 (*clause* 25 *in the Bill as introduced*).—A printing error has been corrected.

Clause 25 (*clause* 26 *in the Bill as introduced*).—The alteration made is like that made in sub-clause (5) of clause 20 for the purpose of applying to arbitrations under this Chapter such provisions of the Act as may be properly applicable.

Clause 25 (*clause* 26 *in the Bill as introduced*).—The alteration made clause (2) so as to allow of provision being made in an arbitration agreement for enlargement of the time for making the award where all the parties consent to such enlargement.

Clause 29 (*clause* 30 *in the Bill as introduced*).—Instead of fixing by the Act the rate of interest which an award shall bear and enacting that interest shall run from the date of the award, we have provided in accordance with the analogous provisions in the Code of Civil Procedure that the Court may fix the rate of interest, but we have made the date from which the interest shall run the date of the decree.

Clause 30 (*clause* 31 *in the Bill as introduced*).—We have omited ground (*b*) which specified fraudulent concealment of a matter which ought to have been disclosed or deceit, because, we consider that this ground is adequately covered by the ground which now appears as ground (*c*) in the clause as revised by us.

Clause 33.—The change made brings the clause into accord with the wording of clause 34.

Clause 35.—We have substituted the words "unless a stay of proceedings is granted under section 34" for the words "on the expiry of the time for making an application under section 34 or on the rejection of such an application," because the giving of notice to the arbitrators should be the time after which arbitration proceedings become invalid and the invalidity should only result if the Court does not grant a stay of proceedings.

Clause 37.—We have omtted the words "the Court may further order that" because we feel that a mere order of the Court might not avail to affect the law of limitation. Without these words the clause will operate with statutory force to affect that law.

Clause 40.—The change made is a drafting improvement only.

Clause 41.—We have substituted the expression "arbitration proceedings" for the words "a reference" in order to cover the various kinds of proceedings which the Bill contemplates.

Clause 42.—We have omitted the provision that substituted service may be effected by leaving a notice at the usual or last known place of abode of a person.

Clause 47.—The clause has been re-drafted in order to remove the dangers of the provision that an arbitration award obtained otherwise than the accordance with all the provision of the Bill should be unenforceeble for any purpose. The effect which the clause as redrafted is designed to produce is that arbitrations shall not be conducted in any way repugnent to the Bill and that any arbitration award may with the consent of the parties be used for the purposes of rule 3 of Order XXIII of the Code of Civil Procedure.

The First Schedule.—The change made in rule 2 removes a difficulty which might otherwise arise in connection with sub-clause (2) of clause 10 of the Bill. If, where there are three arbitrators, the award of the majority shall prevail, the appointment of an umpire is superfluous. The changes made in rules 3 and 5 are merely for the purpose of slightly increasing the limits of time fixed by those rules.

The Second Schedule.—We have added as an additional power of Court the power to appoint a guardian for a minor or person of unsound mind.

The Fourth Schedule.—The amendments are consequential.

2. The Bill was published in the *Gazette* of *India*, dated the 22nd July, 1939.

3. We, think that the Bill has not been so altered as to require republication, and we recommended that it be passed as now amended.

ZAFRULLA RHAN
A. RAMSWAMI MUDALIAR
MOHD. YAMIN KHAN
A. C. DUTTA
F. E. JAMES
C. C- MILLER
D. N. MITRA
SANT SINGH
BHAGCHAND SONI
MUHAMMAD NAUMAN*

The 6th February, 1940.

*Subject to a note

NOTE.

In submitting the report as amended in the Select Committee to which the Bill to consolidate and amend the law relating to Arbitration was referred, I have considered the Bill my colleagues on the Committee and have now the honour to approve the amendments made by the Select Committee subject to the following observations which I want to make and which may be attached to the said report.

To clause 5, add following :—

(*b*) In the event of an organisation, society or association being "Arbitrator" in an agreement, the court shall appoint individual arbitrator or umpire with the approval of the parties concerned if such request is made by any party interested in the "Arbitration".

In clause 9 (*b*) the wording should be changed as follows :—

"9 (*b*) If one party fails to appoint an arbitrator either originally or by way of substitution as aforesaid for fifteen clear days after the service by the other party of a notice in writing to make the appointment such other party having appointed his arbitrator may appoint the arbitrator *with the sanction of the court* to act as sole arbitrator in the reference : or the court may nominate some other arbitrator to represent the failing party ; and his or their award shall be binding on both the parties as if he has been appointed by consent."

In clause 13, introduce another clause as follows :—

(*f*) take down all evidence in writing and have same signed by the witnesses or party appearing in the suit.

In suggesting the amendment, my purpose is to remove chances of hardships in the matter of arbitration. By the change I have suggested in clause 5 (*b*), I want to remove the possibility of a competitor being an "Arbitrator' or "an umpire". In case of Bengal Chambers of Commerce, Calcutta, I know that in the case of disputes over shipments of jute and hessian the Chamber nominated members of such firms to hold arbitration who were doing business in competition with the party in dispute. It is for this reason I want the Court to be given authority to intervene in the nomination of "Arbitrators," if application is made to a competent Court by either party.

By change that I have suggested in clause 9 (*b*) my purpose is simple, that is, authority should be vested in a Court of law to have reference made to them for such failure of appointment of an arbitrator and the Court will be in a position to examine the circumstances, if any, and order on the must equitable principles.

The addition in clause 13 needs practically no explanation, as the writing of evidence must be made compulsory for the matter of reference at least.

MUHAMMAD NAUMAN.

The 3rd February, 1940.

APPENDIX C

CIVIL PROCEDURE CODE

(Act VIII of 1859)

CHAPTER VI.

REFERENCE TO ARBITRATION.

Reference to arbitration on application of the parties.

312. If the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall referred to the ffnal decision of one or more arbitrator or arbitrators, they may apply to the Court, at any time, before final judgment, for an order of reference.

Application how to be made.

313. The application shall be made by the parties in person, or by their pleaders specially authorized in that behalf, by an instrument in writing, which shall be presented to the Court at the time of making the application, and shall be filed with the proceedings in the suit.

Nomination and appointment of arbitrators.

314. The arbitrator or arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the arbitrator or arbitrators, or if the persons nominated by them shall refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court shall appoint the arbitrator or arbitrator or arbitrators.

Order of reference.

315. The Court shall, by an order under its seal, refer to the arbitrator or arbitrators matters in difference in the suit which he or they may be required to determine, and shall fix such time as it may think resonable for the delivery of the award, and the time so fixed shall be specified in the order.

316. If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators, by the appointment of an umpire, or by declaring that the dicision shall be with the majority, or by empowering the arbitrators to appoint an umpire, or otherwise as may be agreed upon between the parties ; or if they cannot agree, upon between the parties ; or if they cannot agree, as the Court may determine.

When the reference is to two or more, the order shall provide for difference of opinion.

317. When a reference is made to arbitration by an order of the Court, the Court shall issue the same processes to the parties and witnesses whom the arbitrator or arbitrators, or umpire, may desire to have examined, as the Caurt is authorized to issue in suits tried before it ; and persons not attending in consequence of such process, or making any other default or refusing to give their testimony, or being guilty of any contempt to the arbitrator or being guilty of any contempt to the arbitrator or arbitrators, or umpire, during the subject investigation of the suit. shall be subject to the like disadvantages, penalties, and punishments, by order of the Court, on the representation of the arbitrator or arbitrators, or umpire, as they would incur for the same offence in suits tried before the Court.

Powers of arbitrators.

318. When the arbitrator or arbitrators shall not have been able to complete the award within the period specified in the order, from the want of the necessary evidence or information, or other good and sufficient cause, the Court, may from time to time enlarge the period for the delivery of the award, if it shall think proper. In any case in which an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if they shall have allowed their time or their extended time to expire without making an award, or shall have delivered to the Court or to the umpire a notice in writing stating that they cannot agree. Provided that an award shall not be liable to be set aside only by reason of its not having been completed within the period allowed by the Court, unless on proof that the delay in completing the award arose from corruption or misconduct of the arbitrator or arbitrators, or umpire, or unless the award shall have been made after the issue of an order by the Court superseding the arbitration and recalling the suit.

Extension of time for making award.

319. If, in any case of reference to arbitration by an order of Court, the arbitrator or arbitrators, or umpire, shall die, or refuse or become incapable to act, it shall be lawful for the Court to appoint a new arbitrator or arbitrators, or umpire, in the place of the person or persons so dying, or refusing, or becoming incapable to act. Where ther arbitrators are empowered by the terms of the order of refernce to apoint an umpire, and do not appoint an umpire, any of the parties may serve the arbitrators with a written notice to appoint an umpire ; and if within seven days after such notice shall have been served, no umpire be appointed it shall be lawful for the Court, upon the application of the party having served such notice as aforesaid, and upon proof to its satisfaction of such notice having been served, to appoint an umpire. In any case of appointment under this section, the arbitrator or arbitrators, or umpire, so appointed shall have the like power to act in the reference, as if their name or nemes had been inserted in the original order of reference.

In case of death, incapacity, or refusal to act as arbitrators or umpire, Court may appoint others instead.

320. When an award in a suit shall be made, either by the arbitrator or arbitrators, or by the umpire, it shall be submitted to the Court under the signature of the person or persons by whom it may be made, together with all the proceedings, depositions, and exhibits in the suit.

Award how to be submitted to Court.

321. It shall be lawful for the arbitrator or arbitrators, or umpire, upon any reference, by an order of Court, if he or they shall think fit. and if it is not provided to the contrary, to state his or their award as to the whole or any part thereof, in the form of a special case for the opinion of the Court.

Arbitrator may state special case.

322. The Court may, on the applicaiion of either party, modify or correct an award where it appears that a part of the award is upon matters not referred to the arbitrators, provided such part can be separated from the other part, and does not affect the decision on the matter referrod ; or where the award is imperfect in form, or contains any obvious erro which can be amended without affecting such decision.

Court may, on application, modify or correct an award in certain cases.

And make order respecting the costs of

The Court may also, on such application make such order as it thinks just respecting the costs of the arbitration, if any question arise respecting such costs, and the award contain no sufficient provision concerning them.

In what cases Court may remit the award, or any of the matters referred to arbitration, for reconsideration.

323. In any of the following cases the Court shall have power to remit the award, or any of the matters referred to arbitration, to be reconsideration of the same arbitrator or arbitrators, or umpire, upon such terms as it may think proper (that is to say)—

If the award has left undertermined some of the matters referred to arbitration, or if it determine matters not referred to arbitration.

If the award is so indefinite as to be incapable of execution.

If an objection to the legality of the award is apparent upon the face of the award.

Award not to be set aside except on ground or corruption.

Application to set aside the award.

324. No award shall be liable to be set aside except on the ground of corruption or misconduct of the arbitrator or nmpire. Any application to set aside an award shall be made within ten days after the same has been submitted to the Court.

Judgment to be according to award.

325. If the Court shall not see cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application shall have been made to set aside the award, or if the Court shall have refused such application, the Court shall proceed to pass judgment according to the award, or according to its own opinion on the special case, if the award shall have been submitted to it in the from of a special case ; and upon the judgment which shall be so given, decree shall follow, and shall be carried into execution in the same manner as other decrees of the Court. In every case in which judgment shall be given according to the award, the judgment shall be final.

Agreement of parties to refer to arbitration may be filed in the Court.

326. When any persons shall, by an instrument in writing, agree that any differences between them or any of them, shall be referred to the arbitration of any person or persons, named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto, or any of them, that the agreement be filed in snch Conrt. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. The application shall be written on a stamp paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered and registered as a suit between some or one of the parties interested, or claiming to be interested, as plaintiffs or plaintiff, and the othrrs, or other of them, as defendants or defendant, if the application have been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the agreement, the agreement shall be filed, and an order of reference to arbitration shall be made thereon.

Provisions of this chapter applicable.

The several provisions of this chapter, so far as they are not inconsistent with the terms of any agreement so field, shall be applicable to all proceedings under an order of reference made by the Court, and to the award of arbitration and to the enforcement of such award.

Filing in Court an award when the matter was referred to arbitration without intervention of Court.

327. When any matter has been referred to arbitration withent the intervention of any Court of Justice, and an award has been made, any person interested in the award may, within six months from the date of the award, make application to the Conrt having jurisdiction in the matter to which the award relates, that the award be filed in Court. The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring such parties to show cause, within a time to be specified, why the award should not be field. The application shall be written on the stamp paper required for petitions to the court where a stamp is required for petitions by any law for the time being in force,

Enforcement of such award.

and shall be numbered and registered as a suit, between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the award, the award shall be filed, and may be enforced as an award made under the provisions of this chapter.

APPENDIX D.

CIVIL PROCEDURE CODE.

(Act XIV of 1882)

Part V.

Of Special Proceedings.

CHAPTER XXXVIII.

REFERENCE TO ARBITRATION.

Parties to suit may apply for order of reference.

506. If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any time before judgment is pronounced, apply in person, or by their respective pleaders specially authorized in writing in this behalf, to the Court for an order of reference.

Every such application shall be in writing, and shall state the particular matter sought to be referred.

Nomination of arbitrator.

507. The arbitrator shall be nominated by the parties in such manner as may be agreed between them.

When Court to nominate arbitrator.

If the parties cannot agree with respect to such nomination, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the Court, the Court shall nominate the arbitrator.

Order of reference.

508. The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award, and specify such time in the order.

When once a matter is referred to arbitration, the Court shall not deal with it in the same suit, except as hereinafter provided.

When reference is to two or more, in order to provide for difference of opinion.

509. If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

(*a*) by the appointment of an umpire, or
(*b*) by declaring that the decision shall be with the majority, if the major part of the arbitrators agree, or
(*c*) by empowering the arbitrators to appoint an umpire, or
(*d*) othewise, as may be agreed between the parties; or, if they cannot agree, as the Court determines.

If an umpire is appointed, the Court shall fix such time as it thinks reasonable for the delivery of his award in case he is required to act.

Death, incapacity, etc., of arbitrators or umpire.

510. If the arbitrator, or, where there are more arbitrators than one, any of the arbitrators, or the umpire, dies or refuses or neglects or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date, the Court may, in its discretion, either appoint a new arbitrator or umpire in the place of the person so dying, or refusing or neglecting, or becoming incapable to act, or leaving British India, or make an order superseding the arbitration, and in such case shall proceed with the suit.

Appointment of umpire by Court.

511. Where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any of the parties may serve the arbitrators with a written notice to appoint an umpire; if, within seven days after such notice has been served, or such further time as the Court may in each case allow, no umpire be appointed, the Court, upon the application of the party who has served such notice as aforesaid, may appoint an umpire.

Powers of arbitrator or umpire appointed under sections 509, 510, 511.

512. Every arbitrator or umpire appointed under section 509, section 510, or section 511, shall have the like powers as if his name had been inserted in the order of reference,

513. The Court shall issue the same process to the parties and witness whom the arbitrators or umpire desire or desires to examine, as the Court may issue in suits tried befor it.

Summoning witnesses.

Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties, and punishments, by order of the Court, on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

Punishment for default, etc.

514. If, from the want of the necessary evidence or information, or from any other cause, the arbitrators cannot complete the award within the period specified in the order, ths Court may, if it thinks fit, either grant a further time, and from time to time enlarge the period for the delivery of the award, or make an order superseding the arbitration, and in such case shall proceed with the suit.

Extension of time far making award.

Supersession of arbitration.

515. When an umpire has been appointed he may enter on the reference in the place of the arbitrators—

When umpire may arbitrate in lieu of arbitrators.

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) when they have delivered to the Court or to the umpire a notice in writing, stating that they cannot agree.

516. When an award in n suit has been made, the persons who made it shall sign it, and cause it to filed in Court, together with any depositions and documents which have been taken and proved before them ; and notice of tho filing shall be given to the parties.

Award to be signed and filed.

517. Upon any reference by an order of the Court, the arbitrators or umpire may, with the consent of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court ; and the Court shall deliver an opinion thereon ; and such opinion shall be added to, and form part of the award.

Arbitrators or umpire ay state special case.

518. The Court may, by order, modify or correct an award—

Court may, on application, modify or correct award in certain cases.

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration, provided such part can be spearated from the other part, and does not affect the decision on the matter referred, or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision.

519. The Court may also make such order as it thinks fit respecting the costs of the arbitration, if any question arise respecting such costs, and the award contain no sufficient provision concerning them.

Order as to costs of arbitration.

520. The Court may remit the award or any matter referred to arbitration to the re-consideration of the same arbitrators or umpire, upon such terms as it thinks fit—

When award or matter referred to arbitration may be remitted.

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration ;

(*b*) where the award is so indefinite as to be incapable of execution ;

(*c*) where an objection to the legality of the award is apparent upon the face of it.

521. An award remitted under section 520 becomes void on the refusal of the arbitrators or umpire to reconsider it. But no award shall be set aside except on one of the following grounds (namely) :—

Grounds for setting aside award.

(*a*) corruption or misconduct of the arbitrator or umpire ;

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed or of wilfully misleading or deceiving the arbitrator or umpire ;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit ;

and no award shall be valid unless made within the period allowed by the Court.

522. If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused snch application,

Judgment to be according to award.

the Court shall, after the time for making such application has expired, proceed to give judgment according to the award,

or if the award has been submitted to it in the form of a special case, according to its own opinion on such case.

Upon the judgment so given a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

Decree to follow,

523. When any person agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

Agreement to refer to arbitration may be filed in Court.

The application shall be writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

Application to be numbered and registered,

On such application being made the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

Notice to show cause against filing.

If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator, when he is not named therein and the parties cannot agree as to the nomination.

524. The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under section 523, and to the award of arbitration and the enforcement of the decree founded thereupon.

Provisions of chapter applicable to proceedins under order of reference

525. When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates that the award be filed in Court.

Filing award in matter referred to arbitration without intervention of Court.

The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

Application to be numbered and registered.

The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to show cause, within a time specifiad, why the award should not be filed.

Notice to parties to arbitration.

526. If no ground such as is mentioned or referred to in section 520 or section 521 be shown against the award, the Court shall order it to be filed and such award shall then take effect as an award made under the provisions of this chapter.

Filing and enforcement of such award.

APPENDIX E

THE CODE OF CIVIL PROCEDURE OF 1908

ACT V OF 1908

Part V.

Of Special Proceedings.

ARBITRATION.

[*New.*] 89. (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in suit or otherwise,, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

Arbitration.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

APPEALS FROM ORDERS.

Order from which appeal lies.

104. (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders—

(*a*) an order superseding in arbitration where the award has not been completed within the period allowed by the Court ;
(*b*) an order on an award stated in the form of a special case ;
(*c*) an order modifying or correcting an award ;
(*d*) an order filing or refusing to file an agreement to refer to arbitration ;
(*e*) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ;
(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court ;
(ff) an order under section 35A ;
(*g*) an order under section 95 ;
(*h*) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in exectuion of a decree ;
(*i*) any order made under rules from which an appeal is expressly allowed by rules ;

Provided that no appeal shall lie against any order specified in clause (*f*) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.

THE SECOND SCHEDULE

ARBITRATION.

Arbitration in Suits.

Parties to suits may reference.

1. [S. 506.] (1) Where in any suits all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

Appointment of arbitrator.

2. [S. 507, para 1.] The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

Order of reference.

3. [S. 503.] (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not save in the manner and to the extent provided in this schedule, deal with such matter in the same suit.

Where reference is to two or more, order to provide for difference of opinion.

4. [S. 509.] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrarors—

(*a*) by the appointment of an umpire ; or
(*b*) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail ; or
(*c*) by empowering the arbitrators to appoint an umpire ; or
(*d*) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

Power of Court to appoint arbitrator in certain cases.

5. [Ss. 507 (2), 510, 511.] (1) In any of the following cases, namely :—

(*a*) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or

(*b*) where an arbitrator of umpire—
(*i*) dies, or
(*ii*) refuses or neglects to act or becomes incapable of acting, or
(*iii*) leaves British India in circumstances showing that he will probably not return at an early date, or
(*c*) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make as order superseding the arbitration, and in such case shall proceed with the suit.

Powers of arbitrator or umpire appointed under paragraph 4 or 5

6. [**S. 512.**] Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Summoning witnesses and default.

7. [**S. 513.**] (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guily of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

Extension of time for making award.

8. [**S. 514.**] Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time and form time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period ; or may make an order superseding the arbitration, and in such case shall proceed with the suit.

Where umpire may arbitrate in lieu of arbitrators.

9. [**S. 515.**] Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

(*a*) If they have allowed the appointed time to expire withourt making an award, or
(*b*) If they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

Award to be signed and filed.

10. [**S. 516.**] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them ; and notice of the filing shall be given to the parties.

Statement of special case by arbitrators or umpire.

11. [**S. 17.**] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order, such opinion to be added to and to form part of the award.

Power to modify or correct award.

12. [**S. 518.**] The Court may, by order, modify or correct an award :—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or
(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or
(*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Order as to costs of arbitration.

13. [**S. 519.**] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Where award or matter referred to arbitration may be remitted.

14. [S. 520] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

(*a*) where the award has left undertermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless snch matter can be separated without affecting the determination of the matters referred ;

(*b*) where the award is so indefinite as to be incapable of execution ;

(*c*) where an objection to the legality of the award is apparent upon the face of it.

Grounds for setting aside award.

15. [S. 521.] (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely :—

(*a*) corruption or misconduct of the arbitrator or umpire ;

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;

(*c*) the award having been made after the issue of on order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

Judgment to be according to award.

16. [S. 522.] (1) Where the Court sees no cause to remit the award or any of the matter referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Conrt shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

Order of reference on agreements to refer.

Application to file in Court agreement to refer arbitration.

17. [S. 523.] (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

Stay of suit where there is an agreement to refer to arbitration.

18. Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Conrt to stay the suit ; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the suit.

19. [S.524.] The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.

Provisions applicable to proceedings under paragraph 17.

Arbitration without the intervention of a Court.

20. [S.525.] (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

Filing award in matter referred to arbitration without intervention of Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as a plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant requiring them to show cause, within a time specified, why the award should not be filed.

21. [S.526.] (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

Filing and enforcement of such award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Exclusion of certain words in the specific Relief Act, 1877.

22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration or to any award, to which the provisions of this schedule app'y.

Forms.

23. The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

APPENDIX TO SCHEDULE II.

No. 1

APPLICATION FOR ORDER OF REFERENCE.

(*Title of Suit.*)

1. This suit is instituted for (*state nature of claim*)
2. The matter in difference between the parties is (*state matter of difference*)
3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.
4. The application therefore apply for an order of reference.

A. B.
C. D.

Dated the.....day of.....19 .

NOTE :—If the parties are agreed as to the arbitrators, it should be so stated.

No. 2

ORDER OF REFERENCE

(*Title of Suit*)

UPON reading the application presented on the day of 19 . it is ordered that the following matter in difference arising in this suit, namely :—

.....

.....

.....

be referred for determination to *X* and *Y*, or in case of their not agreeing then to the determination of *Z*, who is hereby appointed to be umpire ; and such arbitrators are to make their award in writing on or before the.....day of.....19....., and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within.....months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

GIVEN under my hand and the seal of the Court, this.....day of.....19.....

Judge.

No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(*Title of Suit.*)

WHEREAS by an order, dated the.....day of.....19..... [*state order of reference and death, refusal, etc., of arbitrator*], it is by consent order that *Z* be appointed in the place of *X* (decease, or as the case may be), to act as arbitrator, with *Y*, the surviving arbitrator under the said order; and it is ordered that the award of the said arbitrators be made on or before the.....day of.....19.....

GIVEN under my hand and the seal of the Court, this.....day of.....19.....

Judge.

No. 4.

SPECIAL CASE.

(*Title of Suit*)

In the Matter of an arbitration between *A. B.* of.....and *C. D.* of.....the following special case is stated for the opinion of the Court :—

[*Here state the facts concisely in numbered paragraphs.*]

The questions of law for the opinion of the Court are :—

First, whether.....

Secondly, whether.....

Dated the.....day of.....19.....

X
Y

No. 5.

AWARD

(*Title of suit*)

In the Matter of an arbitration between *A. B.* of.....*C. D.* of..... :—

WHEREAS in pursuance of an order of reference made by the Court of.....and dated the.....day of.....19....., the following matter in difference between *A. B.* and *C. D.* namely.....

.....

.....

has been referred to us for determination ;

Now, we having duly considered the matter to us, do hereby make our award as follows :—

We award

(1) that.....

(2) that.....

Dated the.....day of.....19.....

Y
X

APPENDIX F.

THE INDIAN ARBITRATION ACT. 1899.

ACT NO. IX OF 1899.

Passed by the Governor-General of India in Council.

Received the G-G's Assent on the 3rd March, 1899.

WHEREAS it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice : It is hereby enacted as follows :—

Short title, extent and commencement. 1. (1) This Act may be called the Indian Arbitration Act. 1899.

(2) It extends to the whole of India

and

(3) It shall come into force on the first day of July, 1899.

2. Subject to the provisions of section 23, this Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency-town :

Application.

Provided that the Local Government may, by notification in the local official Gazette declare this Act applicable in any other local area as if it were a Presidency-town.

Exclusion of certain enactments in certain cases where Act applies.

3. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, and sections 523 to 526 of the Code of Civil Procedure shall not apply to any submission or arbitration to which the provisions of the Act for the time being apply :

Provided that nothing in this Act shall affect any arbitration pending in a Presidency-town at the commencement of this Act or in any local area at the date of the application thereto of this Act, as aforesaid, but shall apply to every arbitration commenced after the commencement of this Act or the date of the application thereof, as the case may be, under any agreement or order previously made.

Definitions.

4. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "the Court" means, in the Presidency-towns, the High Court, and, elsewhere the Court of the District Judge ; and

(*b*) "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

Submission to be irrevocable except by leave of Court.

5. A submission, unless a different intention is expressed therein, shall be irrevocable except, by leave of the Court.

Provisions implied in submission.

6. A submission, unless a different intention is pressed therein, shall be deemed to include the provisions set forth in the First Schedule, in so far as they are applicable to the reference under submission.

Reference to arbitrator to be appointed by third person.

7. The parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein.

Such person may be designated either by name or as the holder for the time being of any office or appointment.

Illustration.

The parties to a submission may agree that any dispute arising between them in respect of the subject-matter of the submission shall be referred to an arbitrator to be appointed by the Bengal Chamber of Commerce, or, as the case may be, to an arbitrator to be appointed by the President for the time being of the Bengal Chamber of Commerce.

Power for the Court in certain cases to appoint an arbitrator, umpire or third arbitrator.

8. (1) In any of the following cases—

(*a*) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator ;

(*b*) if an appointed arbitrator neglects or refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy ;

(*c*) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him ;

(*d*) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy :

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator, umpire or third arbitrator.

(2) If the appointment is not made within seven clear days after the service of the notice, the Court may, on application by the party who gave the notice, and after

giving the other party an opportunity of being heard, appoint an arbitrator, umpire of third arbitrator, who shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

Power for parties in certain cases to supply vacancy.

9. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed therein,—

(*a*) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, or is removed, the party who appointed him may appoint a new arbitrator in his place ;

(*b*) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court may set aside any appointment made in pursuance of clause (*b*) of this section.

Power of arbitrator.

10. The arbitrators or umpire acting under a submission shall, unless a different intention is expressed therein,—

(*a*) have power to administer oaths to the parties and witnesses appearing ;

(*b*) have power to state a special case for the opinion of the Court on any question of law involved ; and

(*c*) have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Award to be signed and filed.

11. (1) When the arbitrators or umpire have made their award, they shall sign it, and shall give notice to the parties of the making and signing thereof, and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award, or a signed copy of it, to be filed in the Court ; and notice of the filing shall be given to the parties by the arbitrators or umpire.

(3) Where the arbitrators or umpire state a special case under section 10, clause (*b*), the Court shall deliver its opinion thereon ; and such opinion shall be added to, and shall from part of, the award.

Power for Court to enlarge time for making award.

12. The time for making an award may, from time to time, be enlarged by order of the Court, whether the time for making the award has expired or not.

Power to remit award.

13. (1) The Court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted under sub-section (1), the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award within three months after the date of the other remitting the award.

Power to set aside award,

14. Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award.

Award when filed to be enforceable as a decree,

15. (1) An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court.

(2) An award may be conditional or in the alternative.

Illustration.

A dispute concerning the ownership of a diamond ring is referred to arbitration. The award may direct that the party in possession shall pay the other party Rs. 1,000, the said sum to be reduced to Rs. 5 if the ring is returned within fourteen days.

Power to remove arbitrator or umpire

16. Where an arbitrator or umpire has misconducted himself, the Court may remove him.

Costs.

17. Any order made by the Court under this Act may be made on such terms as to costs or otherwise as the Court thinks.

Forms.

18. The forms set forth in the Second Schedule, or forms similar thereto, with such variations as the circumstances of each case require, may be used for the respective purposes there mentioned, and, if used, shall not be called in question.

Power to stay proceedings where there is a submission.

19. Where any party to a submission to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings, may at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending, to stay the proceedings; and such authority, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Power for High Court to make rules.

20. The High Court may make rules consistent with this Act as to—

(*a*) the filing of awards and all proceedings consequent thereon or incidental thereto;

(*b*) the filing and hearing of special cases and all proceedings cosequent thereon or incidental thereto;

(*c*) the transfer of Presidency Courts of Small causes for execution of awards filed, where the sum, awarded does not exceed two thousand rupees;

(*d*) the staying of any suit or proceeding in contravention of a submission to arbitration; and

(*e*) generally, all proceedings in Court under this Act.

Amendment of section 21, Act 1, 1877.

21. In section 21 of the Specific Relief Act, 1877, after the words "Code of Civil Proceduro" the words and figures "and the Indian Arbitration Act, 1899," shall be inserted, and for the words "a controversy" the words "present or future difference," shall be substituted.

Crown to be bound.

22. The provisions of this Act shall be binding on the Crown.

Special provisions as to application of Act to Rangoon.

23. (1) This Act shall apply within the local limits of the ordinary civil jurisdiction of the High Court of Judicature at Rangoon in cases where if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted within those local limits.

Presidency-town.

(2) For the purposes of this Act, the local limits aforesaid shall be deemed to be a

THE FIRST SCHEDULE.

(See Section 6)

Provisions to be implied in Submissions.

Submissions.

I. If no other mode of reference is provided, the reference shall be to a single arbitrator.

II. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

III. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may, from time to time, enlarge the time for making the award.

IV. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

V. The umpire shall make his award within one month after the original or exetended time appointed for making the award of the arbitrators has expired, or on or before any latter day to which umpire, by any writing signed by him, may, from time to time, enlarge the time for making his award.

VI. The parties to the reference, and all persons, claiming through them respectively, shall, subject to the provisions of any law for the time being in force submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which, during the proceedings on the reference the arbitrators may require.

VII. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath.

VIII. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

IX. The costs of the reference and award shall be in the direction of the arbitrators or umpire, who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

(*See section 18*)

Form I.

Submission to single arbitrator.

In the matter of the Indian Arbitration Act, 1899 :—

Whereas differences have arisen and are still subsisting between A. B. of and C. D. of concerning

Now we, the said A. B. and C. D., do hereby agree to refer the said matters in difference to the award of X. Y.

Dated the *189*

(*Signed*) A. B.
C. D.

Form II

Submission of particular dispute to single arbitrator.

In the matter of the Indian Arbirtation Act, 1899 ;—

Whereas differences have arisen and are still subsisting between A. B. of and C. D. of concerning

Now we, the said A.B. and C. D., do hereby agree to refer the said matters in difference

Dated the *189*

(*Signed*) A. B.
C. D.

Form III.

Appointment of single arbitrator under agreement to refer further differences to arbitration.

In the matter of the Indian Arbitration Act, 1899 :—

Whereas, by an agreement in writing dated the day of 189 , and made between A. B of and C. D. of , it is provided that differences arising between the parties thereto shall be referred to an arbitrator as therein mentioned ;

And whereas differences within the meaning of the said provision have arisen and are still subsisting between the paid parties concerning.

Now we, the said parties, A. B. and C. D., do hereby refer the said matters in difference to the award of X. Y.

Dated the *189*

(*Signed*) A. B
C. D.

Form IV.

Enlargement of time by arbitrator by endorsement on submission,

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A. B. of and C. D. of :—

I hereby enlarge the time of making my award in respect of the matters in difference referred to me by the within (or above) submission until the day of 189

Dated the 189 (*Signed*) X. Y.
Arbitrator.

Form V.

Special Case.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A. B. of and C. D. of :—

The following special case is, pursuant to the provisions of section 10, clause (*b*), of the said Act, stated for the opinion of the :—

(*Here state the facts concisely in numbered paragraphs.*)

The question's of law for the opinion of the said Court are :—
First. whether

Dated the *189* (*Signed*) X. Y.
Arbitrator.

Form VI.

Award.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A, B. of and C. D. of :—

Whereas in pursuance of an agreement in writing dated the day of 189 , and made between A. B. of and C. D. of the said A. B. and C. D. have referred to me, X. Y., the matters in difference between them concerning.

(*Or as the case may be*) ;

Now I, the said X. Y., having duly considered the matters submitted to me, do hereby make my award as follows :—

I award—
(1) that
(2) that

Dated the *189* (*Signed*) X. Y.
Arbitrator.

APPENDIX G.

THE ENGLISH ARBITRATION ACT, 1889.

(52 & 53 Vict., c. 49.)

An Act for amending and consolidating the Enactments relating to Arbitration (*26th August, 1889*).

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

References by consent out of Court.

Submission to be irrevocable, and to have, effect as an order of Court.

1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court.

Provisions implied in submissions.

2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission.

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* Sections 13 to 17, and so far as they relate to references under an order of the High Court. Sections 18, 19, 20 and 23 repealed by the 6th Schedule of the Supreme Court of Judicature (Consolidating) Act, 1925.

3. Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

Reference to official referee.

4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Power to stay proceedings where there is a submission.

5. In any of the following cases :—

Power for the Court in certain cases to appoint an arbitrator, umpire, or third arbitrator.

(*a*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have been arisen concur in the appointment of an arbitrator :

(*b*) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy ;

(*c*) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him ;

(*d*) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy ;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator ; who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Power for parties in certain cases to supply vacancy.

6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

(*a*) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place :

(*b*) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court or ajudge may set aside any appointment made in pursuance of this section.

Power of arbitrators.

7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

(*a*) to administer oaths or to take the affirmations of the parties and witnesses appearing ; and

(*b*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court ; and

(*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Witnesses may be summoned by *subpoena*.

8. Any party to a submission may sue out a writ of *subpoena ad testificandum*, or a writ of *subpoena duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

Power to enlarge time for making award.

9. The time for making an award may from time to time be enlarged by order of the Court or a judge, whether the time for making the award has expired or not.

Power to remit award,

10. (1) In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them. to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their awards within three months after the date of the order.

Power to set aside award.

11. (1) Where an arbitrator or umpire has misconducted himself the Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or an arbitrator or award has been improperly procured, the Court may set the award aside.

Enforcing award.

12. An award on a submission may, by leave of the Court or a judge be enforced in the same manner as a judgment or order to the same effect.

**References under Order Court.*

Reference for report

13. *(1) Subject to Rules of Court and to any right to have partieular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2) The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

Power to refer in certain cases.

14. *In any cause or matter (other than a criminal proceedings by the Crown),—

(*a*) if all the parties interested, who are not under disability, consent ; or,

(b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the Court or a judge, conveniently be made before a jury or conducted by the Court through its other ordinary officers ; or,

(*c*) if the question in dispute consists wholly or in part of matter of account ; the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court.

Powers and remuneration of referees and arbitrators.

15. (1) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shalll be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the Court or a judge may direct.

(2) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the court or a judge be equivalent or the verdict of a jury.

(3) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a judge shall be determined by the Court or a judge.

Court to have powers as in reference by consent.

16. The Court or a judge shall, as to references under order of the Court or a judge, have all the powers which are by this Act conferred on the Court or a judge as to references by consent out of Court.

Court of Appeal to have powers of Court.

17. Her Majesty's Court of Appeal shall have all the powers conferred by this Act on the Court, or a judge thereof under the provisions relating to references under order of the Court.

General.

Power to compel attendance of witness in any part of the United Kingdrm and to order *habeas corpus* to issue.

18. *(1) The Court or a judge may order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel the attendance before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

(2) The Court or a judge may also order that a writ of *habeas corpus ad testificandum*

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* Sectfons note 13 to 17, so for as they relate to references under an order of the High Court, Sections 18, 19, 20 and 23 were repeated by the 6th schedule of the Supreme Court of Judicature (Considating) Act 1925.

shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire.

Statement of case pending arbitration.

19. *Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

Costs.

20. *Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Exercise of powers by masters and other officers.

21. Provision may from time to time be made by Rules of Court for conferring on any master, or other officer of the Supreme Court, all or any of the jurisdiction conferred by this Act on the Court or a judge.

Penalty for perjury.

22. Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open Court, and may be dealt with, prosecuted and punished accordingly.

Crown to be bound.

23. *This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which Her Majesty the Queen, either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the Court or a judge to order any proceedings to which Her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown.

Application of Act to references under statutory powers.

24. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act.

Saving for pending arbitrations.

25. This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act.

Repeal.

26. (1) The enactments described in the Second Schedule to this Act are hereby repealed to the extent therein mentioned, but this repeal shall not affect anything done or suffered, or any right acquired or duty imposed or liability incurred, before the commencement of this Act, or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability.

(2) Any exactment of instrument referring to any enactment repealed by this Act shall be construed as referring to this Act.

Definitions.

27. In this Act. unless the contrary intention appeals.

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

"Court" means Her Majesty's High Court of Justice.

"Judge" means a judge of Her Majesty's High Court of Justice.

"Rules of Court" means the Rules of the Supreme Court made by the proper authority under the Judicature Acts.

Extent.

28. This Act shall not extend to Scotland or Ireland.

Commencement.

29. This Act shall commence and come into operation on the first day of January, one thousand eight hundred and ninety.

Short title.

30. This Act may be cited as the Arbitration Act, 1889.

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* See foot note, *Ibid.*

THE FIRST SCHFDULE

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

(*a*) If no other mode of reference is provided, the reference shall be to a single arbitrator.

(*b*) If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within which they have power to make an award.

(*c*) The arbitrators shall make their award in writing within three monts after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

(*d*) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(*e*) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expirad, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

(*f*) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all hooks, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

(*g*) The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath or affirmation.

(*h*) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

(*i*) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part .thereof shall be paid, and may tax or settle the amount of costs to be paid or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short-Title.	Extent of Repeal.
9 Will. 3, c. 15	An Act or determining differences by arbitration.	The whole Act.
3 & 4 Will. 4, c. 42	An Act for the further amendment of the law and the better advancement of justice.	Sections thirty-nine to forty-one, both inclusive.
17 & 18 Vict., c. 125	The Common Law Procedure Act, 1854.	Sections three to seventeen, both inclusive.
36 & 37 Vict., c. 66	The Supreme Court of Judicature Act, 1873.	Section fifty-six, from "subject to any Rules of Court" down to "as a judgment by the Court," both inclusive and the words "special referees or." Sections fifty-seven to fifty-nine, inclusive.
47 & 48 Vict., C. 61	The Supreme Court of Judicature Act, 1884.	Sections nine to eleven, both inclusive.

APPEFDIX H.

THE ARBITRATION ACT, 1934.

(24 & 25 Geo. 5, Cap. 14.)

An Act to amend the law relating to arbitration and make provision for other matters connected therewith.

(*17th May, 1934.*)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

General Amendments of the Law relating to Arbitration.

Arbitration agreement not to be discharged by death of party thereto.

1. (1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such an event be enforceable by or against the personal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall be taken to affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

Provisions in case of bankruptcy.

2. (1) Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the trustee in bankruptcy adopts the contract, be enforceable by or against him so far as relates to any such differences.

(2) Where a person who has been adjudged bankrupt had before the commencement of the bankruptcy become a party to an arbitration agreement and any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, then, if the case is one to which sub-section (1) of this section does not apply, any other party to the agreement or, with the consent of the committee of inspection, the trustee in bankruptcy, may apply to the Court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and that Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

Power of Court where arbitrator is removed or appointment of arbitrator is revoked.

3. (1) Where an arbitrator (not being a sole arbitrator), or two or more arbitrators (not being all the abitrators) or an umpire who has not entered on the reference is or are removed by the Court, the Court may, on the application of any party to the arbitration agreement, appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

(2) Where the appointment of an arbitrator or arbitrators or umpire is revoked by leave of the Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the Court, the Court may, on the application of any party to the arbitration agreement, either—

(*a*) appoint a person to act as sole arbitrator in place of the person or persons removed ; or

(*b*) order that the arbitration agreement shall cease to have effect with respect to the dispute referred.

(3) A person appointed under this section by the Court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the arbitration agreement.

(4) Where it is provided (whether by means of a provision in the arbitration agreement or otherwise), that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this section or under any other enactment) that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regads that dispute.

4. (1) Where an arbitration agreement provides that the reference shall be to three

Provisions on the appointment of three arbitrators.

arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that the reference shall be to three arbitrators to be appointed otherwise than as mentioned in the foregoing sub-section, the award of any two of the arbitrators shall be binding.

Provisions relating to umpires.

5. (1) The following paragraph shall be submitted for paragraph (*b*) of the First Schedule to the principal Act (which sets out certain provisions which are to be implied in an arbitration agreement unless the contrary intention is expressed therein) :—

"(*b*) if the reference is to two arbitrators, the two arbitrators shall appoint an umpire immediately after they are themselves appointed" :

and in paragraph (*c*) of section five of the principal Act after the word "arbitrator" there shall be inserted the words "or where two arbitrators are required to appoint an umpire."

(2) At the time after the appointment of an umpire, however appointed, the Court may on the application of any party to the reference and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire shall enter on the reference in lieu of the arbitrators and as if he were a sole arbitrator.

Arbitrators and umpires to use due dispatch.

6. (1) The Court may, on the application of any party, to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) An arbitrator or umpire who is removed by the Court under this section shall not be entitled to receive any remuneration in respect of his services.

(3) Subject to to the provisions of sub-section (2) of section ten of the principal Act and to anything to the contrary in the arbitration agreement, an arbitrator, or umpire shall have power to make an award at any time.

(4) For the purposes of the section the expression "proceeding with a reference" includes, in a case where two arbitrators, are unable to agree, giving notice of that fact to the parties and to the umpire.

Amendment of Schedule, of principal Act.

7. The following provisions shall be added at the end of the First Schedule to the principal Act :—

"(*j*) the arbitrators or umpire shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land :—

(*k*) the arbitrators or umpire may, if they think fit, make an interim award."

Additional powers of Court.

8. (1) The Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of any of the matters set out in the First Schedule to this Act as it has for the purpose of and in relation to an action or matter in the Court :

Provided that nothing in the foregoing provision shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

(2) Where relief by way of interpleader is granted and it appears to the Court that the claims in question are matters to which an arbitration agreement, to which the claimants are parties, applies, the Court may direct the issue between the claimants to be determined in accordance with the agreement.

(3) Where an application is made to set aside an award the Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

Statement of case by arbitrator or umpire

9. (1) An arbitrator or umpire may, and shall if so directed by the Court, state i—

(*a*) any question of law arising in the course of the reference ; or

(*b*) an award or any part of an award.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the Court under this section shall be deemed to be a judgment of the Court within the meaning of section twenty-seven of the Supreme Court of Judicature

(Consolidation) Act, 1925 (which relates to the jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the Court), but no appeal shall lie from the division of the Court, or any case stated under paragraph (*a*) of sub-section (1) of this section without the leave of the Court or of the Court of Appeal.

Entry of judgment in terms of award.

10. Where leave is given under section twelve of the principal Act to enforce an award in the same manner as a judgment or order judgment may be entered in terms of the award.

Interest on awards.

11. A sum directed to be paid by an award shall unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

Provisions on to costs.

12. (1) Any provision in an arbitration agreement to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any part thereof shall be void ; and the principal Act shall in the case of an arbitration agreement containing any such provision have effect as if that provision were not contained therein :

Provided that nothing herein shall invalidate such a provision when it is part of an agreement to submit to arbitration a dispute which has arisen before the making of such agreement.

(2) If no provision is made by an award with respect to the costs of the reference, any party to the reference may within fourteen days of the publication of the award or such further time as a Court or a judge may direct apply to the arbitrator for an order directing by and to whom such costs shall be paid, and thereupon, the arbitrator shall after hearing any party who may desire to be heard amend his award by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference.

Taxation of arbitrators or umpire's fees.

13. (1) If in any case an arbitraior or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application for the purpose, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into Court there shall be paid out to the arbitrator or umpire by way of fees such sum as may be found reasonable on taxation and that the balance of the money, if any, shall be paid out to the applicant.

(2) An application for the purposes of this section may be made by any party to the reference unless the fees demanded have been fixed by a written agreement between him and the arbitrator or umpire.

(3) A taxation of fees under his section may be received in the same manner as a taxation of costs.

(4) The arbitrator or umpire shall be entitled to appear and he heard on any taxation or review of taxation under this section.

Power of Court to give relief where arbitrator is not impartial or dispute referred involves question of fraud.

14. (1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and after a dispute has arisen any party applies, on the ground thrt the arbitrator so named or designated is not or may not be impartial for leave to revoke the submission or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality.

(2) Where an agreement between any parties provides that dispntes which may arise in the future between them shall be referred and a dispute which so arises involves the question whether any such party has been guilty of fraud, the Court shall, so far as may be necessary to enable that question te be determined by the Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke any submission made thereunder.

(3) In any case where by virtue of his section the Court has power to order that an arbitration agreement shall cease to have effect or to give leave to revoke a submission, the Court may refuse to stay any action brought in breach of the agreement.

Amendment of S. 11 of principal Act

15. Section eleven of the principal Act (which empowers the Court to remove an arbitrator and set aside and award) shall be amended by the insertion of the words "or the proceedings" after the words "has misconducted himself" in both places where those words occur in the said section

Miscellaneous

Limitation of time for commencing arbitration proceedings

16. (1) The statutes of limitation shall apply to arbitrations as they apply to proceedings in the court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of the statutes of limitation both as originally enacted and as applying to arbitrations, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) In sub-section (3) of section four hundred and ninety-six of the Merchant Shipping Act, 1894 (which requires a sum deposited with a wharfinger by an owner of goods to be re-paid unless legal proceedings are instituted by the shipowner), the expression "legal proceedings" shall be deemed to include arbitration.

(4) For the purpose of this section and for the purpose of the statutes of limitation as applying to arbitrations and of the said section four hundred and ninety-six of the Merchant Shipping Act, 1894, as amended by this section, an arbitration shall be deemed to be commenced when one party to be arbitration agreement serves on the other party or parties a notice requiring him or them to appoint an arbitrator, or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated.

(5) Any such notice as is mentioned in sub-section (4) of this section may be served either :—

(*a*) by delivering it to the person on whom it is to be served ; or

(*b*) by leaving it at the usual or last known place of abode in England of that person ; or

(*c*) by sending it by post in a registered letter addressed to that person at his usual or last known place of abode in England ; as well as in any other manner provided in the arbitration agreement ; and where a notice is sent by post in manner prescribed by paragraph (*c*), service thereof shall, unless the contrary is proved, be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

(6) Where the terms of an agreement to refer futue disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the foregoing provisions of this section extend the time for such period as it thinks proper.

(7) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the dispute referred, the Court may further order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the statutes of limitation for the commencement of proceedings (including arbitration) with respect to the dispute referred.

(8) For the purposes of this section the expression "the statutes of limitation" includes any enactment limiting the time within which any particular proceeding may be commenced.

Application of section 69 of 22 & 23 Geo. 5. c. 37, to solicitors' costs in arbitrations.

17. Section sixty-nine of the Solicitors Act, 1932 (which empowers a Court before which any proceeding is being heard or is pending to charge property recovered or preserved in the proceeding with the payment of solicitor's costs), shall apply as if an arbitration were a proceeding in the Court, and the Court may make declarations and orders accordingly.

Amendment of section 16 of Agricultural Holdings Act, 1923, 13 & 14 Geo. 5, c. 9 ; 51 & 52 Vict., c. 43.

18. The following sub-sections shall be inserted after sub-section (5) of section sixteen of the Agricultural Holdings Act, 1923 :—

"(5*a*) Sections one hundred and ten, one hundred and eleven and one hundred and twelve of the County Courts Act, 1888 (which provide for the issue of summonses to witness in County Court actions and the enforcement of such summonses and the bringing up of prisoners to give evidence in such actions) shall apply to any arbitration under this Act as if that arbitration was an action or matter in the County Court.

(5*b*) The High Court may order that a writ of *habeas corpus ad testiffcandum* shall issue to bring up a prisoner for examination before any arbitrator appointed under this Act, if the prisoner is confined in any prison under process in any civil action or matter.

Saving for pending arbitrations.

19. Subject as horeinafter provided, the provisions of this Act shall not affect any arbitration which has been commenced within the meaning of section sixteen of this Act before the date on which this Act comes into operation, but shall apply to any arbitration so commenced after the said date under an arbitration agreement made before the said date :

Provided that nothing in this section shall affect the operation of the provisions of this Act amending the Agricultural Holdings Act, 1923.

Application to statutory arbitration.

20. This Act, except the provisions thereof set out in the Second Schedule to this Act, shall apply in relation to every arbitration under any other Act passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other Act were an arbitration agreement, except in so far this Act is incosistent with that othcr Act or with any rules or procedure authorised or recognised thereby -

Provided that this Act shall not apply to any arbitration to which the principal Act does not apply and no provision of this Act which expressly amends a provision of the principal Act shall apply to any arbitration to which that provision of the principal Act does not apply.

Short title, interpretation, application, extent, repeal and commencement 52 & 53 Vict., c. 49.

21. (1) This Act, may be cited as the Arbitration Act, 1934.

(2) In this Act, unless cntext otherwise requires :—

The expression "the principal Act" means the Arbitration Act, 1889.

The expression "Arbitration agreement" means a written agreement to submit present or futuro differences to arbitration, whether an arbitrator is named therein or not.

(3) References in this Act and in the principal Act to an award shall include references to an interim award.

(4) This Act shall he construed as one with the principal Act, and the principal Act, the Arbitration Clauses (Protocol) Act, 1924* and the Arbitration (Foreign Awards) Act, 1930,† and this Act may be cited together as the Arbitration Acts, 1889 to 1934.

(5 This Act shall not apply to Scotland or Northern Ireland.

(6 The enactment mentioned in the Third Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(7) The Act shall comc into operation on the first day of January, nineteen hundred and thirty-five.

SCHEDULES

First Schedule. Section 8.

Matters in respect of which the Court may make Orders.

(1) Security for costs.
(2) Discovery of documents and interrogatories.
(3) The giving of evidence by affidavit.
(4) Examination on oath of any witness before an officer of the Court or any other

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* 14 & 15 Geo. 5, c. 39. †20 & 21 Geo. 5, c. 15

person, and the issue of a commission or request for the examination of a witness out of the jurisdiction.

(5) The preservation, interim custody or sale of any goods which are subject-matter of the reference.

(6) The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or expriment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.

(7) Interim injunctions or the appointment of a receiver.

Second Schedule. Section 20.

Provisions of Act which do not apply to Statutory Arbitration.

Sub-section (1) of section one.

Section two.

Section three.

Sub-section (2) of section eight.

Sub-section (1) of section twelve.

Section fourteen.

Section sixteen.

Third Schedule. Section 21

Enactments Repealed.

Session and Chapter	Title or Short Title.	Extent of Repeal.
52 & 53 Vict., c. 49	The Arbitration Act, 1889.	Paragraph (*b*) of section seven; section nineteen; paragraph (*c*) and (*e*) of the First Schedule, and in paragraph (*d*) of that schedule the words "have allowed their time or extended time to expire without making an award or."
10 & 11 Geo. 5, c. 81	The Administration of Justice Act, 1920.	Section sixteen.

APPENDIX I.

THE ADMINISTRATION OE JUSTICE ACT, 1920.

(10 & 11 Geo. 5, c. 81.)

(*Extracts*)

Section 16. (1) Where a submission to arbitration provides that the reeference shall to three arbitrators, ono to be appointed by each party and tho third to be appointed by the two appointed by the parties, then, unless the submission express a contrary intention—

Power as to appointment of arbitrators where submission provides for three arbitrators.

(*a*) If one party fails to appoint an arbitrator for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitracor to act as sole arbitrator in the reference, and the award of the arbitrater so appointed shall be binding on both parties as if he had been appointed by consent :

(*b*) If after each party has appointed an arbitrator the two arbitraiors appointed fail to appoint a third arbitrator within seven clear days after the service by either party of a notice upon them to make the appointment, tho Court or a Judge may, on an application by the party who gave the notice, exercise in the place of the two arbitrators the power of appointing the third arbitrator :

(*c*) If an arbitrator, appointed either by one of the parties, by the two arbitrators, or by the Court or a judge, refuses to act, or his incapable of acting, or dies, a new arbitrator may be appointed in his place by tho party, arbitrators, or Court or judge, as the case may be.

(2) The Court or a judge may set aside any appointment of a person to act as sole arbitrator made in pursuance of this section.

(3) This section shall be construed as if it were included in the Arbitration Act, 1889 and that Act shall have effect accordingly.

APPENDIX J.

THE COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 Vict., c. 125.)

(*Extracts*)

12th August, 1854.

Power to Court or judge to direct arbitration before trial.

3. If it be made to appear, at any time after the issuing of the writ, to the satisfaction of the Court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or judge, upon such application, if they or he think fit, to decide such matters in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court, or in county causes, to the judge of any County Court, upon such terms as to costs and otherwise as such Court or judge shall think responsible, and the decision or order of such Court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the findings of a jury upon the matter referred.

Special case may be stated, and question of fact tried.

4. If it shall appear to the Court or a judge that the allowance or disallowance of any particular item or items in such accounts depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a jury, or by a judge upon the consent of both parties as hereinbefore provided, it shall be lawful for such Court or judge to direct a case to be stated, or an issue or issuses to be tried, and the decision of the Court upon such case, and the finding of the jury or judge upon such issue or issues, shall be taken and acted upon by the Arbitrator as conclusive.

Arbitrators may state special case.

5. It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order or any of the superior Courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when one action is referred, judgement, if so ordered, may be entered according to the opinion of the Court,

Power to judge to direct arbitration at time or trial, when issues of fact to his decision.

6. If upon the trial of any issue of fact by a judge under this Act it shall appear to the judge that the question arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him. at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties or to an officer of the Court, or in County causes, to a judge of any County Court, upon such terms as to costs and otherwise. as such judge shall think responsible; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question, not referred, in like manner as if no reference had been made.

Proceedings before and power of such arbitrator.

7. The proceeding upon any such arbitration as aforesaid shall, except otherwise directed hereby the submission or document authorising the reference, be conducted in the manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the Court, the attendance of witness, the produciion of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of Court or judge's order.

Power to send back to arbitrator.

8. In any case where reference shall be made to arbitration as aforesaid the Court or a judge shall have power at any time and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or judge may seem proper.

Application to set aside the award

9. All applications to set aside any award made on a compulsary reference under this Act shall and may be made within the first seven days of the term next following the publication of the award to parties, whether made in vacation or term ; and if not such application is made, or if no rule is granted, thereon, or if any rule granted thereon is afterwards discharged such award shall be final between the parties.

Enforcing of awards within period for setting them aside.

10. Any award made on a compulsory reference under this act, may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication notwithstanding that the time for moving to set it aside has not elapsed.

If action commenced by one party after all have agreed to arbitration.

11. Whether the parties to any Deed or Instrument in writing to be hereafter made or executed, or any of them, shall agree that any of their existing or future differences between them or any of them shall be referred to arbitration and any one or more of the parties so agreeing or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or agent of any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which action or suit is brought, or a judge thereof, on application by the defendant or defendents, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists, why such mattters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceeeings in such action or suit, on such terms as to costs and otherwise as to such Court or judge may seem fit. Provided always, that any such Rule or Order may at any time afterwards be discharged or varied as justice may require.

On failure of parties or arbitrators, judge may appoint single arbitrator or umpire

12. If in any case of arbitration the document authorising the reference provide that the reference shall be to single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator ; or if any appointed arbitrator refuse to act, or become incapable of acting. or die, and the terms of such document show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one, or if where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator, or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorising the reference do not show that it was intended that such a vacancy should not be supplied. and the parties or arbitrators respectively do not appoint a new ones then a very such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire or third arbitrator respectively ; and if within seven clear days after such notice shall have been served no arbitrator, or third arbitrator be appointed, it shall be lawful for any judge of any of the Superior Courts of law or equity at Westminister, upon summons to be taken out of by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire and third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been apointed by consent of all parties.

When reference is to two arbitrators and one party fail to appoint, other party may appoint arbitrator to act alone.

13. When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorising the reference show that it was intended that the vacancy should not be supplied ; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of submission as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and award made by him shall be binding on both parties as if the appointment had been made by consent ; provided, however, that the Court or a judge may revoke such appointment, on such terms as shall seem just.

14. When the reference is to two arbitrators, and the terms of the document authorising it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award unless they be called upon by notice as aforesaid to make the appointment sooner.

Two arbitrators may appoint umpire.

15. The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respoctively shall contain a different limit of time) within three months after he shall have been appointed and shall have entered on the reference, or shall have been called upto to act by a notice in writing from any party, but the parties may by consent in writing enlarge the term for making the award ; and it shall be lawful for the Superior Court of which such submission, document, or order is or may be made a rule or order, of for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award ; and if no period be stated, for the enlargement it shall be deemed to be an enlargement for one month ; and in any case where an umpire shall have ben appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered any party or to the umpire a notice in writing stating they cannot agree.

Award to be made in three months, unless parties or Court enlarge time.

16. When any award made on any such submission, document, or order of reference as aforesaid directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court of which the document authorising the reference is or is made a rule or order to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorising the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment in ejectment in against every such party or person named in it, and execution may issue, and possession shall be delivered by the Sheriff as on a judgment in ejectment.

Rule to deliver possession of land pursuant to award to be enforced as a judgment in ejectment.

17. Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the Superior Courts of law or equity at Westminister, on the application of any party thereto, unless such agreement or submission contain word supporting that the parties intend that it should not be made a rule of Court , and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such Superior Courts, it may be made a rule of that Court only ; and if when there is no such provision a case be stated in the award for the opinion of one of the Superior Courts, and such Court be specified in the award, and the document authorising the reference has not before the publication of the award to the parties, been made a rule of Court, such document may be made a rule only of the Court specified in the award for the opinion of one of the Superior Courts, and such Court is or has been made a rule or order of any one of such Superior Courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration of award.

Agreement or submission in writing may be made rule of Court unless a contrary intention appear.

APPENDIX K.

ARBITRATION ACT 1950, 24 GEO. 6. CH. 27

ARRANGEMENT OF SECTIONS

PART I

GENERAL PROVISIONS AS TO ARBITRATION

Effect of Arbitration Agreements, & c.

Section
1. Authoriiy of arbitrators and umpires to be irrecoverable.
2. Death of party.
3. Bankruptcy.
4. Staying court proceedings where there is submission to arbitration.
5. Reference of interpleader issues to arbitration.

Arbitrators and Umpires.

6. When reference is to a single arbitrator.
7. Power of parties in certain cases or supply vacancy.
8. Umpires.
9. Agreements for reference to three arbitrators.
10. Power of court in certain cases to appoint an arbitrator or umpire.
11. Reference to official referee.

Conduct of proceedings, Witnesses etc.

12. Conduct of proceedings, witnesses, etc.

Provisions as to Awards.

13. Time for making award.
14. Interim awards.
15. Specific performance.
16. Awards to be final.
17. Power to correct slips.

Costs, Fees and Interest.

18. Costs.
19. Taxation of arbitrator's or umpire's fees.
20. Interest on awards.

Special Cases, Remission and Setting aside of Awards etc.

21. Statement of case.
22. Power to remit award.
23. Removal of arbitrator and setting aside of award.
24. Power of Court to give relief where arbitrator is not impartial or the dispute involves question of fraud.
25. Power of court where arbitrator is removed or authority of arbitrator is revoked.

Enforcement of Award.

26, Enforcement of award.

II

Miscellaneous.

27. Power of court to extend time for commencing arbitration proceedings.
28. Terms as to costs, etc.
29. Extension of s. 496 of the Merchant Shipping Act. 1894.
30. Crown to be bound.
31. Application of Part I to stautory arbitrations.
32. Meaning of "arbitration agreement',
33. Operation of Part 1.
34. Extent of Part I.

PART II

ENFORCEMENT OF CERTAIN FOREIGN AWARDS

35. Award to which Part II applies.
36. Effect of foreign awards.
37. Conditions for enforcement of foreign awards.
39. Meaning of " final award."
40. Saving for other rights, etc.
41. Application of Part II to Scotland
42. Application of Part II to Northern Ireland.
43. Saving for pending proceedings.

PART III

GENERAL

44. Short title, commencement and repeal.

Schedules

First Schedule.—Protocol on arbitration Clauses signed on behalf of His Majesty at a Meeting of the Assembly of the League of Nations held on the twenty-fourth day of September, nineteen hundred and twenty three.

Second Schedule.—Convention on the Execution of Foreign Arbitral Awards signed at Geneva on behalf of His Majesty on the twenty-sixth day of September. nineteen hundred and twenty-Seven.

CHAPTER 27

An Act to consolidate the Arbitration Acts, 1889 to 1934.

[28th July, 1950.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in

this present Parliament assembled, and by the authority of the same, as follows :—

PART I

GENERAL PROVISIONS AS TO ARBITRATION

Effect of Arbitration Agreements, &c.

Authority of arbitrators and umpires to be irrevocable.

1. The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court or a judge thereof.

Death of party.

2. (1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceascd or any other party, but shall in such an event be enforceable by or against the personal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall be taken to affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

Bankruptcy

3. (1) Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the trustee in bankruptcy adopts the contract, be enforceable by or against him so far as relates to any such differences.

(2) Where a person who has been adjudged bankrupt had, before the commencement of the bankruptcy, become a party to an arbitration agreement, and any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, then, if the case is one to which sub-section (1) of this section does not apply, any other party to the agreement or, with the consent of the committee of inspection, the trustee in bankruptcy, may apply to the court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and that court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

Staying court proceedings where there is submission to arbi tration.

4. (1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

(2) Notwithstanding anything in thls Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies, or any person claiming through or under him, commences any legal proccedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is out in fact any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings.

Reference of interpleader issues to arbitration.

5. Where relief by way of interpleader is granted and it appears to the High Court that the claims in question are matters to which an arbitration agreement to which the claimants are parties. applies the High Court may direct the issue between the claimants to be determined in accordance with the agreement,

Arbitrators and Umpires

6. Unless a contrary intention expressed therein, every arbitration agreement shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator.

When reference is to a single arbitrator.

Power of parties in certain cases to supply vacancy.

7. Where an arbitration agreement provides that the reference shall be two arbitrators, one to be appointed by each party then, unless a contrary intention is expressed therein—

(*a*) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator, in his place ;

(*b*) if, on such a reference, one party fails to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the High Court or a judge thereof may set aside any appointment made in pursuance of this section,

Umpires.

8. (1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators shall appoint an umpire immediately after they are themselves appointed.

(2) Unless a contrary intention is expressed therein, every arbitration agreement shall where such a provision is applicable to the reference, be deemed to include a provision that if the arbitrators have delivered to any party to the arbitration agreement, or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(3) At any time after the appointment of an umpire, however appointed, the High Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire shall enter upon the reference in lieu of the arbitrators and as if he were a sole arbitrator.

Agreements for reference to three arbitrators,

9. (1) Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appoinntment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that the reference shall be to three arbitrators to be appointed otherwise than as mentioned in subsection (1) of this section the award of any two of the arbitrators shall be binding.

Power of court in certain cases to appoint an arbitrator or umpire.

10. In any of the following cases—

(*a*) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen, concur in the appointment of an arbitrator ;

(*b*) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy ;

(*c*) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him ;

(*d*) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy ;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concer in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the High Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the

like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Reference to official reference.

11. Where an arbitration agreement provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the High Court or a judge thereof as to transfer or otherwise, hear and determine the matters agreed to be referred.

Conduct of Proceedings, Witnesses, etc.

Conduct of proceedings, witness, etc.

12. (1) Unless a contrary intention is expressed therein, every arbitration agreement shall where such a provision is applicable to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator or umpire, on oath or affirmation, in relation to the matters in dispute, and shall subject as aforesaid, produce before the arbitrator or umpire all documents within their possession or power respectively wich may be required or called for, and do all other things which during the proceedings on the reference the arbitrator or umpire may require.

(2) Unless a contrary intention is expressed therein, every arbitration agreement shall where such a provision is applicable to the reference, be deemed to contain a provision that the witness on the reference shall, if the arbitrator or umpire thinks fit, be examined on oath or affirmation.

(3) All arbitrators or umpire shall, unless a contrary intention is expressed in the arbitration agreement. have power to administer oaths to, or take the affirmations of, the parties to and witness on a reference under the agreement.

(4) Any party to a reference under an arbitration agreement may sue out a writ of *subpoena ad testificandum* or a writ of *subpoena duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action, and the High Court or a judge thereof may order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel the attendauce before an arbitrator or umpire of a witness wherever he may be within the United Kingdom.

(5) The High Court or a judge thereof may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before an arbitrator or umpire.

(6) The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of—

(*a*) security for costs ;
(*b*) discovery of documents and interrogatories ;
(*c*) the giving of evidence by affidavit ;
(*d*) examination on oath of any witness before an officer of the High Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction ;
(*e*) the preservation, interim costody or sale of any goods which are the subject-matter of the reference ;
(*f*) securing the amount in dispute in the reference ;
(*g*) the detention, preservation, or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any person s to enter upon or into any land or building in lhe possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence ; and
(*h*) interim injunctions or the appointment of a receiver ;

as it has for the purpose of and in relation to an action or matter in the High Court :

Provided that nothing in this sub-section shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

Provisions as to Awards.

Time for making award.

13. (1) Subject to the provisions of sub-section (2) of section twenty-two of this Act, and anything to the contrary in the arbitration agreement, an arbitrator or umpire shall have power to make an award at any time.

(2) The time, if any, limited for making an award, whether under this Act or otherwise, may from time to time be enlarged by order of the High Court or a judge thereof, whether that time has expired or not.

(3) The High Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, and an arbitrator or umpire who is removed by the High Court under this sub-section shall not be entitled to receive any remuneration in respect of his services.

For the purposes of this sub-section, the expressions "proceeding with a reference" includes, in a case where two arbitrators are unable to agree, giving notice of that fact to the parties and to the umpire.

Interim awards.

14. Unless a contrary intention is expressed therein every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this Part of this Act to an award includes a reference to an interim award.

Specific performance.

15. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the High Court to order specific performance of any contract other than a contract relating to land or any interest in land.

Awards to be final.

16. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

Power to correct slip

17. Unless a contrary intention is expressed in the arbitration agreement, the arbitrator or umpire shall have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Costs, Fees and Interest.

Costs.

18. (1) Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs or the reference and award shall be in the discretion of the arbitrator or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

(2) Any costs directed by an award to be paid shall, unless the award otherwise directs, be taxable in the High Court.

(3) Any provision in an arbitration agreement to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any party thereof shall be void, and this part of this Act shall, in the case of an arbitration agreement containing any such provision, have effect as if that provision were not contained therein:

Provided that nothing in this sub-section shall invalidate such a provision when it is a part of an agreement to submit to arbitration a dispute which has arisen before the making the application.

(4) If no provision is made by an award with respect to the costs of the reference, any party to the reference may, within fourteen days of the publication of the award or such further time as the High Court or a judge thereof may direct, apply to the arbitrator for an order directing by and to whom those costs shall be paid, and thereupon the arbitrator shall after hearing any party who may desire to be heard, amend his award by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference.

(5) Section sixty-nine of the Solicitors Act, 1932 (which empowers a Court before which any proceeding is being heard or is pending to charge property recovered or preserved in the proceeding with the payment of solicitors' costs) shall apply as if an arbitration were proceeding in the High Court, and the High Court may make declarations and orders accordingly.

Taxation of arbitrator's or umpire's fees.

19. (1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the High Court may, on an application for the purpose, order that the arbitrator or umpire shall deliver the award to the applicant on payment into court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into

court there shall be paid out to the arbitrator or umpire by way of fees such sum as may be found reasonable on taxation and that the balance of the money, if any shall be paid out of that agreement.

(2) An application for the purposes of this section may be made by any party to the reference unless the fees demanded have been fixed by a written agreement between him and the arbitrator or umpire.

(3) A taxation of fees under this section may be reviewed in the same manner as a taxation of costs.

(4) The arbitrator or umpire shall be entitled to appear and be heard on any taxation or review of taxation under this section.

Interest of awards.

20. A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

Special Cases, Remission and Setting aside of Awards. etc.

Statement of case..

21. (1) An arbitrator or umpire may, and shall if so directed by the High Court, state—

(*a*) any question of law arising in the course of the reference ; or

(*b*) an award or any part of an award,

in the form of a special case for the decision of the High Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the High Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the High Court under this section shall be deemed to be a judgment of the Court within the meaning of section twenty-seven of the Supreme Court or Judicature (Consolidation) Act, 1925 (which relates to the jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the High Court), but no appeal shall lie from the decision of the High Court on any case stated under paragraph (*a*) of sub-section (1) of this section without the leave of the High Court or of the Court of Appeal.

Power to remit award

22. (1) In cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

(2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

Removal of arbitrator and setting aside of award.

23. (1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

(3) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

Power of court to give relief where arbitrator is not impartial or the dispute involves question of fraud.

24. (1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, and after a dispute has arisen any party appeals on the ground that the arbitrator so named or designated is not or may not be impartial, or leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.

(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arise involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

(3) In any case where by virtue of this section the High Court has power to order that an arbitration agreement shall cease to have effect or to give leave to revoke the authority of an arbitrator or umpire, the High Court may refuse to stay any action brought in breach of the agreement.

Power of court where arbitrator is removed or authority of arbitrator is revoked.

25. Where an arbitrator (not being a sole arbitrator), or to or more arbitrators (not being all the arbitrators) or an umpire who has not entered on the reference is or are removed by the High Court, the High Court may, on the application of any party to the arbitration agreement, appoint a person to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the High Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the High Court, the High Court may, on the application of any party to the arbitration agreement, either—

(*a*) apoint a person to act as sole arbitrator in place of the person or persons removed ;

or

(*b*) order that the arbitration agreement shall cease to have effect with respect to the dispute referred .

(3) A person appointed under this section by the High Court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the arbitration agreement.

(4) Where it is provided (whether by means of a provision in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the High Court, it orders (whether under this section or under any other enactment) that the agreement shall cease to have effect as regards my particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

Enforcement of Award.

Enforcement of award

26. An award on an arbitraiion agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

Miscellaneous.

Power of court to extend time for commencing arbitration proceedings.

27. Where the terms of an agreement to refer future disputes to arbitration provide that claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some step other to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper .

Terms as to costs. etc.

28. Any order made under this Part of this Act may be made on such terms as to costs or otherwise as the authority making the order thinks just :

Provided that this section shall not apply to any order made under sub-section (2) of section four this Act,

Extension of s. 496 of the Merchant Shipping Act, 1894.

29. (1) In sub-section (3) of section four hundred and ninety-six of the Merchant Shipping Act, 1894 (which requires a sum deposited with a wharfinger by an owner of goods to be repaid unless legal proceedings are instituted by the ship-owner), the expression "legal proceedings" shall be deemed to include arbitration.

(2) For the purposes of the said section four hundred and ninety-six, as amended by this section, an arbitration shall be deemed to be commenced when on party to the arbitration agreement serves on the other party or parties a notice requiring him or them to appoint or concur in appointing an arbitrator, or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated.

(3) Any such notice as is mentioned in sub-section (2) of this section may be servad either—

(*a*) by delivering it to the person on whom it is to be served : or

(*b*) by leaving it at the usual or last known place of abode in England of that person ; or

(*c*) by sending it by post in a registered letter addressed to that person at his usual or last known place of abode in England ;

as well as in any other manner provided in the arbitration agreement ; and where a notice is sent by post in manner prescribed by prragraph (*c*) of this sub-section, service thereof shall, unless the contrary is proved, be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

Crown to be bound.

30. This Part of this Act (except the provisions of sub-section (2) of section four thereof) shall apply to any arbitration to which His Majesty, either in right or the Crown or of the Duchy of Lancaster or otherwise, or the Duke of Crownwall, is a party.

Application of Part I to statutory arbitrators.

31. (1) Subject to the provisions of section thirty-three of this Act, this Part of this Act, except the provisions thereof specified in sub-section (2) of this section, shall apply to every arbitration under any other Act (whether passed before or after the commencement of this Act) as if the arbitration were pursuant to an arbitration agreement and as if that other Act were an arbitration agreement, except in so far as this Act is unconsistent with that other Act or with any rules or procedure authorised or rccognised thereby.

(2) The provisions referred to in sub-section (1) of this section are sub-section (1) or section two, section three, sub-section (2) of section four, section five, sub-section (3) of section eighteen and sections twenty-four, twenty-five, twenty-seven and twenty-nine.

Meaning of arbitration agreement."

32. In this Part of this Act, unless the context otherwise requires, the expression "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whethere an arbitrator is named therein or not.

Operation of part 1.

33. This Part of this Act shall not affect any arbitration commenced [within the meaning of sub-section (2) of section twenty-nine of this Act] before the commencement of this Act, but shall apply to an arbitration so commenced after the commencement of this Act under an agreement made before the commencement of this Act.

Extent of Part I.

34. Sub-section (2) of section four of this Act shall—

(*a*) extend to Scotland, with the omission of the words "Notwithstanding anything in this Part of this Act" and with the substitution, for references to staying proceedings, of references to sisting proceedings ; and

(*b*) extend to Northern Ireland, with the omission of the words "Notwithstanding anything in this Part af this Act."

but. save as aforesaid, none of the provisions of this Part of this Act shall extend to Scotland or Northern Ireland.

PART II

ENFORCEMENT OF CERTAIN FOREIGN AWARDS

Awards to which Part II applies.

35 (1) This Part of this Act applies to any award made after the twenty-eighth day of July, nineteen hundred and twenty-four—

(*a*) in pursuance of an agreement for arbitration to which the protocol set out in the First Schedule to this Act applies ; and

(*b*) between persons of whom one is subject to the jurisdiction of some one of such Powers as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be parties to the convention set out in the Second Schedule to this Act, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid ; and

(*c*) in one of such territories as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be territories to which the said convention applies :

and an award to which the Part of this Act applies is in this Part of this Act referred to as "a foreign award"

(2) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section.

(3) Any Order in Council under section one of the Arbitration [Foreign Award] Act 1930, which is in force at the commencement of this Act shall have effect as if it had been made under this section.

Effect of foreinn awatds.

36. (1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in England either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section twenty-six of this Act.

(2) Any foreign award which would be enforceable under this Part of this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in England, and any references in this Part of this Act to enforcing a foreign award shall be construed as including references to relving on an award.

Conditions of ensorce-ment of forcign awards

37. (1) In order that a foreign award may be enforceable under this Part of this Act it must have—

(*a*) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed ;

(*b*) been made by the tribunal provided for in the agreement or constituted in manner agreed by the parties ;

(*c*) been made in conformity with the law governing the arbitration procedure ;

(*d*) become final in the country in which it was made ;

(*e*) been in respect of a matter which may lawfully be referred to arbitration under the law of England ;

and the enforcefent thereof must not be contrary to the public policy or the law of England.

(2) Subject to the provisions of this sub-section, a foreign award shall not be enforceable under this Part of this Act if the court dealing with the case is satisfied that—

(*a*) the award has been annulled in the country in which it was made : or

(*b*) the party against whom it is sought to enforce the award was not given notico of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented ; or

(*c*) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration :

Provided that, if the award does not deal with all the questions referred, the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (*a*), [*b*] and (*c*) of sub-section (1) of this section, or the existence of the conditions specified in paragraphs (*b*) and (*c*) of sub-section (2) of this section, entitling him to contest the validity of the award, the court may, if it think fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Eviednce.

38. (1) The party seeking to enforce a foreign award must produce—

(*a*) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made ; and

(b) evidence proving that the award has become final ; and

(*c*) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (*a*), (*b*) and (*c*) of sub-section (1) of the last foregoing section are satisfied.

(2) In any case where any document requires to be produced under sub-section (1) of this section is in a foreign language, it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law of England.

(3) Subject to the provisions of this section, rules of court may be made under section ninety nine of the Supreme Court of Judicature (Consolidation) Act. 1925 with respect to the evidence which must be furnished by a party seeking to enforce an award under this Part of this Act.

Meaning of ,'final award."

39. For the purposes of this Part of this Act, an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Saving for other rights etc.

40. Nothing in this Part of this Act shall—

(*a*) prejudice any rights which any person would have had of enforcing in England any award or of availing himself in England of any award if neither this Part of this Act nor Part I of the Arbitration (Foreign Awards) Act, 1930, had been enacted ; or

(*b*) apply to any award made on an arbitration agreement governed by the law of England.

Arbitration of Part II to Scotland.

41. (1) The following provisions of this section shall have effect for the purpose of the application of this Part of this Act to Scotland.

(2) For the references to England there shall be substituted references to Scotland.

(3) For sub-section (1) of section thirty-six there shall bc substituted the following sub-section :—

"(1) A foroign award shail, subject to the provisions of this Part of this Act, be enforceablc by action, or, if the agreement for arbitration contains consent to the registration of the award in the Books of Council and Session for execution and the award is so registered, it shall. subject as aforesaid, be enforceable by summary diligence."

(4) For sub-section (3) of section thirty-eight there shall be substituted the following sub-section :—

"(3) The Court of Session shall, subject to the provisions of this section have power exercisable by statutory insrtument to make provision by Act of Sederunt with rcspect to the evidence with must be furnished by a party seeking to enforce in Scotland an award under this Part of this Act, and the Statutory Instruments Act, 1946, shall apply to a statutory instrumcnt containing an Act of Sederunt made under this sub-section as if tha Act of Sederunt had been made by a Minister of thc Crown."

Application of Part II to Northern Ireland

42. (1) The following provisions of this section shall have effect for the purpose of the application of this part of this Act to Northern Ireland.

(2) For the referenccs to England there shall be substituted references to Northern Ireland.

(3) For sub-section (1) of section thirty-six there shall be substituted the following sub-section :—

"(1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceablc either by action or in the same manner as the award of an arbitrator under the provisions of the Common Law Procedure Amendment Act (1reland), 1856, was enforce able at the date of the passing of the Arbitration (Foreign Awards) Act, 1930."

(4) For the reference, in sub-section (3) of section thirty-eight, to section ninety-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, there shall be substituted a reference to section sixty-one of the Supreme Court of Judicature (Ireland) Act, 1877, as amended by any subsequent enactment.

Saving for Pending Proceedings.

43. Any proceedings instituted under part 1 of the Arbitration (Foreign Awards) Act' 1930, which are uncompleted at the commencement of this Act may be carried on and completed under this Part of this Act as if they been instituted thereunder,

PART III

General

Short title, commencement and repeal.

44, (1) This Act may be cited as the Arbitration Act, 1950.

(2) This Act shall come into oporation on the first day of September, nineteen hundred and fifty,

(3) The Arbitration Act, 1889, the Arbitration Clauses (Protocol) Act, 1924, and the Arbitration Act, 1934, are hercby repealed except in relation to arbitrations commenced (within the meaning of sub-section (2) of section twenty-nine of this Act) before the commencement of this Act, and the Arbitration (Foreign Awards) Act 1930, is hereby repealed; and any reference in any Act or other document to any enactment hereby repealede shall be construed as including a reference to the corresponding provision of this Act.

SCHEDULES

First Schedule

Sections 4, 35.

Protócol on Arbitration Clauses signed on behalf of His Majesty at a Meeting of the Assembly of the League of Nations held on the twenty-fourth day of September, nineteen hundred and twenty-three

The undersigued, being duly authorised, declare that they accept, on behalf of the countries which thcy represent, the following provisions :—

1, Each of the contracting States recognises the validity of an agreement whether

relating to existiug or future differences between parties, subject respectively to the jurisdiction of different contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any contracting State which avails itself of his right will notify the Secretary-General of the League of Nations, in order that the other contracting States may be so informed.

2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The tribunal of the contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies an including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5, The present protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible, with the Secretary. General of the League of Nations, who shall notify such deposit to all the signatory States-

6. The present Protocol shall come into force as soon as two ratifications have been deposited. Thererfter it will take effect, in the case of each ocntracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any contracting State on giving one year's notice. Denunciation shell be effected by a notification addressed to the Secretary-General of the League, who will imediately transmit copies of such notification to all other signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The contracting States may declare that their acceptance of the present Protocol does not include any or all of the under-mentioned territories : that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere seperately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary General to all signatory States.

The contracting States may also denounce the Protocol seperately on behalf of any of the territories referred to above. Article 7 applies such denunciation.

SECOND SCHEDULE

Section 35.

Convention on the Execution of foreign Arbitral Awards signed at Gevena on bchalf af His Majesty on the twenty-sixth day of September, nineteen hundred and twenty-seven

ARTICLE I

In the territories of any High Contracting Party to which the present Convention applies , an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary :

(*a*) That the award has been made in pursuance of a submission to arbitration under the law applicable thereto ;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon ;

(*c*) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure ;

(*d*) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition appeal* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.

(*e*) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

ARTICLE 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the court is satisfied -—

(*a*) That the award has been annulled in the country in which it was made ;

(*b*) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case ; or that, being under a legal incapacity, he was not properly represented ;

(*c*) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it think fit. postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

ARTICLE 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (*a*) and (*c*), and Article 2 (*b*) and (*c*), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

ARTICLE 4

The party relying upon an award or claiming its enforcement must supply, in particular ;—

(I) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made ;

(2) Documentary or rather evidence to prove that the award has become final, in the sense defined in Article 1 (*d*), in the country in which it was made ;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (*a*) and (*c*), have been fulfilled.

A translation of the award and of the other documents mentioned in the Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

ARTICLE 5

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

ARTICLE 6

The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

ARTICLE 7

The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

ARTICLE 8

The present Convention shall come into force three months after it shall have ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

ARTICLE 9

The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

ARTICLE 10

The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September, 24th, 1923, applies can be effected at any time by means of a declaration addressed to the Secretary-General of the Legue of Nations by one of the High Contracting Parties.

Such declaration shall take effect three monthes after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any or the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

ARTICLE 11

A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

Table of Statutes referred to in this Act.

Short Title	Session and Chapter
Common Law Procedure Amendment Act (Ireland), 1856 ...	19 & 20 Vict. c. 102.
Supreme Court of Judicature (Ireland) Act, 1877	40 & 41 Vict. c. 57.
Arbitration Act, 1889	52 & 53 Vict. c. 49.
Merchant Shipping Act, 1894	57 & 58 Vict. c. 60.
Arbitration Clauses (Protocol) Act, 1924	14 & 15 Geo. 5 c. 39.
Supreme Court of Judicature (Consolidation) Act, 1925	15 & 16 Geo. 5 c. 49.
Arbitration (Foreign Awards) Act, 1930	20 Geo. 5 c. 15.
Arbitration Act, 1934	24 & 25 Geo. 5 c. 14, 9 & 10 Geo. 6 c. 36.

APPENDIX L.

REPORT OF THE CIVIL JUSTICE COMMITTEE 1924-25.

Chapter XIII. Pages 208—221

ARBITRATION.

1. The law as regards arbitration may be said to consist of the Second Schedule of the Civil Procedure Code and the Indian Arbitrasion Act of 1899. The provisions of the Second Schedule to the Code are substantially the same as certain sections in the Code of

1882. The note made by the Special Committee over which Sir Erle Richards presided in 1907 was as follows :—

"We are of opininn that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration and insert therein a new and comprehensive Arbitration Act. There are perhaps difficulties as to this at present. We have determined, therefore, to leave the arbitration clauses much as they are in the present Code ; but we have placed them in a Schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitrati5n Act."

That this hope has not been fulfilled, although sixteen years have elapsed, is certainly a pity, but it is important to observe that what is required is not so much that the whole of the law, on this subject, should be put into one act, as that the law should be made more workable.

2. The importance, especially in commercial matters, of a prompt and workman-like system of arbitration requires little emphasis in a report such as this, in which the law's delays are the main subject-matter. The fact that a debtor can postpone judgment or execution for a very long time by taking advantage of elaborate procedure and congeston in our courts, is not merely to be regarded as giving rise to injustice in an individual case or cases, but must be viewed as a general source of risk, and expense whiich has to be provided for out of the gross profits of every trade affected. In so far as an arbitration system may be made prompt and effective, the public can expect to get its goods cheaper. In so far as the enforcement of contracts for the sale and purchase of goods is uncertain dilatory and expensive, the public, when it buys, must expect to have included in the price a certain some as premium, or as reserve, against this from or risk. Whether, without some system of arbitration, business would be possible or not, *ceteris pribus* it would not be possible at the present levels of prices. It is. therefore, in the intereet of the Indian consumer, as well as in the interest of persons engaged in commerce, that Indian trade should have the advantage of a workman-like system or commercial arbitration.

In the buying and selling of goods there is alwaye a special necessity for arbitration. So far as the ordinary law goes any variation between the goods tendered and the contract description entitles the buyer to reject. In foreign trade espeacially rejection of goods is a serious matter. Accordingly in many trades the usual form of contract provides that even if the goods should fail in some reasons to satisfy the contract description, an arbitrator or arbitrators may nevertheless require the buyer to accept the goods subject to an allowance. This is a very important stipulation from a seller's point of view.

3. A main feature of our Arbitration Law is that we have two systems—one for mofussil India, and the other applicable to centres of trade and commerce—chiefly the Presidency towns. This double system applies. however, only to arbitration that are carried out independently of any suit for proceeding in a law Court and to the enforcement of awards made in such arbitrations. When parties have once gone to law and a question arises of taking the decision of the matter in dispute out of the hands of the court and giving it to an arbitrator or arbitrators chosen by the parties, the law applicable to this process is substantially the same for the whole of India. The first and broadest question, is whether as regards arbitration which are carried on, are agreed to be carried independently of any suit it is particable to establish one and the same law for the whole of India,—that is, for the mofussil, as well as for the commercial towns. If so, it would seem that the Indian Arbitration Act, which applies to towns. would require, with some modifications, to be extended to the mofussil. superseding in this respect certain provisions in the Second Schedule of the Code. It would certainly not be practicable in Calcutta, Bombay or Karachi, to revert to the rudimentary provisions of the Second Schedule ef the Code. The project of extending the principles of the Act of 1899 to the whole of India is as old as the Act itself. So far the weight of opinion has always been against the proposal.

I

Arbitration under a submission.

4. The Indian Arbitration Act of 1899 though technically it extends to the whole of British India, was expressed to apply of its own force only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town. By s. 2, however, Local Governments with the previous sanction of the Governor-General in Council were empowered by notification to declare the Act to be applicable in any other local area as if it were a presidency town. Since 1920 the sanction of the Governor-General in Council has not been necessary. The Act was immediately applied to Karachi (1899). Thereafter it was applied but on certain special terms to Delhi (1909). to Cawnpore (1912), and to Amritsar (1915). The Government of India was apparently of opinion that the Act of 1899 was not entirely

suitable for every variety of arbitration proceedings in such town as these. It would only sanction the application of the Act in these mofussil centres on condition that merchants should not come under its terms unless they had agreed to go to arbitration under the Act. The Act accordingly applies only "to written agreements, submissions or references thereon, in which the parties expressly declare that it should apply" (if. Punjab Act 1 of 1911). In like manner by the United Provinces Act 1 of 1912 it is enacted by section 2, that for the purposes of the Indian Arbitration Act, 1899, and notwithstanding anything to the contrary in the definition of the word "submission" as given in section 4 (*b*) of that Act "submission" shall mean a written agreement to submit present or future differences to arbitrators under the Indian Arbitration Act, 1899, whether an arbitrator is named therein or not.

Recently (March 1923) the Act has been extended by the Madras Government to Tuticorin.

5. Under the Indian Arbitration Act, the scheme of arbitration law is roughly this— that if parties have made in writing an agreement to refer, then, upon dispute arising, one party may require the other to comply with his agreement; to appoint, or concur in appointing, an arbitrator, or umpire; to lay the dispute before the arbitrator, or arbitrators, for decision; the award, when made, has only to be filed in Court by the arbitrator, in order that it may become capable of being carried into execution as though it were a decree. If one party to a submission refuses to appoint an arbitrator, or refuses to come before the arbitration tribunal, when established the system broadly speaking is that the party insisting upon arbitration may have the arbitration carried on *ex parte*, and the award will be equally binding. Under this system if any question arises as to the validity of the submission, or the jurisdiction of the arbitrators, or as to the regularity of the proceedings, the party objecting has various courses open. One is to try by obtaining an injunction to prevent the arbitration proceedings from taking place, or from being brought to a conclusion. A second is to wait until the award is made, and then apply to the court to have the award set aside or declared to be void. There is, however, a third course which in recent years has been much resorted to by parties who desire to defeat an agreement to refer, namely, to institute a suit about the matter in dispute— usually a suit for a declaration of some sort—the object being that as the matters in difference are thus brought before a court of law, arbitration proceedings will become fruitless, or will, at least have to be suspended for many months until some questions of procedure are settled at first instance or on appeal. Another form of procedure, much affected of late, is to wait until the award is being put in execution by transfer to some mofussil Court for the purpose, and then to launch a suit in the mofussil asking for an injunction to restrain the execution, and for a declaration, e. g., to the effect that the submission was obtained by fraud, that the arbitrator misconducted himself, and that the award is not binding on the plaintiff.

6. The scheme of the Indian Arbitration Act of 1899 is, in many cases, utterly ineffective in the sense that a person, who has no defence to a just claim, who has agreed to refer all such matters to arbitration, and against whom an award has been made in terms of his agreement, may nevertheless, defy the other party, not for months only, but for years, by means of one or other of the methods above referred to. In all the courts, which have to administer the Act of 1899, the advantages of arbitration can for practical purposes be abolished by bringing a suit to set aside the award as distinct from an application under the Act. According to the rules of most High Courts applications under the Act are more or less summary, and are intended to be disposed of with certain promptitude.

So long, however as the plaintiff takes care to raise some question affecting the validity of the submission, it is settled law that he is entitled to proceed by way of suit. There is difference of opinion as to whether it would be open to him to bring a suit merely for the purpose of raising an objection of the type contemplated by section 14 of the Act. *e.g.*, misconduct of the arbitrator; and there is also room for difference of opinion as to whether such a question can be agitated in a suit, provided that the suit raises other questions affecting the validity of the submission. The one safeguard to be described in the Act, against the action of a party desirous of defeating an agreement to refer is the provision that the award. when held, shall be capable of execution as though it were a decree. Accordingly it is in the power of any Court staying execution under the award or prohibiting the plaintiff from carrying the execution, to require the party against whom the award has been pronounced to give security in cash. if necessary. as a condition depriving the plaintiff of his *prima faice* right to execute the award. For one reason or another the courts in India do not appear to succeed in utilizing this weapon with sufficient effectiveness to put an end even to impudent attempts to defeat and delay just claims upon awards.

7. In the city of Karachi, the seheme of the Indian Arbitration Act would appear to break down more constantly and in morc striking fashion than in any of the Presideney towns. Merchants in Karachi do a great deal of business with the Punjab ; commercially speaking the Punjab is the hinter land of Karachi. In almost every trade the common form of contract employed contains a submission clause. It has happened, owing in recent years to being made in favour of the Karachi merchant, and against the up-country dealer. Until comparatvely recently the stafeguard to which we have referred—namely the fact that the award, when filed, is under the Act capable of execution at once as though it were a decree—was entirely overthrown by certain rules of the Judicial Commissioner's Court. By these rules notices were issued to the parties , the party against whom the award was made was invited to take objections, and a more or les protracted litigation was embarked upon the question whether or not the award should "stand filed." Apart from such proceedings, subordinate Judges in the Punjab, are readily induced to grant interim injunctions, frequently *ex parte*, restraining the execution of awards. This injunctions, however misconceived, can be relied upon to occupy many months before being ultimately discharged. We have been assured that, from the Karachi merchant's point of view, it would appear possible to have the execution of an award delayed almost indefinitely by proceeding from one court to another in the Punjab, obtaining injunctions, the discharge of each of which would involve much time and in some cases would necessitate report to the High Court at Lahore.

8. Particular instances of protracted litigation arising out of agreements to refer may be given to show the reality of the evil. We may first take the case which resulted in a ruling of the High Court of Lahore, reported in I.L.R. 3 Lah. 226. Messrs. Jai Narain Babu Lal apparently carried on business as piece-goods merchants at Karachi, with branches at Amritsar and Delhi. They would seem to have sold piece-goods under written contracts which contain an arbitration clause, providing for a reference to arbitration by two European merchants of Karachi. In 1918, before the Armistice, they entered into several forward contracts with certain Delhi merchants, for the sale of piece-goods to be supplied in the begining of 1919. After the Armistice in November, 1918, the piece-goods market fell very heavily. The buyers declared to take delivery of the goods pleading that they were induced by fraud to enter into the contracts, and that the goods tendered were not of proper shipment, and were otherwise in disconformity with the contract. In April or May, 1919, the sellors called upon the different buyers to refer the dispute to arbitration. *It is to the proceedings that ensued upon this that we desire to call attention.* The Delhi buyers filed suits in Delhi for a declaration that the contracts were not binding on them, and for an injunction restraining Messrs. Jai Narain Babu Lal from going to arbitration. On the 9th October, 1919, the District Judge of Delhi, granted temporary injunctions against Messrs. Jai Narain Babu Lal. These injunctions were discharged by Mr Justice Abdul Raoof on the 23rd of December, 1919 [*Vide* 54 I.C. 546]. But pending an appeal against his decision under the Letters Patent. temporary injunctions were again issued by the Lahore High Court which were discharged on the 23rd of February, 1920. by a Bench consisting of Sir Shadi Dal and Mr. Justice Martinue [*Vide* 55 I. C. 409]. Pending appeal against the interlocutory orders, the plaints filed by the Delhi merchants were returned to them for making certain amendments and were readmitted in May, 1920 as suits of 1920. These suits were dismissed on the 13th October, 1920 on the ground that the plaintiffs had no cause of action at that stage, and in the event of awards being passed against them the Delhi merchants could then come to court to set them aside. The Delhi merchants appealed against the decision of the subordinate Judge dismissing their suits. There was delay in serving Messrs. Jai Narain Babu Lal and the disposal of the appeals hung for a long time.

After the discharge of the injunctions by the Lahore High Court, Messrs. Jai Narain Babu Lal served fresh notices on the Delhi merchants calling upon them to appoint their arbitrators. Some of them did so under protest. The arbitrators passed their awards in January. 1921. The Delhi merchants thereupon filed fresh suits for a declaration and injunction, *inter alia* claiming to have the awards set aside on the ground that the arbitrators had no jurisdiction to proceed with the matters in dispute pending the disposal of the appeals filed in the first set of suits. They also filed objections to the awards in the Karachi Court and applied that the hearing of the objections be stayed under secction 10 of the Civil Procedure Code pending the disposal of the second set of suits filed by them in the Delhi Court. Under the rules then in force in the Judicial Commissioner's Court at Karachi no award could be executed as a decree pending the disposal of objections to the award. The applications for stay was disallowed. Revision applications against this decision were subsequently dropped. In the mean time the buyers expedited the disposal of the second set of suits in the Delhi Court and obtained a decision in their favour setting aside the awards on the preliminary point that the arbitrators were *functi officio* during the pendency of the appeals in the first set of suits. The Punjab High Court reserved this

finding and remanded the suits tor disposal on the merits (*Vide* I,L.R. 3 Lah. Page 296). The objections to the award were then provided with in Karachi and were disallowed on 27th June, 1922, revision applications against the decision of the Karachi Court were also disallowed. Though the awards could then be enforced as decrees, Messrs. Jai Narain Babu Lal had still to fight the Delhi suits on the merits and though they may have been able to plead in the Delhi Court that the decision of the Karachi Court was binding, there was still plenty of scope for further delay in the Delhi Court and they not unnaturally compromised the matter. So far as we are concerned the buyers may or may not have had an excellent case for contesting their liability to go to arbitration, but the possibility of such a claim of proceedings as is above set out is in itself proof that our arbitration law is ineffective.

9. Further illustration may be given of the manner in which arbitration clauses can be rendered nugatory by the misuse of the principle laid down in the well-known English case, *Doleman* v, *Ossett Corporation* (1912). 3 K. B. 257, namely that arbitrators cannot proceed to decide a dispute if there is a suit pending about the same dispute, unless stay of the suit has been obtained from the court in order that the arbitrators might decide the matter. It is not uncommon for debtors to institute suits in the Punjab in respect of the same matter as in the subject-matter of arbitration in Karachi. Applications for stay of such suits take a very long time. In certain cases suits for accounts were filed up-country against the Karachi claimants in arbitration. The Karachi claimants applied to the up-country Court for stay under section 19 of the Indian Arbitration Act and proceeded with arbitration. On the awards being filed in the Judicial Comissioner's Court at Karachi, they were set aside on the principle above mentioned, but on appeal the awards were ordered to be taken off the file and to be represented to the court in the event of the stay application being granted (*vide* 17 Sind Law Reporter, page 225). We were informed, when at Karachi, that it somtimes takes from two to three years in up-country courts to have an application under section 19 finally disposed of. It is not uncommon for the up-country suits to be filed after the arbitrators have entered on the reference and just a day or two before they make their award. Thus in the Karachi case numbered J. Mis. No. 297 of 1921, the reference to arbitration is dated 29th April, 1921, the award is the 18th May, 1921, and the suit is the 14th May, 1921. The effect of such tactics is frequently to oblige claimants to settle for a much smaller sum than to which they are entitled.

10. The Associated Chamber of Commerce discussed the question of arbitration at a meeting in December, 1923, and urged upon Government that steps should be taken to put the law of arbitration in India into a more satisfactory state. We observe that Mr. R. S. Backhouse of the Karachi Chamber was of opinion, first, that the provisions of section 15, to the effect that the award on being filed shall be enforceable as if it were a decree, should be modified ; and also that provision should be made in the Indian Arbitrtion Act to the same effect as is made by paragraph 17 of the Schedule to the Code—namely that the party claiming arbitration may apply to the court, and the court after giving notice to the several parties concerned may make an order of reference if the agreement to refer appears to be valid. Mr. Backhouse pointed out very forcibly certain of the defects of the Indian Arbitration Act, in particular the failure to provide a right of appeal in case arising in towns other than the Presidency tows. He also called attention to such rulings as *E.* D. *Basson Co* v. *Ram Datt Ramirishna Das*, I L. R. 50 Cal, 81. and the case already referred to *Jai Narain Babu Lal* v. *Jamal* I. L. R. 3 Lahore, 296, which seem to permit unlimited right of suit about awards.

11. We have been furnished with a copy of a draft Bill to consolidate and amend the law relating to arbitration in British India, prepared by Mr. Harchandrai Vishandas, of Karachi. Apart from minor amendments of the law and from the fact that the whole law of arbitration is intended to be incorporated into one Act, the general intention of the Bill appears to be to apply the principles of the Indian Arbitration Act of 1899 to the whole of India, making however certain modifications seem to be (1) that an award may be enforced as a decree but only by leave of the court, such leave to be obtainable only after lapse of a certain time in order that an application to set aside, modify, or remit the award may be made meanwhile ; (2) that no suit should lie to contest the validity of a submission or award on any ground other than fraud ; and (3) that no award should be deemed to be invalid by reason only of its being based on a reference which amongst other matters, includes the subject-matter of a pending suit or proceeding.

12. On the whole, we think experience shows that arbitration is an extraordinary ineffective device in the absence of a fairly high degree of honesty in the parties. If the result of a submission clause is that one party to defeat the arbitration will always allege fraud, or misconduct of the arbitrator, or something else, no provision of the law will ever succeed in securing a quick settlement of disputes. The simple fact seems to be that the more carefully the law be amended the more ingenuity will be applied in making

allegations of a kind which courts of law cannot refuse to investigate at length. We doubt whether mofussil India is ready for, or requires. a system of arbitration any more elaborate than is provided for by the Second Schedule. We would recommend rather that the law, under the Indian Arbitration Act, should be made more drastic and effectual, than that it should be extended.

13. What seems to be most required is that in the case of every arbitration one court and one only should be the forum in which all questions relating to the validity of the award should be finally determined. It is, we think, necessary to require all persons, who desire to challenge awards made by arbitrators in Presidency towns and other commercial centres, to bring their proceedings in the court of the town. There seems to be no hardship, whatsoever, in saying that people who have agreed to arbitrate, *e.g.*, in Karachi should litigate about the arbitration in Karachi. Under scction 2 of the Act of 1899 a submission may come under the Act or under Schedule II of the Code according as a suit would lie, or would not lie, in a Presidency town. This depends on various accidental circumstances, *e,g.*, if one party out of many lives in the Presidency town, or if one part of the cause of action occurs in the Presidency town. We think that it should be open to parties to state in their submission clause that the refernce is to be under the Act, and that all proceedings are to be taken, *e.g.*, in Karachi or in some particular Presidency town or commercial centre to which the Act applies. When an arbitration has been held or is being held under such a clause the law should require all questions to be determined by the court of the town whether the factum and validity of the submission be challenged or not. Such a rule is not more open to abuse than many others which work well in practice.

14. We think also that the practice of granting to restrain arbitration proceedings is one that might with advantage be totally prohibited. As we understand the law such injunctions should never be granted to a party whose case is that he never entered into an agreement to refer, but should be granted only in very special cases where there is an agreement to refer but the plaintiff claims that it relates, to a matter in respect of which there is some equity which makes it desirable to prevent proceedings being carried on. Such cases are extremely rare and there is no hardship, in our opinion, in refusing such injunctions in any case—still less in confining the right to grant such injunctions to courts of Presidency towns, or other commercial centres.

15. We see no reason why a provision on the lines of paragrape 17 of the Second Schedule should not be made applicable to arbitrations under the Indian Arbitration Act : provided always that this provision is purely facultative, and is not in any way intended to require persons claiming arbitration to apply to the Court in the first place to enforce the agreement to refer.

16. We are against the suggestion that the award should not be enforceable the moment it is filed. This we regard a very valuable improvement upon English practice and the only thing that has made arbitration in India in any degree effective. We have no evidence whatever of abuse of this provision and though it is open to be abused we see no grounds for repealing it.

17. We are also against the suggestion that the arbitrators should be compellable by the court to state a case, as this would, in India, be sure to lead to wide and gross abnse.

18. In our judgment no amendment of the law will effect very much for the benefit of trade unless in those centres, to which the Indian Arbitration Act at present applies, there is provided a summary method of disposing of objections to awards, as well as a provision which will be effective to prevent the interference of any other court. We think that every court acting under the Indian Arbitration. Act, should be empowered to require all applications to set aside awards, on whatsoever grounds, to be made by motion on affidavit evidence, it being open to the court, if it thinks necessary (*e.g.*, in a case where allegations of fraud are made) to give facilities for oral evidence, and for discovery, and to require particulars from each party of his allegations. In an ordinary High Court, with an Original Side there is nothing to prevent a Judge disposing of a motion under the Indian Arbitration Act as carefully and as thoroughly as though he were trying a suit, with the aid of discovery or oral evidence as necessary. To provide that an allegation of fraud will entitle the plaintiff to proceed by the more elaborate method of a suit is merely to invite plaintiffs to couple allegations of fraud with any other case that they may have.

19. We have ascertained that since the meeting of the Associated Chambers of Commerce in December, 1923, the Government of India in the Legislative Department have made an investigation of the points of difficulty presented by the existing law. A few of the more important points on which the law requires to be amended, or defined, may be noted here. In a case arising in Cawnpore, or Amritsar, *i.e.*, a commercial centre to which

the Indian Arbitration Act has been applied, but which has not got a Chartered High Court, it should be provided that an order confirming or setting aside an award is to be subject to one appeal, and one only. We agree that the principle of *Doleman* v. *Ossett Corporation* (1912) 3 K. B. 257, should be reconsidered : the mere filing of a suit should not of itself interrupt an arbitration (cf· I.L.R. 3 Lah. 296 at 307). The effect of devolution of the rights of a party to a submission should be declared particularly as regards official assignees, or official receivers in insolvency. A period of limitation should be provided for motions to take an award off the file or to set aside the award on whatsoever grounds. Provision should be made enabling witnesses to be summoned before arbitrators and enabling commissions to be issued to examine witnesses for the purpose of an arbitration.

II.

Arbitration in a Suit.

20. As regards arbitrations in suits, the chief question which requires attention is the question whether it is advisable to permit parties to a suit referring their disputes to arbitration otherwise than by the procedure provided by Articles 1—16 of the Second Schedule to the Code. Whether the language of the Second Schedule or of section 89 of the Code amounts to a prohibition of arbitration in suits otherwise than by the means described on the Schedule is a matter upon which judicial opinion is divided. The High Court of Bombay in *Manilal Motilal* v. *Gokuldas Mooljl*, I.L.R. 45 Bombay 245, has held that an arbitration in a suit, without any order as required by the Second Schedule, may be enforced as an adjustment of the suit under Order 23, rule 3. We consider that it would be advantageous if all arbitrations in suits, except as provided by the Second Schedule, were made void ; the awards should only be recorded as adjustments of the suits when the court is asked to do so by all the parties.

21. It sometimes happens that the matters in difference in a pending suit, together with other matters connected therewith, can most conveniently be disposed of by arbitration. Under the Second Schedule it would seem to be impossible to have any arbitration in a suit wherein the award should validly extend to other matters. We see no reason why other matters should not, by consent of all concerned, be included in such an arbitration, at all events by the leave of the Court. We think, moreover, that this kind of objection, even when leave of the court has not been obtained, should be regarded as one to which the court need not give effect. In other words, we think that the court should have the power to grant the necessary leave *ex parte*. Provisions will be necessary in such cases and is also necessary as regards adjustments which comprise matters not in suit, to make clear that the Registration and Stamp Acts are not defeated.

22. It would appear that an order setting aside an award under paragraph 15 of the Second Schedule to the Code may result in unlimited litigation notwithstanding the provisions of section 104, sub-section (2) of the Code. The summary given below of proceedings which arose out of an order of the Munsif of Fatehpur in the Cawnpore judgeship is well worth study. We are told that the properties involved are two shops ; worth about four or five hundred rupees. The litigation as will be seen arose from the circumstances that an arbitrator who had been given time till 30th January, 1918, filed his award on the 31st. The correctness of the order setting aside this award as made out of time was canvassed on appeal from the Munsiff's decree in the suit. The case has taken even years and is now before the High Court of Allahabad. The case is not uninstructive as regards some of the points discussed in the chapters of this repirt which deal directly with appeals.

17th August, 1917—Suit instituted (No. 438 of 1917).

5th September, 1917—Written statement filed by defendant.

13th December, 1917—Case referred to arbitration.

15th January, 1918—Order extending time for filing award : "The arbitrator should file his award before the 31st January, 1918. Case to be brought forward on 31st January, 1918"

31st January,1918—Award made and filed—decreeing the suit in toto in plaintiff's favour.

2nd February, 1918—Defendant's objection that the award had been made beyond time by one day, and should be set aside.

1st March, 1918—Munsif allowed objection, set aside award and fixed 22nd March, 1918, for trial.

22nd March, 1918—Trial, evidence recorded.

25th March,1918—Judgment delivered—plaintiff and defendant held joint-owners in equal shares.

22nd April, 1918. and 29th April, 1918—Appeal and cross-appeal by both parties to the District Judge at Cawnpore who transfered them to subordinate Judge.

14th June, 1918—Plaintiff's appeal allowed, defendant's appeal dismissed on the ground that the award had been made within time and should not have been set aside. Decree passed in favour of the plaintiff in accordance with the award.

Appeal by the defendant against the two decrees of the lower appellate Court.

15th July, 1918—Second appeals (Nos. 910 and 911 of 1918) in the High Court by the defendant against the two decrees of the lower appellate court.

4th January, 1912—Both second appeals heard by a single Judge and dismissed-
30th March, 1921—Letters Patent appeals (Nos. 21 and 22 of 1922) filed.

6th July, 1922—Letters Patent appeals allowed—Order of the Munsif setting aside the award restored, and the case remitted to the lower appellate court.

6th November, 1922—Letter of the Registrar to the subordinate Judge, Cawnpore, returning reeords af the case.

12th May, 1923—Case heard by the subordinate Judge on the merits, and judgement of the Munsif affirmed—Appeal and cross-appeal dismissed.

29th November, 1923—Second appeal (No. 1591 of 1923) filed by the plaintiff. (Delay in filing the appeal was probably due to the intervention of the long vacation).

3rd January, 1924—Hearing under Order 41, rule 11, Civil Proceduro Code; appeal admitted.

It would seem necessary to provide that an order setting aside an award and superseding an arbitration should not be impeached in an appeal from the decree.

23. An important question as to which we consider that the law might well be clearer is the question of the extent to which a court should be expected or required to interfere with the arbitrator's conduct of an arbitration between the date of the order of reference and the date limited for filing the award. Sometimes complaints are made to the court of the conduct of the arbitrator during this period. It seems to us that if long periods are not limited for the filing of the award it would be as well to prescribe that attacks upon the conduct of the arbitrator should not be entertained except upon the question whether the time should be further extended, or after the award has been made.

24. Some flagrant cases occur where there are two arbitrators each appointed by one side. Some times defendant's arbitrator will withdraw from the case just before the time comes to make the award and after many proceedings have been taken before himself and his colleague. Even if the court has power to appoint another arbitraton such tactics will in general produce extreme delay. Apart altogether from cases where the defendant's arbitrator is not playing fair, we have been given particulars of cases sent to arbitration under the Second Schedule where for one reason or another the delay has been unconscionable. After time has been given on one or two occasions the court is apt to grant further extensions of time rather than to have all the cost and expense already incurred before the arbitrators thrown away. Sometimes in the end the reference has to be superseeded. Sometimes also the award has in the end to be set aside. In such cases the cases has to commence *de novo* many months after it might have been heard originally by the court itself. No rules or law can be suggested by us to obviate entirely this type of disaster. All that can be done when such cases are noticed by a district Judge or High Court Judge at the time of inspection or in the course of a scrutiny of statements of delay is to give such critisim and such advice as regards the handling of these cases as may tend to assist the judge to maintain a stricter control. The one weapon of any effectiveness which the court has in its power to limit the time for the making of the award.

25. Under paragraph 20 of Schedule II of the Civil Procedure Code where any matter has been referred to arbitration without the intervention of a court;, and an award has has been made thereon, any person interested in the award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court. The application shall be numbered and registered as a suit between the applicant as plantiff and the other parties as defendants. The court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause within a time specified why the award should not be filed. After such notice, according to paragraph 21, where the court is satisfied that the matter has been referred to arbitration and that an award has been made thereon *and where no ground such as is mentioned or referred to in paragraph* 14 *or paragraph 15 is proved*, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Upon the judgment so pronounced the decree shall follow.

According to these provisions and to the decisions thereon, if there is any ground such as is mentioned in paragraph 14 or 15 is proved, the court has only one course open, namely, to dismiss the petition. It can either accept the award as it is or reject it alto-

gether. It, however, the arbitration had been in a suit or under an order of reference on an agreement to refer them, under paragraph 14, the court could have remitted the award or the matter referred to arbitration to the reconsideration of the same arbitrator or umpire upon snch terms as it might think fit. Moreover, it is not clear that the court acting under paragraph 20 can modify or correct the award as it can do under paragraph 12 in the case or an award made in an arbitration through court. This is very hard on the parties in whose favour the award is : It discourages reference to arbitration, and leads to unnecessary litigation. It is now the accepted opinion, that arbitration shhuld be encouraged as much as possible. It is therefore necessary that the court should have power even in the case of reference to arbitration, without the intervention of the court, to exercise the powers given in paragraphs 12 and 14 or the Schedule. Both in the original Bill of 1901 and as it emerged from the Select Committee in 1905, it was provioed that "for the purposes of section 525 (corresponding to paragraph 21) the court shall have all the powers conferred and shall perform all the duties imposed upon it by sections 510 to 522." Section 518 corresponds to the present paragraph 12 and 520 corresponds to the present paragraph 14. Probably this change was not carried out because the Special Committee which sat to consider the Bill in 1907 thought, as we have been, that the whole law or arbitration should be transferred to a seperate comprehensive Arbitration Act. It is, however, very desirable that the change contemplated in the Bill of 1901, should be made as early as possible, Most arbitrators are not professional lawyers and often made obvious mistakes of form which do not affect the merits of their decision.

26. There are a number of other amendments which might well be made to the Second Schedule in points of detail. These, however, cannot usefully be discussed here.

APENDIX M.

Rules frmed under Section 44, Arbitration Act, 1940.

By Different High Courts.

High Court of Judicature at Fort William in Bengal.

(Original Side)

Notification, dated, Calcutta the 19th August, 1940.

APPENDIX NO. 14

Rules under section 44 of the Arbitration Act. 1940.

It is ordered that with effect from the 1st day of September, 1940, the following Rules and forms framed under the provisions of section 44 of the Arbitration Act, 1940, shall apply to all applications and proceedings on the Original Side of the High Court of Judicature at Fort William in Bengal under the Act. These Rules and Forms shall be included as Appendix No. 14 in the appeadices contained in the Book of the Rules and Orders of the original Side of the High Court and shall be entitled "Rules under Section 44 of the Arbitration Act. 1940 (Original Side) "

The existing Rules contained in Chapter XXIII shall continue in force with application to such References as were pending on the first day of July. 1940, and to applications and proceedings made under the Arbitration Act, 1940. between the 1st day of July and the 1st day of September, 1940.

The officers and chapters mentioned in these Rules and Forms refer to officers of the Original Side, and chapters of the Rules and Orders of the Original side.

1. All applicatsons, affidavits and proceedings under the Act shall be instituted in the matter of the Act, and in the matter of Arbitration Agreement. or in the matter of the Reference to arbitration in the suit as the case may be.

2. All applications under the Act shall, except as hereinafter otherwise provided, be made to the Court on motion after notice to the parties affected thereby and the provisions of Chapter XX shall, so far as the same be applicable, apply to such applications. The person making the application shall be called the petitioner, and any person served with notice thereof shall be called a respondent.

3. An application under section 20 of of the Act shall be made by presenting before the Registrar or Master a petition verified by an affidavit, the petitioner being called the plaintiff, and the respondent the defendant (Form No. 1).

A copy of the Arbitration Agreement shall be filed with such petition and the original arbitration agreement shall, if the same be in the possession of the petitioner and the provisions of Rule 9 of Chapter VII shall be followed, so far as the same are applicable. Upon the petition being presented as aforesaid the Registrar or Master, where the papers are in order, shall file the same and the appliaation shall be numbered and registered as a

suit. The notice required under section 20 (3) of the Act shall thereupon be issued by the Registrar or Master to the parties other than the petitioner requiring them to show cause on a date to be specified therein why the agreement should not be filed, Such notice shall be served by and at the expense of the petitioner (Form No. 2).

4. An application under section 21 or the Act shall be made by petition signed by the parties and verificd by their affidavit or the affidavit of one of them (Form No. 3).

5. An application, which is consented to by all the parties affected thereby, shall be made by petition with the consent of the parties endorsed thereon and signed by them. Such petition shall be verified by the affidavits of the parties or the affidavit of one of them.

6. An application for issue of summons to a person to give evidence or to produce a document shall be made in writing to the Registrar or Master and the provisions or Chapter XXXVI in regard to such application and the fees and allowances payable to the persons so summoned shall be applicable thereto.

7. An application under section 28 of the Act shall be made to a judge upon summons to all parties interested. An application under section 16 (2) of the Act for extension of time shall be made to a judge.

8. Every petition or affidavit in support of a notice of motion shall be divided into paragraphs numbered consecutively, and shall contain the name. description and place of residence of the petitioner and the respondent, and a statement in a summary from of the material facts, the facts shewing that the Court has jurisdiction. and the nature of the relief asked for, and shall specify the persons liablc to be affected thereby.

9. Where the Arbitrators or Umpire state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part in the form of a special case for the opinion of the Court, they shall transmit the same to the Registrar and shall at the time give notice of such transmission of the parties.

10. Every special case stated under section 15 (*b*) of the Act shall contain, and contain only, a statement in a summary form of the material facts and the points for the opinion or the Court (Form No. 4)

11. Upon receipt of such special case, notice under section 14 (3) of the Act shall be issued by the registrar to the parties intimating to them that the Court will proceed to pronounce its opinion thereon on a date fixed in the notice and shall be served by and at the expense of such party or parties as the Registrar may direct (Form No. 5).

12. The opinion of the Court may be filed by any party to arbitration agreement or the order of reference, and an office copy thereof shall be taken in the usual way of transmission to the Arbitrators or Umpire. Such office copy be added to and shall from part of the Award.

13. The Arbitrators or Umpire shall forward the Award or a signed copy thereof (du y stamped) together with any depositions and documents which may have been proved before them or him when causing the same to be filed under Section 14 (2) of the Act together with necessary Court Fees for filing (and in case of awards in languages other than English Rs. 2 for every folio of ninety words as translation fees) under a sealed cover to the Registrar with a letter requesting that the Award be filed.

14. Where the provisions of the Act and of rule 13 have been complied with the Registrar shall file the Award and issue notice thereof to the parties under section 14 (2) of the Act intimating to them that the Court will proceed to pronounce judgment thereon on a date to be fixed in the notice (Form No. 6). Such notice shall be served by and at the expense of such party or parties as the Registrar may direct.

15. The notices to be issued under the above rules 3, 11 and 14 shall be made returnable before the Court hearing motions :

Provided that where the agreement relates to a commercial matter, or the special case has been stated, or the award has been made in commercial suit, the notices shall be made returnable before the Court hearing commercial suits. Such notices shall be served not less than eight days before the returnable date in the manner provided for service of notices in Chapter VIII, so far as the same may be applicable.

16. The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under section 39 of the Act.

17. The fees in respect of proceedings under this Act shall be according to the Table of Fees for the Original Side of the Court, as near as circumstances will permit.

18. The forms set out in the Schedule hereto, with such variations as the circumstances of each case may require, shall be used for the purposes therein mentioned.

SCHEDULE OF FORMS.

Form No. 1.

Application under section 20 of the Arbitration Act, 1940.

Suit No. of 19 .

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.
Ordinary Original Civil Jurisdiction.

In the Matter of the Arbitration Act, 1940
and
In the Matter of an Arbitration Agreement, dated the day of 19 .

Between

A. B. (name, description and place of residence).....*Plaintiff*

and

C. D. (name, description and place of residence.).....*Defendant.*

The petition of A. B. abovenamed sheweth :—

1. By an agreement in writing dated the day of 19 , and entered into by and between the plaintiff and the defendant abovenamed at (place where the agreement was entered into and signed) within the aforesaid jurisdiction. copy whereof is hereto annexed, it was agreed that the following matters in difference between the parties should be referred to the arbitration of (name, description and place of residence of the arbitrator) :—

(State matter of difference.)

2. Difference has arisen between the plaintiff and the defendant as to (state the nature of the difference) to which the said agreement applies.

Your petitioner, therefore, prays for an order that the said agreement be filed.

A. B.

Plaintiff's Attorney.

I, of make oath and say that the matters referred to in paragraphs to or (solemnly affirm) of the foregoing petition are true to my knowledge.

Sworn (solemnly affirmed), etc.

Form No. 2.

Notice under section 20 (3) of the Arbitration Act, 1940.

Suit No. of 19 .

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.
Ordinary Original Civil Jutisdiction.

(Title as in Form No. 1.)

To

C. D.

the defendant abovenamed,

Whereas the plaintiff abovonamed has on the day of 19 made an application which has been numbered and registered as suit No. of 19 for an order that the arbitration agreement dated the day of 19 and entered into by and between the plaintiff and you the defendant be filed, you are hereby required under sub-section (3) of section 20 of the Arbitration Act, 1940, being served with this notice, to appear before the Court on the day of 19 at o'clock in the forenoon to show cause why the said agreement should not be filed.

Dated 19

Registrar

Master

Form No. 3.

Application for an order of reference under section 21 of the Arbiiration Act, 1940.

Suit No. of 19 .

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.
Ordinary Original Civil Jurisdiction.

In the Matter of the Arbitration Act, 1940
and
In the Matter of suit No. of 19 ,
A. B.
v.
C. D.
(Title of Suit.)

The petition of A. B. and C. D. abovenamed shewith :—

1. This suit is instituted for (state nature of claim).
2. The matters in difference between the parties are (state matters of difference).
3. The petitioners being all the parties interested have on the day of 19 at within the jurisdiction aforesaid agreed (state nature of agreement) that the matters in difference between them shall be referred to the arbitration of (name, description and place of residence of the arbitrator or the manner as to the appointment of arbitrator agreed upon between the parties).
4. The petitioners therefore pray :—
   (*a*) that the aforosaid matters in difference be referred for determination to the arbitrator abovenamed ;
   (*b*) that the date within which the award is to be made be ffxed.

A. B.
C. D.

(Verification and Jural as in Form No. 1.)

Form No. 4.

Section 13 (b) of the Arbitration Act, 1940.

(Special Case.)

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL
Ordinary Original Civil Jurisdiction.

In the Matter of an Arbitration Agreement,
and
In the Matter of an Arbitration Agreement, dated the day of 19 .
between
A. B. (name, description and place of residence)
and
C. D. (name, description and place of residence.)
or
In the Matter of Suit No. of 19 .
(Title of Suit)

The following special case is stated for the opinion of the Court :—
(state the facts concisely in numbered paragraphs.)
The question of law for the opinion of the Court are :—
First, whether
Secondly, whether
Dated the day of 19 .

P
Y
Arbitrators

Umpire

Form No. 5.

Notice under Section 14 (3) of thr Arbitration Act, 1940.

IN THE COURT OF JUDICATURE AT FORT WILLIAM IN BENAAL.
Ordinary Original Civil Jurisdiction.
Title as in Form No. 4.)

Take notice that the arbitrators have / Umpire has stated for the opinion of the Court a special case, copy whereof is hereto annexed, and that the Court will proceed to pronounce its opinion thereon on the day of 19 .
Dated this day of 19 .

Registrar,

Form No. 7.

Notice under section 14 (2) *of the Arbitration Act*, 1940.

IN THE COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Ordinary Original Civil Jurisdiction.

(*Title as in Form No.* 4,)

Take notice that the Award of the Arbitrator appointed in the matter of the above Arbitration $\frac{\text{Agreement}}{\text{Suit}}$ has this day been filed and that the Court will proceed to pronounce judgment on such Award on the day of 19 .

Dated this day of 19 .

Registrar

Form No. 7.

Order of reference under section 20 (4) *and* 23 (1) *of the Arbitration Act*, 1940.

IN THE COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Ordinary Original Civil Jurisdiction.

In the matter of the Arbitration Act, 1940

and

In the Matter of an Arbitration Agreement, dated the day of 19 .

Between

A. B. (state name, description and place of residence)

and

C. D, (state name, description and place of residence.)

or

In the Matter of Suit No. of 19 .

(Title of Suit.)

Upon reading the petition of verified by an affidavit of , and filed on the day of 19 , issued upon the filing of the said petition and an affidavit of of the due service thereof affirmed on the day of 19 , both filed on the day of 19 , and the Arbitration Agreement dated the day of 19 , entered into by and between the plaintiff and the defendant. And upon hearing counsel for the plaintiff and counsel for thn defendant it is ordered that the said agreement be filed. And it is further ordered that following matters in difference namely,

arising in this Suit.

---

specified in the said Agreement

(State matters in difference).

be referred for determination to X and Y, or in case of difference of opinion between them to the determination of Z, who is hereby appointed to be umpire. And it is further ordered that the said arbitrators shall make and submit their award in writing together with all proceedings had, deposition recorded and exhibits filed before them on or before the day of 19 , and in case of difference of opinions between the said arbitrators as to the award they shall forthwith give notice of such difference to the said umpire who shall make and submit his award in writing together with all proceedings had, depositions recorded and exhibits filed before him within the day of 19 . And the parties are to be at liberty to apply from time to time as they may have occasion.

Witness, etc.

Registrar

Master

Form No. 8.

Order for appointment of new Arbitrator or Umpire under section 8 (2) and 13 of the Arbitration Act, 1940.

(Same title as in Form No. 7.)

Upon reading on the part of (name of petitioner) a notice dated the day of 19 , from his attorney or from the said

petitioner to respondent abovenamed and
his attorney and an affidavit of of the due service thereof affirmed on the
day of 19 , and an affidavit of affirmed
on the day of 19 , all filed on the day of
19 . And upon hearing counsel for the petitioner and counsel for
the respondent : And whereas by an Arbitration Agreement dated the day of 19
Order dated the day of 19
(State terms of the agreement or order reference relating to the matter and faliure to appoint or death, refusal, etc., of arbitrator or umpire). It is ordered that Z be appointed in place of X deceased (or as the case may be) to act as arbitrator with Y, the surviving arbitrators under the said Agreement / Order or Z be appointed to act as Umpire. And it is further ordered that the award of the Arbitrators / Umpire be made and submitted in writing on or before the day of 19 .

Witness, etc.

Registrar

Master

Form No. 9.

Arbitration Agreement to submit present differences to single Arbitrator.

In the Matter of the Arbitration Act, 1940.

Whereas differences have arisen and are still subsisting between A. B. of and C. D. of concerning (state matters of difference.)

Now, we, the said parties A. B. and C. D., do hereby refer the said matters in difference to the award of X. Y.

(Signed) A, B.
C. D.

Form No. 10.

Appointment of single arbitrator under agreement to refer future differences to arbitration.

In the Matter of the Arbitration Act. 1940.

Whereas by an agreement in writing, dated the day of 19 , and made between A. B. of and C. D. of it was provided that differences arising between the parties thereto should be referred to an arbitrator as therein mentioned ;

And whereas differences within the meaning of the said provision have arisen and are still subisting between the said parties concerning.

(State matters of difference.)

Now, we, the said A. B. and C. D., do hereby agree to refer the said matters in difference to the award of X. Y.

Dated the day of 19 .

(Signed) A. B.
C. D.

Form No. 11.

Award.

(*Title as in Form No, 4.*)

Whereas in pursuance of an agreement in writing, dateed / order of reference made herein on and made the day of 19 between the abovenamed A. B. and C. D., the said A. B. and C. D., have referred to me namely X. Y. the matters in difference between them concerning.

(State matters in difference.)

have been referred to me for determination.

Now, I, the said X. Y., having duly considered the matters submitted to me, do hereby make my award as follows :—

I award

(1) that

(2) that

Dated the day of 19 . (Signed) X. Y.
Arbitrator.

BOMBAY HIGH COURT—APPELLATE SIDE RULES

The Bom. Govt. Gazette, March 27, 1941, Part IV, c, pp. 388-93.

No. 1171 :—In exercise of of the powers conferred by section 44 of the Arbitration Act, 1940 (X of 1940), the Honourable Chief Justice and Judges are pleased to make the following rules :—

Title of application.

1. (*a*) Save as hereinafter provided, all applications, affidavits and proceedings, under the Act, shall be instituted in the matter of the Act, and in the matter of the Arbitration.

(*b*) Application under Chapter IV of the Act shall be instituted in the suit or matter in which order of reference is made.

(*c*) Applications under section 34 of the Act shall be instituted in the suit which the applicant seek to have stayed.

(*d*) Applications under section 7 (2) of the Act shall be instituted in the matter of the insolvency in which the reference to arbitration is sought or claimed.

(*e*) Applications under section 14 of the Act shall be numbered and registered as regular suits. Other applications under the Act shall be numbered and registered as Miscellaneous Applications requiring judicial enquiry.

Mode of application

2. All applications under the Act shall be made only to the proper Court and all applications shall be made by petition and shall be presented in the same manner as plaints or other applications to the Clerk of the Court or to such other officer as the Court appoints in that behalf who shall cause them to be registered and take such orders as are necessary from the presiding Judge.

Contents of petition

3. Every petition shall be divided into paragraphs numbered consecutively and shall contain a statement of facts relied on and the nature of the relief asked for, and shall clearly specify the persons liable to be affected thereby. A copy of the Arbitration agreement, the Special case or the Award relating to the petition, if any, whenever necessary shall be annexed thereto.

Filing of Award.

4. (*a*) Arbitrator or Umpire or any of the parties to the arbitration may cause the Award or a signed copy thereof to be filed in Court in the manner prescribed in rule No. 2.

(*b*) When the Award is filed by the Arbitrator or Umpire he shall, together with the Award, send to the Court, any depositions and documents which have been taken and proved before him, and the opinion pronounced by the Court on the special case submitted by him, if any, in accordance with section 14 of the Act, by forwarding the same under a sealed cover addressed to the Court. He shall also send together with the Award a copy of the notice given to the parties concerned and affidavit of service of such notice and of attestation of his signature on the Award.

(*c*) When the award is filed by any of the parties to the Arbitration under clause (*a*) the party may move the Court to direct the Arbitrator to produce in original such of the documents as were produced before him together with the Record of the Arbitration.

Notice of filing award.

5. When the Award has been filed in Court, the Court shall forthwith issue notice of such filing to the parties interested in the award.

Notice of application to persons affected by Award.

6. Upon any application by petition under the Act, the Judge shall direct notice thereof to be given to all persons mentioned in the petition and to such other persons as may seem to him to be likely to be affected by the proceedings, requiring all or any of such persons to show cause, within the time specified in the notice, why the relief sought in the petition could not be granted.

Limitation for application for judgment on Award.

7. An application for judgment in terms of an award shall not be made until after the expiration of thirty days from the date of service of the notice of filing the award.

Court to issue Notice on application under section 20.

8. When an application under section 20 of the Act is filed and registered, the Court shall on the applications issue a notice, returnable within not less than ten days from the service thereof, calling upon the opoosite party to show cause why the Arbitration Agreement should not be filed.

Process to be issued on application by Arbitrator or Umpire.

9. Process to the parties to arbitration proceedings or to witness shall be issued by the Court on the written application of the Arbitrator or the Umpire.

Accompaniment of the above application.

If the proceedings are under Chapter II of the Act, the application for such processes must be accompanied by a copy of the agreement under which the arbitrator or the Umpire is acting. If otherwise, the date of the order appointing him Arbitrator or Umpire shall be mentioned in the application.

Application of Code of Civil Procedure and the Civil Circulars.

11. In the cases not provided for in the foregoing rules or in the Act, the provisions of the Code of Civil Procedure, 1908, and the High Court Civil circulars, *mutatis mutandis*, shall apply to all proceedings before the Court and to all appeals under the Act.

12. The Court fees and process fees chargeable for all petitions shall be in accordance with the Court Fees Act and the rules for the levy of the process fees in force for the time being.

13. The appended form, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

No. 1.

APPLICATION FOR AN ORDER OF REFERENCE.
(*Title of Suit*)

I. This suit is instituted for (state nature of claim.)
2. The matter in difference between the parties is (state matter of difference.)
3. The applicants being all the parties interested have agreed that the matter in difference between them shall have referred to arbitration.
4. The applicants therefore apply for an order of reference.

(Signed A. B.
C. D.

Dated the day of 19 .

Notes :—It the parties are agreed as to the arbitration it should be so stated.

No. 2.

ORDER OF REFERENCE
(*Title of suit*)

Upon reading the application presented on the day of 19 , it is ordered that the following matter in difference arising in this suit, namely : be referred for determination to X and Y, or in case of their not agreeing them to the determination of Z, who is hereby appointed to be Umpire ; and such arbitrators are to make their award in writing on or before the day of 19 , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply

Given under my hand and seal of the Court, this day of 19 .

Judge.

No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.
(*Title of suit*)

Whereas by an order, dated the day of I9 , (state order of reference and death, refusal, etc., of arbitrator), it is by consent ordered than Z. be appointed in the place of X deceased (or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order ; and it is ordered that the award or the said arbitrators be made on or before the day of 19 .

Given under my hand and seal of the Court, this day of 19 .

Judge.

No. 4.

SPECIAL CASE.

(*Title of Suit*)

In the Matter of an arbitration between A. B. of and C. D. of the following special case is stated for the opinion of the Court —

(Here state the facts concisely in numbered paragraphs.)

The question of law for the opinions of the Court are :—

First, whether X.

Secondly whether. Y.

Dated the day of 19 .

No. 5.

(AWARD.

(*Title of Suit*)

In the Matter of an arbitration between A. B. of and C. D. of

Whereas in pursuance of an order of reference made by the Court of and dated the day of 19 . the following matter in difference between A. B. and C. D., namely :—has been referred to us for determination.

Now, we, having duly considered the matter referred to us, do hereby make our award as follows ;

We award

(1) that

(2) that X.

Y.

Dated the day of 19 .

III BOMBAY HIGH COURT

Original Side Rules

In exercise of the powers conferred by section 44 of the Arbitration Act, 1940 (X of 1940), the Honourable the Chief Justice and Judges are pleased to direct that the following heading and rules be substituted for the heading and rules 312 to 386 in Chapter XXIII at pages 89 to 91 of the Rules and Forms of the Bombay High Court, Original Side, 1936 :—

The Arbitration Act, 1940

372 (*a*) *Title of application*—Save as hereinafter provided, all applications, affidavits and proceedings, under the Act, shall be instituted in the matter of the Act, and in the matter of the Arbitration.

(*b*) Applications under Chapter IV of the Act shall be instituted in the suit or matter in which order of reference is made.

(*c*) Applications made under section 34 of the Act shall be instituted in the suit which the applicant seeks to have stayed.

373 *Mode of application*— (*a*) All applications under the Act shall be made by petition and, when they are not under sections 17, 20 and 34 of the Act, shall be presented to the sitting Judge in Chambers,

(*b*) Applications under section 17, 20 and 34 shall be made by motion in open Court in the arbitration, suit, or matter, as the case may be.

374. *Contents of petition.*—Every petition shall be divided into paragraphs numbered consecutively and shall contain a statement of facts relied on, and the nature of the relief asked for and shall clearly specify the persons liable to be affected thereby. A copy of the arbitration agreement. the special case or the award relating to the petition, if any. whenever necessary shall be annexed thereto.

375. *Filing of Award.*—The Arbitrator or Umpire shall cause the award of a signed copy thereof to be filed in Court, together with any depositions and documents which may have been taken and proved before him and the opinion pronounced by the Court on a special case submitted by him, if any, in accordance with section 14 of the Act, by forwarding the same under a sealed cover addressed to the prothonotary and Senior Master with a letter requesting that the same be filed. He shall also send together with the Award a copy of the notice given to the parties concerned and affidavit of service of such notice and of attestation of his signature on the award.

376. *Notice of filing Award.*—When the award has been filed in court the Prothonotary and Senior Master shall forthwith issue notice of such filing to the parties interested in the award.

377. *Notice of applicatian to persons affected by award.*—Upon any applications by petition under the Act, the Judge shall direct notice thercof to be given to all persons mentioned in the petition, and to such other person as may seem to him to be likely to be affected by the proceedings, requiring all or any of such persons to show cause, within the time specified in the notice, why the relief sought in the petition should not be granted.

378. *Limitation for application for judgment on award.*—An application for judgment in terms of an award shall not be made until after expiration of 30 days from the date of service of the notice of filing of the award.

379. *Mode of applying for such judgment.*—An application for judgment in terms of an award shall be made by motion in open Court, and shall be accompanied by a certificate from the Prothonotary and Senior Master that no application has been made to remit the award or any of the matters referred to arbitration for reconsideration, or to set aside the award, or, if made, that it has been allowed.

380. *Draft decree to be lodged with the Prothonotary.*—When an application for judgment in terms of an award is made, the applicant shall at least four days before the hearing of the application lodge with the Prothonotary and Senior Master, for submission to the Court, the draft decree which the applicant considers is warranted by the award and shall, at the same time, servo a copy thereof on all parties interested in the award. The Court may adopt, correct or modify such draft and the decree shall be drawn up accordingly.

381. *Prothonotary to issue notice on application under section 20,*—When an application under section 20 of the Act is filed and registered the Prothonotary and Senior Master shall, on application, issue a notice returnable with not less than 10 days from the service thereof calling upon the opposite party, to show cause why the arbitration agreement shall not be filed.

382. *Processess to be issued on application by Arbitrator or Umpire.*—Processes to the parties to arbitration proceedings or to witness shall be issued by the Prothonotary and Senior Master on the written application of the arbitrator or the umpire.

383. *Accompaniment of the above application.*—If the proceedings are under Chapter II of the Act, the application for such process must be accompanied by a copy ef the agreement under which the arbitrator or umpire is acting. If otherwise the date of the order appointing him arbitrator or umpire shall be mentioned in the applicaton.

384. *Application of Code of Civil Procedure and the Rules and Forms.*—In cases not provided for in the foregoing rules or in the Act. the provisions of the Code of Civil Procedure, 1908, and the rules and forms of the Court, *mutatis mutandis,* shall apply to all proceedings before this Court and to all appeals ,under the Act.

385, *Table of Fees applicable.*—The fees shall be according to the Table of Fees for the Original Side of the Court, so far as they are applicable, the petition under section 20 of the Act for the purpose being deemed a plaint.

Rules framed by the Bombay High Court under the Arbitration (Protocol and Convention) Act, 1937.

386 A. *Title of application, etc.*—All applications, affidavits and proceedings under the Act shall be instituted in the matter of the Act, and in the matter of the arbitration.

386 B. *Mode of application.*—Applications under sections 3 and 5 of the Act shall be made by petition which shall be presented to the Honourable the sitting Judge in Chambers.

386 C. *Contents of petition.*—Every petition shall be divided into paragraphs, numbered consecutively, contain, in a summary form a statement of the material facts relied on, and the nature of the relief asked for, and shall specify the persons liable to be affected thereby.:

386. D. *Stay of proceedings under section 3 of the Act.*—Under an application for stay of proceedings under section 3 of the Act being filed, the Court shall direct notice to be given to the party or parties to the legal proceedings, other than the applicant, requiring him or them to show cause, within a time specified, why the order should not be made, unless the Court is satisfied that the object of the application would be defeated by the delay occasioned by the notice.

386 E. *Documents to be produced with petition.*—The party seeking to enforce a foreign award shall produce with his petition :—

(*a*) the document specified in section 8 (1) of the Act and, where such document is in a foreign language, the translation thereof in English certified in the manner prescribed in sub-section (2) of the said section 8 ;

(*b*) the original agreement for arbitration or an authenticated copy thereof and, when the same is in a foreign language, the translation thereof into English certified in the manner prescribed in sub-section (2) of the said section 8 ;

(*c*) an affidavit or affidavits showing (1) that the said agreement was valid under the law by which it was governed, (2) that the award was made by the tribunal provided for in the agreement or constituted in the manner agreed upon by the parties, (3) that it was made in conformity with the law governing the arbitration procedure and (4) that it has become final in the country in which it was made ; and

(*d*) other document or documents in support of his application.

386 F. *Procedure to be followed in case of non-production of document with petition.*—It the application under section 5 of the Act be presented without the document specified in rule 386E (*a*) above, it shall forthwith be returned to the party presenting it. If such application is unaccompanied by the documents specified in rule 386E (*b*) and (*c*) above. the Chamber Judge may allow time within which such documents must be filed.

386 G. *Execution of decrees and orders.*—The provisions of the Code of Civil Procedure and the Rules and Forms of this Court relating to execution of decrees and orders, *mutatis mutandis*, be applicable to the execution of decrees and orders under the Act.

386 H. *Fees payable on proceedings.*—The fees in respect of proceedings under the Act shall be according to the Table of Fees for the Original Side of the Court so far as the same are applicable,

MADRAS HIGH COURT RULES FRAMED UNDER ARBITRATION ACT OF 1940.

P. Dis. No. 208—45

Amendments to Civil Rules of Practice and Circular Orders.

In exercise of the powers conferred by section 4 of the Arbitration Act, 1940, the High Court has made the following amendments to the Civil Rules of Practice and Circular Orders, Volumes I and II. 1940 Edition :

In Part II of the Civil Rules of Practice and Circular Orders, Volume I, after Chapter XIII, add the following :—

CHPTER XIV.

Rules under the Arbitration Act, 1940.

1. All applications and proceedings under the Act shall be headed in the matter of the Act and of the arbitration and save as otherwise provided shall be made by petition.

2. Every petition shall be in writting, signed and verified in the same manner as a pleading under the Code of Civil Procedure, specifying the name, description and place of residence of the petitioner and the respondent and shall contain a statement of the material facts and the nature of the relief prayed for and shall specify the persons liable to be affected thereby.

3. Every special cases stated under section 13 (*b*) of the Act shall contain only a statement in summary form of the material facts and points for the opinion of the Court. When the Court has pronounced its opinion under section 14 (3) it shall be the duty of the arbitrators to have a certified copy of such opinion added to and made part of the award.

4. On receipt of such special case the Court shall issue notice to the parties,

5. Applications under section 14 of the Act shall be numbered and registered as suits.

6. When the award or a signed copy of it is filed in Court under section 14 (2) of the Act the arbitrator shall send to the Court any depositions or documents which have been taken and proved before him. He shall also file with the petition a copy of the notice given to the parties concerned and an affidavit of service of such notice.

7. When the award has been filed in Court the Court shall forthwith issue notice of such filing to the parties interested in the award,

8. Judgment in terms of the award shall not be made until after the expiry of thirty days from the date of service of the notice of filing the award.

9. An application under section 20 (1) of the Act shall be numbered and registered as a suit and shall be accompanied by the arbitration agreement in original or a copy thereof.

10. The Court shall issue the same process to the parties and witnesses whom the arbitrator desires to examine as the Court may issue in suits tried before it.

11. In the cases not provided for in the forgoing rules or in the Act the provisions of the Code of Civil Proceduue, Civil Rules of Practice and Circular Orders, Volaumes I and 1I, and the Circular Orders issued by the High Court from time to time *mutatis mutandis* shall apply to all proceedings before the Court and to all appeals under the Act,

12, The forms prescribed with such variation as the circumstances of each case may require shall be used for the respective purposes therein mentioned.

Add the following after Appendix III-M in Part II of the Civil Rules of Practice and Circular orders, Volume II :—

APPENDIX III-N

Forms under the Arbitration Act, 1940,

Form No. 1

APPLICATION FOR AN ORDER OF REFERENCE.

(*Time of Suit*)

1. This suit is instituted for (state nature of claim).

2. The matter in difference between the parties is (state matter of difference).

3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.

4. The applicants therefore apply for an order of reference.

Dated the day of 19 , A B
C D

Note:—If the parties are agreed to the arbitrators, it should be so stated

Form No. 2.

ORDER OF REFEEENCE.

(*Title of Suit*)

Upon reading the application presented on the day of 19 , it is ordered that the following matter in difference arising in this suit, namely :—

.....

.....

.....

be referred for determination to X and Y, or in case of their not agreeing them to the determination of Z, who is hereby appointed to be the umpire ; and such arbitrators are to make their award in writing on or before the day of 19 , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within.....months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

Given under my hand and the seal of the Court this day of 12 .

Judge.

Form No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(*Title of Suit*)

Whereas by an order. dated the day of I9 , (state order of reference and death, refusal, etc., of arbiirator) it is by consent ordered that Z' be appointed in the place of X (deceased or as the case may be), to act as arbitrator, with Y, the surviving arbitrator another the said order ; and it is ordered that the award of the said arbitrators be made on or before the day of 19 .

Given under my hand and the seal of the Court this day of 19 .

Judge.

Form No. 4.

SPECIAL CASE

(*Title of Suit*)

In the matter of an arbitration between A. B. of and C. D. of the following special case is stated for the opinion of the Court ;—

(Here state the facts concisely in numbered paragraphs).

The questions of law for the opinion of the Court are—

First whether.....

.....

Secondly whether.....

.....

X.
Y.

Dated the day of 19 .

Form No. 5.

AWARD

(*Title of Award*)

In the matter of an arbitration between A. B. of C. D, of

Whereas in pursuance of an order reference made by the Court of ... ... and dated the day of ... ... ' I9 , the following matter in difference between A. B. and C. D., namely.....

.....

has been referred to us for determination ;

Now. We, having duly considered the matter referred to us, do hereby make award as follows :—

We award

(1) that.....

(2) that.....

Dated the day of 19

X.
Y

THE SIND CHIEF COURT RULES
ON THE ORIGINAL SIDE
CHAPTER XIX
ARBITRATION

Proceedings under Chapters III and IV of the Arbitration Act, 1940.

278, *Proceedings under Chapter III and IV and how entitled.*—(1) Every application under section 20 (1) of the Arbitration Act, 1940 (hereinafter in this rule and rules 279 to 292 called the Act) shall be verified. numbered and registered as a suit. All subsequent applications shall be entitled in such suit.

(2) All applications under Chapter IV of the Act shall be entitled in the suit in which they are filed.

SPECIAL CASE

279. *Form.*—A special case shall be submitted in form No. 12 in Appendix A. It will set out clearly distinctly the questions of law on which the opinion of the Court is required and shall state concisely. in paragraphs numbered consequently, such facts and refer shortly to such documents as may be necessary to oable the Court to decide the said questions and shall be signed by the arbitrators or umpire.

280. O.S.— (1) *Special case to be forwarded to Registrar.*—A special case shall be forwarded to the Registrar (O.S.) accompanied by the documents or copies of the documents therein referred to. The Registrar (O.S.) shall fix a day for the appearance of the parties before him and issue a notice accordingly to the parties.

(2) *Hearing in Court*—The Registrar (O.S.) on being satisfied as to the service of the notice on the parties shall, as soon as the special case is ripe for hearing, fix it for hearing on the next or some other miscellaneous business day.

AWARD

281. (1) *Form of Awards.*—An award shall so far as possible be in the form No. 12A Appendix A.

(2) *Award in form of special case.*—Where the arbitrator or umpire state an award wholly or in part, in the form of a special case, they shall follow the provisions of the rule 279, and shall also. so far as it is practicable, state the award on various points of law in the alternative. Where it is not practicabie to do so, thay shall state the award accordingly to the view they take of the law.

282 (1) *Award how filed in Court.*—The arbitrators or umpire shall cause the award or a signed copy of it to be filed in Court by forwarding the same under a sealed cover addressed to the Registrar (O.S.) with a petition in Form No. 12B in Appendix A requesting the same to be filed. The arbitrators or umpire shall state in the petition the name of the party or of any person claiming under him at whose request the award or copy of it is being filed and the amount of fees and charges received, if any. The arbitrators and umpire shall also send together with the award or copy the arbitration agreement and the reference, if in their possession, the depositions and documents which may have been taken and proved, the opinion pronounced by the Court on a special case, submitted by them, if any, and also a copy of the notice given to the parties together with receipts or acknowledgments thereof.

(2) If the Court makes an order under section 38 of the Act directing the award to be delivered, it shall further direct that the arbitrator or umpire shall also deliver the documents mentioned in sub-rule (1), if in their possession, to the applicant who shall cause the award to be filed in Court by forwarding the same together with the aforesaid documents under a sealed cover to the Registrar (O.S.) with a petition in Form No. 12 in Appendix A.

(3) When an award made without intervention of a Court has been so filed, the accompanying petition shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested under the reference as plaintiff or plaintiff and the remainder as defendant or defendants.

An award made and a special case stated in an arbitration under Chapter III and IV of the Act shall be entitled in such suit.

283. *Service of notice of filing of award in Court.*—(1) The Registrar (O.S.) shall issue notice to the parties other than the party referred to in rule 282 (2) of the filing of an award in form 12 (c) in Appendix A. If a special case is stated in the form of an award, the provision of rule 280 shall be followed, so far as may be, for hearing the special case.

(2) The arbitrators or umpire or the party referred to in rule 282 (2) shall deposit Rs. 5 in the first instance in Court to meet the cost of such notice.

284, *Form of application to modify, correct or set aside, award.*—An application to modify, correct or set aside an award, or to remit an award to the arbitrators or umpire for reconsideration shall be made by a verified petition which shall set out the grounds on which the application is made such petition shall be entitled in the suit in which it is filed. A notice of such petition shall be served on the opposite party.

INTERIM ORDERS.

285. *Applications for interim orders to be by interlocutory application.*—(1) All applications under section 18 of the Act shall be by interlocutory applications which shall. so far as may be and subject to the provisions of section 18 of the Act, be regulated by Rules 73 and 74.

(2) The affidavit filed with such application must among other things show that the provisions of rule 282 have been duly complied with, that the arbitration agreement the reference and award passed thereon are *prima facie* free from objection and that delay in granting the application pending the service of notice under rule 283 or pending expiry of the period allowed for making an application under section 15, 16 or 30 of the Act, as the case may be, is likely to prejudice him.

286. *Service of notice of interim order on opposite party.*—(1) A copy of an interim order passed under section 18 (1) of the Act together with a copy of the application made and affidavit filed in support of it shall be served in the person against whom such interim order has been passed.

(2) If the party to whom notice has been issued wishes to show cause, the provisions of rule 75 shall, so far as may be, be followed.

APPLICATIONS

287. *Form of other applications under the Act and their registration.*—(1) Save as aforesaid, all applications under the Act shall be made by petition entitled in the matter of the Act and the arbitration.

(2) There shall be annexed to every such petition the documente, if any, relating to the subject-matter of such application.

(3) Every such petition shall be supported by affidavit and, unless otherwise ordered by the Court, the provisions of rules 74 to 76 shall so far as may be. apply.

The person making an application shall be the petitioner and the person served therewith, the respondent.

(4) Every petition or copy thereof shall specify the persons affected thereby and upon whom notice must be served as hereinafter provided.

(5) Every such petition and every special case in an arbitration without intervention of a Court (not being a special case stated in the form of an award) shall be numbered and registered as a miscellaneous application : Provided that if more than one applications are made in the same arbitration for extension of time under section 28 of the Act, subsequent applications shall bear the number and title of the first such application.

(6) This rule shall not apply to an application under section 34 of the Act.

288. *Notice to persons concerned*,—Notice shall be served upon all persons specified in the application under rule 287 (4), upon the arbitrator, arbitrators or umpire against whom an application under section 11 of the Act is made and upon such other persons as may appear to the Court or Registrar (O.S.) to be affected by or concerned with the application.

STAY OF PROCEEDINGS.

289. *Title af applications, etc., under section 34.*—(1) Applications. affidavits and proceedings under section 34 of the Act shall be entitled in the suit or the proceeding which the applicant seeks to have stayed.

(2) *Notice to issue before ordering stay of proceedings.*—No proceeding shall be stayed under section 34 of the Act without notice to the opposite party, except where it appears that the object of granting a stay would be defeated by the delay occasioned by the notice when an interim stay may be granted.

FEES.

290. *Advocate's fees.*—Advocates fees shall be calculated at the rates laid down in clause 2 of Chapter VIII in Appendix C except, if the Court so thinks fit, in the case of an application to set aside an award when the fees shall be calculated at half the rates laid down in clause 1 of the said chapter.

GENERAL

290A. *Notice of appointment of arbitrator.*—A notice of appointment of the arbitrators or umpire, as the case may be, under section 8 (2), 12, 20 or 23 of the Act shall be in Form No. 12D in Appendix A. Such Notice shall be served at the cost of the party making the application.

291. *Mode of service of notices.*—(1) Unless otherwise ordered, all notices under this chapter.

(*a*) shall be served in the manner prescribed by or under the code for the service of summons, or

(*b*) if the Registrar so directs, may be addressed,, whether they reside within the jurisdiction of the Court or not, to the parties, arbitrators or umpire, as the case may be, at the place where they reside and sent to them by registered post prepaid for acknowledgement, provided that at such place there is regular postal service.

(2) When notices are served on the arbitrators or umpire under clause (*a*) of sub-rule (1) they shall be served on them personally.

292. *Award include interim award.*—The foregoing provisions relating to an award shall apply, so far as may be, to an interim award. Provided that in the case of arbitration without intervention of a Court an award or or awards subsequent to the first interim award shall bear the same title and number as the first interim award.

THE ARBITRATION (PROTOCOL AND CONVENTION) ACT 1937.

293. *Title of applications, etc.*—Applications. affidavits and proceedings under the Arbitration (Protocol and Convention) Act, 1937 (hereinafter in this chapter called "the said Act',) shall be entitled in the matter of the said Act, and in the matter of the arbitration : Provided that applications, affidavits and proceedings under section 3 of the said Act shall be entitled in the suit or matter which applicant seeks to have stayed.

294. *Applications under sections 3 to 5 to be disposed of as miscellaneous matters.*—Applications under sections 3 and 5 of the said Act shall be made by petition and shall be disposed of as miscellaneous matters.

295. *Contents of petition.*—Every petition shall be divided into paragraphs, numbered consecutively and shall contain in a summary form a statement of the material facts relied and the nature of the relief asked for, and shall specify the persons liable to be affected thereby.

296. *Stay of proceedings under section 3 of the said Act.*—(1) Upon an application for stay of proceedings under section 3 of the said Act being filed, the Court shall direct notice

to be given to the party or parties to the proceeding, other than the applicant, requiring him or them to show cause, within the time specified, why the order should not be made unless the Court is satisfied that the object of the application would be defeated by the delay occasioned by the notice.

(2) Any order for stay made under rule (1) may be varied or set aside by the Court on application made thereto by any party dissatisfied with such order.

297. (1) *Documents to be produced within petition.*—The party seeking to enforce a foreign award shall produce with his petition—

(*i*) the document specified in section 8 (1) of the said Act, and where such document is in a foreign language, a translation thereof into English certified in the manner prescribed in sub-section (2) of the said section 8 ;

(*ii*) the original agreement for arbitration or a copy thereof authenticated in manner required by the law of the country in which it was made and, when the same is in a foreign language, a translation thereof into English certified in manner prescribed in sub-section (2) of the said section 8 ;

(*iii*) an affidavit or affidavits showing (*a*) that the said agreement was valid under the law by which it was governed, (*b*) that the award was made by the tribunal provided for in the agreement or constituted in the manner agreed upon by the parties, (*c*) that it was made in conformity with the law governing the arbitration procedure and (*d*) that it has become final in the country in which it was made ; and

(*iv*) other document or documents in support or his application.

(2) *Procedure to be followed in case of non-pooduction of document with petition.*—If the application under section 5 of the said Act be presented without the document specified in clause (*i*) of sub-rule (1), it shall forthwith be returned to the party presenting it. If such application is unaccompanied by the documents specified in clauses (*ii*) and (*iii*) of sub-rule (1), the Court may allow time within which such document must be filed.

298. *Presumption as regards certain copies.*—(1) The Court shall presume that a copy of an agreement for arbitration or of an award required to be produced under sub-rule (1) of rule 297 is duly authenticated in manner required by the law of the country in which it was made if it is certified on the fact of such copy by a diplomatic or consular agent of the British Government or of the Government of India in the country in which it was made that the authentication is in the manner commonly used in that country for the authentication of copies of such documents.

(2) The Court shall presume that any document purporting to be a copy of the arbitration proceedings relating to the awards is genuine and accurate if it is certified on the face of such document by a diplomatic or consular agent of the British Government or of Government of India in the country in which the arbitration proceedings took place that the document is authenticated in manner commonly in use in that country for the authentication of copies of such documents.

299, *Execution of decree and order.*—The provisions of the Code and the Rules and Forms of this Court relating to execution of decrees and orders shall, *mutatis mutandis*, be applicable to the execution of decrees and orders under the said Act.

300. *Advocates' fees.*—The advocates' fees shall be calculated at the rate laid down in clause 2 of Chapter VIII in Appendix C except, if the Court so thinks fit, in the case of an application to set aside an award when the fees shall be calculated at half the rates laid down in clause 1 of the said chapter.

Form No. 12,

SPECIAL CASE.

(Rule 279)

IN THE CHIEF COURT OF SIND,

Original Civil Jurisdiction.

[1. In an arbitration without intervention of the Court.]

Miscellaneous Application No. of 19 .

In the matter of the Arbitration Act, 1940, and an arbitration between A. B. of and C. D. of

Suit No. of 19 .

A. B..... Plaintiff.

Versus

C. D..... Defendant.

In the matter of arbitration between the following special case is pursuant to the provisions of section 13 (b) of the Arbitration Act, 1940,stated for the opinion of the Chief Court of Sind :—

(Here state the facts concisely in numbered paragraphs).

The question of law for the opinion of the said Court are ;—

First, whether.....

Secondly, whether.....

Dated, the 19 . (Signed) X, Y.
Arbitrator.

Form No. 12A.

AWARD.

(Rule 281).

IN THE CHIEF COURT OF SIND.

Original Civil Jurisdiction.

In the matter of arbitration between

Whereas in pursuance of on arbitration agreement dated the day of 19 . between the parties above-named, the said parties have a by reference dated referred to us/me, X- Y., the matters in difference between them concerning.....

(or as ths case may be)

Now we/I the said X. Y., having duly considered the matters submitted to us/me, do hereby make our/my award as follows :—

We/1 award—

(1) that.....

(2) that.....

Dated, the 19 . (Signed) X. Y.
Arbitrators/Umpire.

Form No. 12B.

PETITION ACCOMPANYING AWARD.

(Rule 282)

I.

(*Cause title as in Form No. 12.*)

Pursuant to the provisions of section 14 (2) of the Arbitration Act, 1940, and rule 282 (1) of the Sind Court Rules. and at the request of A. B. we the said X. Y., who were appointed $\frac{\text{arbitrators}}{\text{umpire}}$ beg to forward herewith the accompanying award togother with the documents mentioned below and request that the award be filed in Court.

2. A. B. (or C, D., as the case may be) has made payment to us under :—

Arbitration fees Rs.....

Arbitration charges—Rs.....

Cost and charges for filing award—Rs.....

3. The Nazir's receipt regarding deposit of Rs. 5/- in Court in pursuance of the provisions of rule 283 (2) of the said rules is herewith submitted.

Dated, the 19 . *Sd. Petitioners.*

Documents accompanying the petition ;—

(1) The arbitration agreement dated.....

(2) The reference dated.....

(3) The depositions of.....

(4) The documents proved.....

(5) The opinion pronounced by the Court on a special case submitted, if any,

(6) Copy of notice given to the parties under section 14 (1) of the said Act together with receipts or acknowledgments thereof.

II

(*Title is above*)

Pursuant to the provisions of the rule 282 (2) of the said Chief Court Rules, the petitioner above-named begs to forward herewith the accompanying award together with the documents mentioned below which have been delivered to him in pursuance of an order of this Court dated the day of 19 . in miscellaneous Application No. of 19 , and requests that the award be filed in Court.

2. The Nazir's receipt regarding deposit of Rs. 5 in Court in pursuance of the provisions of rule 283 (2) of the said rules is herewith submitted.

(*Sd.*) *Petitioner*

Dated the 19 .

Documents accomyanying the award [same as in No 1.]

Form No. 12C.

NOTICE OF FILING OF AWARD.

(Rule 283).

(*Cause title as in form No. 12*).

To

Take notice that the award of the arbitrators / umpire appointed in the above matter was filed in the Court on the day of 19 , and that this Court will proceed to pass judgment, according to the award unless an application is duly made under sections 15, 16 or 30, as the case may be, of the Arbitration Act, 1940.

(*Sd.*) *Sheristadar*

To

Form No. 12D.

NOTICE OF APPOINTMENT OF ARBITRATOR.

(Rule 290A).

I

(*Cause title as in Form No 12*).

Appointment under section 8 (2).

Take notice that on an application made in the above matter under sub-section (2) of section 8 of the Atbitration Act, 1940, the Court has appointed you an arbitrator / arbitrators / umpire

You are, therefore, required to make an award in accordance with the provisions of the said Act.

(Sd.) *Sheristadar.*

To

III

(*Cause title as in Form No. 12.*)

Appointment under section 20.

Take notice that on an application made in the above suit under section 20 of the Arbitration Act, 1940, the Court has ordered the arbitration agreement between the above parties to be filed and has further made an order of reference to you as arbitrator / arbitrators appointed by the Court / parties.

A copy of the arbitration agreement is forwarded herewith.

You are, therefore. required to make an award in accordance with the provisions of the said Act.

(Sd.) *Sheristodar.*

To

IV

(*Cause title as in Form No. 12.*)

(*Appointment under section 22 and 23*).

Take notice that on an application made in the above suit under section 21 of the Arbitration Act, 1940, the Court has made an order of reference to you as an arbitrator / arbitrators appointed by the above parties (or, as the case may be, the Court has appointed you as an arbitrator) to determine the following matters in difference between the above parties.

(Set out the difference here)

You are, therefore, required to make an award in accordance with the provisions of the said Act, by the day of 19 .

Dated the day of 19 .

(Seal of the Court).

(Sd.) *Sheristadar.*

To

Sealer.
Advocate for Plaintiff.
Advocate for Defendant.

Instructions.

In case of your requiring the attendance of any person whom you may desire to examine you may apply to the Court for process ; and persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence on oath or solemn affirmation administered under section 13 of the said Act or being guilty of contempt to you during the investigation of the reference will, on your representation, be dealt with according to law (section 43).

You may for good and sufficient cause apply to the Court to enlarge the time for making the award (section 28).

Unless a different intention appears in the arbitration agreement, you may, if you think fit, make an interim award (section 27),

When you have made the award, you shall submit the same to Court, under your signatures, together with the arbitration agreement and the reference, if in your possession, the depositions and exhibits and the opinion pronounced by the Court on a special case submitted by you, if any, and a copy of the notice given to the parties together with receipts or acknowledgment thereof (section 14 and rule 282 of the Sind Chief Court rules).

Unless a different intention is expressed in the arbitration agreement, it shall be lawful for you, if you think fit, to state a special case for the opinion of the Court or any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court (section 13).

CHAPTER XXXI

ARBITRATION RULES.

1. *Preliminary.*—The rules contained in this Chapter are made under section 44 of the Arbitration Act, 1940, hereinafter referred to as the Act.

2. *Presentation of application under the Arbitration Act, 1940.*—All applications under the Act shall be made by petition and shall be presented to the Court in the same manner as a plaint or other application. The petition shall be verified is the same manner as a plaint and shall, if necessary. be supported by an affidavit.

3. *Form of petition.*—The petition shall be divided into paragraphs, numbered consecutively, and shall contain the name, description and place of residence of the petitioner as well as the opposite party and a statement in summary form—

(*a*) of all material facts ;

(*b*) of facts showing that the Court to which the application is presented has jurisdiction : and

(*c*) of the nature of the relief asked for ;

and shall specify the names, descriptions and places of residence of other persons likely to be affected by it.

4. *Statement of special case under section 13 (b) of the Act.*—(1) In a reference under section 13 (*b*) of the Act, the question of law on which the opinion of the Court is sought and the facts out of which it arises shall be distinctly stated. A copy of the arbitration agreement, if any, shall be annexed to such reference. The arbitrators or umpire making the reference shall give notice of the action taken by them to the parties concerned.

(2) When the Court has pronounced its opinion under section 14 (3) of the Act, a copy thereof shall be sent to the arbitrators or umpire making the reference and they shall have such opinion added to and made part of the award.

5. *Cases to be registered as suits or miscellaneous cases.*—A case in which the award is filed under section 14 (2) or an application made under section 20 (1) of the Act shall be numbered and registered as a suit. Other applications under the Act shall be numbered and registered as a miscellaneous case.

6. *Issue of notice.*—After a petition has been presented the Court may, if it is not in order or according to law, reject it. If it is not rejected, the Court shall direct notice thereof to be given to all persons mentioned in the petition and to such other persons as may seem to it to be likely to be affected by the proceedings, requiring all or any of such persons to show cause, within the time specified in the notice, why the relief sought in the petition should not be granted. Such notice shall be accompanied by copies of the petition and the affidavit, if any, copies being supplied by the petition.

1. *Payment of proces-fees.*—(1) The petitioner shall deposit the necessary process-fees for service of notice on the other parties concerned within seven days of the order directing the issue of notice or within such further time as the Court may, for sufficient cause shown, allow.

(2) The party who may have requested the arbitrators or umpire under section 14 (2) of the Act to cause an award to be filed shall, within seven days after the filing of the award or within such further time as the Court may, for sufficient cause shown, allow, deposit the necessary process-fees for the service of notice on the other parties concerned.

8. *Mode of filing award.*—(I) Where the award is filed by the arbitrators or umpire under section 14 (2) of the Act they shall send to the Court under sealed cover the award or a signed copy thereof together with any proceedings or depositions and documents which may have been taken and proved before them and the opinion pronounced by the Court on the special case under section 14 (3) of the Act, if any. They shall also send with the award a copy of the notice given to the parties concerned under section 14 (1) of the Act. If the sealed cover is sent by post, it shall be sent under registered cover.

(2) Where the award is filed by a party to the arbitration, any party may move the Court to direct the arbitrators or umpire to produce before it any proceedings or depositions and documents which may have been taken and proved before them together with the record of the arbitration which may be in their possession.

9. *Application under section 20* (1) *of the Act.*—Every application under section 20 (1) of the Act shall be accompained by a copy of the arbitration agreement.

10. *Issue of process at the request vf arbitrators or umpire.*—The Court shall cause process to be issued to the parties to an arbitration proceeding or to witness on the written request of the arbitrators or umpire.

(2) If the proceedings are under chapter II of the Act the request for the issue of such process shall be accompained by a copy of the agreement under which the arbitrators or umpires are acting.

11. *Court-fees and process-fees.*—Court fees and process.fees chargeable with respect to all matters under the Act shall, as nearly as may be, be in accordance with the provisions of the Court Fees Act, 1870, and the rules for the time being in force relating to the payment of such fees on the original side.

12. *Procedure.*—In matters not provided for in this Chapter the provision of the Code and any rules governing the proceedings of the Court shall, so far as may be and with necessary modifications and adaptations, apply to all proceedings including appeals under the Act before the Court.

13. *Proceedings in subordinate Courts.*—The rules contained in this chapter shall, with necessary modifications and adaptations, also apply to proceedings under the Act in subordinate Courts

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APPENDIX O

RULES OF DIFFERENT CHAMBERS OF COMMERCE AS TO ARBITRATION

THE LONDON COURT OF ARBITRATION

The London Court of arbitration, formed in 1892, in an impartial body prepared to appoint arbitrators at the request of disputants who themselves can be confident that their differences will be settled with the minimum of delay and expenditure by arbitrators of the highest standing and possesing expert knowledge.

CONSTITUTION AND FUNCTIONS

The Court is administered by members appointed by the Corporation of London and the London Chamber of Commerce, and its function is to appoint arbitrators to settle disputes which may, under the law of England, be submitted to arbitration.

RULES

The Court's Rules, which have been revised periodically as the Arbitration Law has been amended, provide for the conduct of all arbitrations referred to it, and may be obtained free of charge from the Registrar.

PANEL OF ARBITRATORS

The Courts maintains a comprehensive Panel of Arbitrators which is classified according to professions and trades. The Arbitrators selected and appointed by the Court are of high standing and the Court is in a position to call upon the services of acknowledged experts for whatever dispute may be submitted.

FEES

The fees payable to arbitrators, umpires and the Court are fixed by a scale which is set out in the Rules. The scale is the maximum and the fees are assessed in accordance with the time taken by arbitrators in dealing with cases. It is not uncommon for the fees actually charged to be lower than the maximum.

The Court is fortunate in the fact that leading members of the professions and of the business world are prepared to act as arbitrators under its Rules and to be bound by its scale of fees. The Court appreciates that arbitrators who accept its nomination are influenced by their desire to asist the general welfare of the commercial community.

PROCEDURE

On receiving a request for the appointment of an arbitrator, the Court, after satisfying itself that the arbitration agreement between the parties is in order, selects a qualified arbitrator whose name is notified to both parties. If possible, notice is also given at the same time that the arbitrator will hear the parties at the offices of the Court or at some other convenient place on a certain day, generally about a week later.

EXPEDITION

The Court takes every step in its power to ensure that cases conducted under its Rules are completed in the shortest possible timo. A special Committee is called to appoint arbitrators in urgent cases so that, with the co-operation of the parties, arbitrations may be disposed of without delay.

On the occasion, the award of an arbitrator appointed by the Court was in the hands of the parties seven days after the receipt of the request for appointment.

PRIVACY OF HEARINGS

All hearings are conducted in private and only the parties themselves, or their accredited representatives, their witness and the Registrar of the Court are entitled to be present. The Awards of Arbitrators are disclosed only to the parties.

REFERENCES TO THE COURT

There are two ways in which parties may provide for their differences to be referred to the Court :—

(*a*) By the previous insertion in the contract or order from the following clause :—

"The construction, validity and performance of this contract shall be governed by the law of England and all disputes which may arise under, out of, or in connectian with, or in relation to this contract shall be submitted to the arbitration of the London Court of Arbitration under and in accordance with its Rules at the date hereof.

The parties hereto agree that service of any notices in the course of such arbitration at their address as given in this contract shall be valid and sufficient."

(*b*) By signing a form of arbitration agreement when a dispute has arisen.

The advantage of the first method is that whatever dispute may arise it is automatically referred to the Court on a request for the appointment of an arbitrator by either party. The second method is necessary where there is no previous agreement (such as a clause in the contract) to submit a dispute to arbitration and in these circumstances it is impossiblo to compel a disputant to refer a dispute to arbitration if he is unwilling to do so.

A model form af arbitration agreement is also included in the Rules and seperate copies suitable for completion and signature by parties to a dispute may be obtained from the Regitrar.

SCOPE OF THE COURTS WORK

The Court's services are available to any person, firm, company or organisation of any nationality. Parties in the British Commonwealth and Empire and in foreign countris often request the London Court of Arbitration to appoint an arbitrator to sottle thoir duties,

69, Cannon Street,
London, E.C. 4.

December, 1952.

RULES OF THE LONDON COURT OF ARBITRATION

Constitution of Tribunal.

1. *Name.*—This Arbitration Tribunal shall be called "The London Court of Arbitration," hereinaftor referred to as "The Court."

2. *Offices.*—The offices of the Court shall be at the London Chamber of Commerce, hereinafter called "The Chamber of Commerce," or at such place as the Council of Chamber of Commerce may from time to time determine.

3. *Object.*—The Court of arbitration shall be avaliable both for voluntary references to arbitration, and for the arbitration of cases referred by Courts of Law or the Judges thereof.

4. The Court shall be constituted of: (*a*) Members appointed by the Council of the Chamber of Commerce, and (*b*) Members appointed by the Common Council of the Corporation of the City of London.

5. The Arbitration Committee of London Chamber of Commerce shall have the general administration and management of the Court and shall with the sanction of the Council of the London Chamber of Commerce appoint, or remove, the Registrar and other of its officers (if any).

6. *Duties of Registrar.*—The duties of the Regisirar or Acting Registrar (if any), shall be as follows: He shall by himself or his subordinate receive arbitration agreement and fees and costs, give all necessary notices to the arbitrators and umpires. give notice of hearing to parties and all prescribed or necessary notites, keep a Registrar of arbitration agreements, a Register of Awards and Reconciliations, and such other books and memoranda and make such returns as the Court shall from time to time require. He shall render such assistance to the arbitrator, arbitrators or umpire in an Arbitration as he or they may legally and properly require; he shall direct other officers of the Court (if any), and report to the Court anything in the conduct of any officer deserving of report, and generally shall carry out the instructions of the Arbitration Committee.

7. *Deputy Registrar.*—If an Acting or Deputy-Registrar is appointed he may, during the absence of the Registrar, perform the duties of the Registrar, and at other times discharge such other duties at the Court may direct.

8. The Court may, at its discretion, and either generally or in any specific case, or subject to any rules or conditions, delegate to its Chairman, or to a Sub-Committee or Sub-Committees or any members of the Court, or to the Registrar of Acting Registrar or other officer thereof all or any of the powers and duties prescribed by these Rules.

9. *Urgency Committee.*—The Court shall annually appoint a standing sub-committee consisting of the Chairman, Deputy-Chairman and six other members to be called the "Urgency Committee," whose duty it shall be in all references deemed by the Registrar or the Acting Registrar to be urgent either to appoint an arbitrator or arbitrators, and where necessary an umpire, to deal with the Reference under consideration or alternatively to direct that the Court shall forthwith be summoned to make such order thereon as circumstances may render appropriate. Three members of the Urgency Committee shall form a quorum, and such Committee may be called by telephone, telegram, or by letter, according to the discretion, of the Registrar or Acting Registrar. A meeting of the Court may be called in like manner if the Urgency Committee so direct.

The Urgency Committee shall report their action to the Court at the next meeting of that body in all cases referred to them.

Appointment of Arbitrators.

10. It shall be the duty or the London Court of arbitration to prepare and maintain a panel of qualified persons willing to act as arbitrators. Such panel or any part thereof may be from time to time revised by the said Court in such manner as they think fit.

11. (a) All arbitrations under these Rules shall be held before one arbitrator or two arbitrators, and when requested by the arbitrators or eithe sider with the addition of an Umpire or three arbitrators according to the desire of the parties. Unless the parties or all or some of them otherwise expressly stipulate or the Court shall think fit to appoint two or more arbitrators the arbitration shall be held by one arbitrator.

(b) The Court may (subject to rule 34) nominate appoint or select any person or persons to the arbitrator, arbitrators or umpire in any reference to arbitration under these Rules.

(c) If the reference be to two arbitrators, they shall (provided the said Court has not appointed an umpire under the last preceeding clause) before entering upon the reference appoint an umpire, but if they fail to appoint such umpire within ten days from the appointment of the arbitrator last appointed the said Court shall appoint an umpire and he shall have the like power to act in the reference and make an award as if he had been appointed by the consent of the parties.

(d) If the reference be to two arbitrators and an umpire the umpire may if the arbitrators have so agreed sit with the arbitrators at the holding of the arbitration and in such case if the arbitrators cannot agree upon their award may make his award either after further hearing on without further hearing as he may think fit.

(e) If the reference be to three arbitrators the award of the majoriy shall be sufficient and binding on all parties.

12. *Filling Vacancies.*—If any arbitrator or umpire dies or if any arbitrator, arbitrators or umpire becomes unable to act or declines to act or continue to act or is or becomes in the opinion of the Court unfitted to act or for fourteen days after a notice from the parties or any of them or from the said Court fails to act or continue to act the said Court may, on the application of any party, remove such arbitrator, arbitrators or umpire and appoint some other person or persons to act in his or their place.

13. *Security of Courts.*—The Court shall have power to direct that such some of money that they may think fit shall be deposited with them as security for the fees, costs and expenses of the arbitration.

14. *Form of agreement.*—If two or more persons have a difference which they wish to have determined in accordance with these Rules they shall, except in the case provided for in Rule 15 hereof fill up and sign a submission in the form set out in the First Schedule hereto or to the like effect.

15. Wherever a written contract contains an agreement to submit any disputes which arise in the future to the arbitration of the Court or the London Chamber of Commerce or any officer thereof or any person to be nominated by them or him or in accordance with these Rules the parties shall not be required to sign any further agreement but the agreement shall be deemed to contain an implied contract by all parties to submit to arbitration in accordance with these Rules and an implied undertaking to be bound by and to observe the award of the arbitrator, arbitrators or umpire, and any interlocutory directions given or orders made by him or them.

16. Every arbitration agreement shall be deemed to contain a clause whereby all parties agree to waive any term in their contract which compels any party to lodge a complaint within a less period than fourteen days and any such terms shall be read as if the number fourteen were submitted therein for such less number of days.

17. Every submission to arbitration shall be deemed to contain an undertaking by all parties :

(a) to pay the fees, costs and expenses of the arbitrator, arbitrators and umpire and the costs of the arbitration and award, in such manner as may by the award be directed ; and

(b) not to take any legal proceedings against the arbitrator, arbitrators or umpire or against the London Chamber of Commerce or its officers or the Court or its officers in respect of any matter arising in the arbitration.

Duties of Arbitrator.

18. *Hearing of evidence* —The arbitrator, arbitrators or umpire shall hear the evidence and the arguments of the parties or their agent in the presence of all parties or their agents and determine the dispute in accordance therewith. If one or more parties shall fail to appear at any meeting of which due notice has been given, the arbitrator, arbitrators or umpire shall adjourn that meeting to a date not less than seven days from the original date thereof and give notice of such adjourned meeting to all parties. If any party shall fail to appear at such adjourned meeting, the arbitration may proceed in his or their absence, but save as aforesaid, the arbitrator, arbitrators or umpire shall not be entitled to hear evidence or arguments in the absence of any party and in no case shall he or they be entitled to inform themselves about any of the matters in dispute by means of conversations but shall rely entirely on the evidence given and documents and facts proved before him or them and on his or their own knowledge.

19. Notwithstanding anything in these Rules, it shall be competent for an arbitrator, arbitrators or umpire, in any case where all the parties so agree including cases where the only question in dispute is whether merchandise is equal in quality or condition to a sample and/or in accordance with a contract, to make his or their award after a comparison of the sample and the bulk or the contract and the goods delivered and a perusal of the relevant documents without hearing *viva voce* evidence or the arguments of the parties or their agents.

20. *Ascertainment of Price of goods.*—Notwithstanding anything in these Rules, where in any arbitration a question arises as to the price of goods at a particular date in some place other that that in which the arbitration is held, it shall be competent to the arbitrator, arbitrators or umpire to invite the Chamber of Commerce of such other place, or any

trade organisation or Government official to furnish him or them with a certificate of such price on such date and he or they shall be entitled to receive such certificate in evidence without other proof than the signature of the responsible official of such Chamber of Commerce or trade organisation or of such Government official.

21. *Award.*—It shall be the duty of an arbitrator or arbitrators or umpire to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

22. The award, when not stated in the form of a special case, shall follow as near as may be the form set out in the Third Schedule hereto.

Powers of Arbitrator.

23. *Administration of Oath.*—The arbitrator, arbitrators or umpire shall have power to administer an oath to the parties and their witness and shall do so in all cases unless all the parties agree that the evidence shall be taken without the sanction of an oath.

24. *Interim Orders.*—The arbitrator, arbitrators or umpire shall have power to make such order as he or they think fit for the interim protection, warehousing, sale or disposal of the subject-matter of the arbitration. When the subject-matter of the arbitration is sold in accordance with this Rule the price received shall be paid forthwith into a separate banking account in the name of the London Chamber of Commerce pending the result of the arbitration.

25. *Discovery.*—The arbitrator, arbitrators or umpire shall have power to direct the parties to disclose and produce to him or them and to each other any books or documents in their possession or power relevant to or touching any af the matters in dispute.

26. *Interrogations.*—The arbitrator, arbitrators or umpire shall have power to direct any parties to answer upon oath such interrogatories as he or they may permit but shall only permit interrogatories which bear directly on any of the matters in dispute.

27. *Evidence taken by Examiner.*—The arbitrator, arbitrators or umpire shall have power to direct that the evidence of any witness or witnesses who are not resident in the district where the arbitration is being held and who cannot without undue inconvenience or expense attend the arbitration may be taken before an examiner.

28. *Substituted Services.*—The arbitrator, arbitrators or umpire shall have power to direct that notice of any step in the arbitration may be served on any party by means of submitted service on any person residing in the district where the arbitration is held who has been nominated by or is acting as agent or representative of such party for that purpose in that district.

29. *Specific Performance of Contract.*—The arbitrator, arbitrators or umpire shall have power to order specific performance of any contract other than a contract relative to land or any interest in land.

30. *Evidence by Affidavit.*—The arbitrator, arbitrators or umpire shall have power to direct that the evidence of any witness may be given by affidavit. and to order that such witness shall attend before him or them for cross-examination by any other party to the arbitration who may desire to cross-examine him.

Procedure.

31. *Claims*—A party applying for arbitration undor these Rules in pursuence of an arbitration agreement or a submission shall address a writen claim to the Court.

32. Such claim shall contain.

(i) the names and addresses af the parties ,
(ii) a copy of the arbitration agreement ;
(iii) a short preliminary statement of the nature of the dispute and of the claim made ;
(iv) a request for the appointment ef an arbitrator, arbitrators and/or umpire if not already appointed by agreement ;
(v) if an arbitrator or arbitrators or an umpire have already been agreed upon, his or their names and addresses.

33. *Appointment of Arbitrator, Arbitrators, and/or Umpire.*—If the parties agree in selecting an arbitrator, arbitrators or umpire they shall so inform the Court and shall specify the arbitrator, arbitrators and umpire agreed upon, and the said Court may at their discretion appoint such arbitrator, arbitrators or umpire, but shall not be bound to do so, or they may require the parties to specify a new arbitrator, arbitrators or umpire.

34. In cases where no arbitrator, arbitrators or umpire have been agreed upon between the parties and approved by the Court, the Court shall upon receipt of a claim from either side proceed to appoint an arbitrator or arbitrators and/or umpire in the manner prascribed in Rule 11. Such appointment shall be made in writiing and shall be

conditional upon the proposed arbitrator, arbitrators and umpire being willing to act. The Court shall give notice to the arbitrator, arbitrators and/or umpire of his or their appointment.

35. The Court shall at once communicate to all parties the names and addresses of the arbitrator, or arbitrators or umpire (if any).

36. The arbitrator, arbitrators or umpire shall be entitled to proceed with the arbitration as soon as he or they have received notice of his or their appointment.

37. *Answers.*—The time for submissior of an answer by any respondent shall be in the case of persons residing within the jurisdiction of the High Court of Justice a period of fourteen days from the date on which the Court gives notice to him or them or the claim for arbitration ; and in the case of respondents residing outside such jurisdiction a period or fourteen days together with such further period as is sufficient for a registered letter from the Court to be received by the respondent and for his answer thereto to be received by the said Court, Notwithstanding anything in this Rules contained if any respondant does not submit an answer within the above-mentioned period the arbitrator, arbitrators or umpire shall be entitled to proceed with the reference,

38. Any party who wishes an arbitrator, arbitrators and/or umpire to give directions on any of the matters dealt with under Rules 25—30 or who requires further particulars or his opponents claim or defence or counterclaim shall give written notice to the arbitrator or arbitrators or umpire and to all other parties. The arbitrator, arbitrators or umpire shall thereupon fix a date and place for a preliminary meeting and give a reasonable written notice thereof to all parties, and at such meeting shall make such interlocutory or other order as he or they may think fit.

39. *Time and place of Hearing.*—The arbitrator, arbitrators or umpire shall fix date and place for the hearing of the arbitration and shall give reasonable notice thereof to all parties. The place for hearing shall be the Offices of the Court, 69, Cannon Street, London, E. C. 4, unless the arbitrator, arbitrators or umpire for special reasons otherwise order.

40. Subject to such adjournments as the arbitrator, arbitrators or umpire think just or convenient, the arbitration shall be continued *de die in diem* until concluded.

41 The arbitration shall be held in private and no person shall be entitled to be present except the parties, their representatives or agents, the witness, and the officers of the Court.

42. *Counsel and Solicitors.*—Any party may be represented by a barrister or solicitor in the absence of any agreement to the contrary by all parties. Notice of intention to be so represented must be given to the Court and all other parties at least four days before the hearing.

43. *Agents.*—Any party may appear in person or be represented by an agent other than a barrister or soiicitor if he so desires, but such agent shall before taking any part in the proceedings produce to the arbitrator, arbitrators or umpire a written authority from his principal authorising such agent to appear for him.

44. *Chain of Sales.*—Where goods have been sold and resold on two or more occasions and the same, or substantially the same dispute arises on more than one contract of sale, it shall be competent for the arbitrator, arbitrators or umpire appointed to determine any one such dispute to invite the parties to any other such dispute to join in the arbitration to the end that all such disputes may be determined at the same time by means of an arbitration besween the first sellor and the last buyor.

45. *Services of Notices.*—In all cases where these Rules require notices to be served on any party and where the business address of any such party is given in the contract which contains the arbitration agreement, service of such notice may be effected, if directed by the arbitrator, arbitrators or umpire, by means of a cablegram addressed to the party concerned at the address so given in the contract or arbitration agreement unless such party shall have given to the other party notice of change of address or of some other address as his address for service, in which case the cablegram shall be directed to such new or other address.

Costs and Fees.

46. (i) *Arbitrator's Fees* —The parties to every arbitration under these Rules shall pay a fee for the services of the arbitrator, arbitrators and/or umpire in accordance with the scale set out in the Fifth Schedule hereto, and also his or their expenses,

(ii) *Orders as Costs.*—The arbitrator, arbitrators or umpire may by his or their award direct any of the parties to pay the costs of the arbitration, including the fees and expenses payable to the arbitrator, arbitrators or umpire and the costs incurred by the parties, or may divide such costs between the parties in such proportion as he or they think fit and may assess the amount of such costs, or he or they may in the award ex-

pressly reserve the assessment of costs and direct that they shall be assessed before him or them at a subsequent date.

(iii) Subject as herein provided, the fees and expenses of the arbitrator, arbitrators or umpire shall be paid to him or them by the party taking up the award, without prejudice to the right of such party to recover such fees and expenses from any person or persons ultimately liable to pay the same.

(iv) If for ten days after notification has been given to the parties that the award has been made and is ready for delivery, no party takes up the award, then upon the expiration of such ten days the arbitrator's, aabitrators' and umpire's fees and expenses shall forthwith be payable and be paid to the arbitrator, arbitrators or umpire by the parties to the arbitration without prejudice to the right of any patty who pays the same to recover such fees and expenses from any person or persons ultimately liable to pay the same.

(v) *Arbitrator's Fees when dispute compromised.*—In any case where, before the award is published, the Reference is determined by the act of the parties, then if the same is so determined before notice has been given by the selected arbitrator, arbitrators, or umpire of his or their consent to act in the particular case, the arbitrator, arbitrators or umpire shall not be entitled to any fees or expenses, but if it is so determined after such notice has been given, then there shall forthwith be paid to such arbitrator or arbitrators and/or umpire by the several parties to the arbitration agreement, in equal shares the specified fees and expenses for such time as the arbitrator, arbitrators and/or umpire shall have sat to hear the case, and devoted to the perusal and consideration of the papers, and if he or they shall not at the time of such determination have sat to hear the case, or persued and considered the papers, then such fees and expenses as he or they would have been entitled to if he or they had held a sitting of one hour's duration for that purpose.

Award.

47. *Delivery of Award.*—The arbitrator, arbitrators or umpire shall deliver his or their award in writing to the Court and any party to the reference may have a copy thereof on payment of the fees and expenses set out in the Fifth Schedule hereto.

Arbitration Clause Recommended for Insertion in Contracts.

The construction, validity and performance of this contract shall be governed by the law of England and all disputes which may arise under, out of, or in connection with or in relation to the contract shall be submitted to the arbitration of the London Court of Arbitration under and in accordance with its Rules at the date hereof.

The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and suffiicient.

J. G. ALLANBY, *Registrar*,
69, Cannon Street,
London, E.C. 4,
England.

FIRST SCHEDULE.

Form of an Arbitraiion Agreement submitting an existing dispute to Arbitration in the absen e of a sufficient arbitration clause in a contract between the parties.

Whereas a dispute has arisen between us, A. B. of and C. D. of the Rules of the London Court of Arbitration and whereas the matters involved in toe said dispute are as follows :

(*Insert brief particulars*).

Now we the said A.B. and C,D, here agree as follows :—

1, That all the said matters in dispute between us shall be determined by the arbitration of the person appointed in accordance with the said Rules.

2. That we abide by and perform the award of the arbitrator appointed as aforesaid.

3. That we will abide by and perform tll interlocutory orders made by the arbitrator in accordance with the said Rules.

4. That the dispute shall be decided in accordance with the law of.

5. That we will pay the arbitrator's fees and expenses and such costs as may be by the award directed.

6. That we will not take any legal proceedings against the arbitrator or the London Court of Arbitration or any officer thereof in respect of any matter arising in the arbitration.

As witness our hands day of 19 .

Witness.

(Signed)
A. B.
C. D.

SECOND SCHEDULE.

Case stated in the course of an arbitration for the opinion of High Court

In the matter of an arbitration between A.B. and C. D.

Whereas I. E. F. of have been appointed arbitrator in accordance with the Rules of London Court of Arbitration to determine a dispute between the above mentioned A. B. and C. D.

And whereas I have taken on myself the burden of the reference and in the course thereof a question of law has arisen which the said $\frac{\text{(A.B.)}}{\text{(C.D.)}}$ has requested me to submit to this Honourable Court and I have agreed to do so.

And whereas the following facts have been admitted or proved in evidence before me namely ;

(a)
(b)
(c)

And whereas the said A. B. contended that and the said C. D. contended that And whereas the documents set out in the Schedule hereto were proved in evidence before me and are to be treated as forming part of this case.

Now I, the said E. F., do hereby submit to this Honourable Court. the following question of law, namely.

Given under my hand this day of 19 .

(Signed) E. F.

Witness.

THIRD SCHEDULE.

Ordinary Form of Award.

Whereas a dispute ass arisen between A. B. of and C. D. of and the said A. B. and C. D. have agreed to submit such dispute to arbitration in accordance with the Rules of the London Court of Arbitration and whereas the London Court of Arbitration have appointed me E. F. of to be the sole arbitrator to determine the said dispute and I have taken on myself the burden of the reference andhave heard the evidence and the arguments adduced by the parties and their representatives.

Now I, the said E. F., do hereby make my award as follows :

1. I award that the said C. D. do pay to the said A.B. sum of £ (or that the said A. B. is not entitled to recover any sum of money form the said C. D.).

2. I assess the costs of the arbitration at £ and of this award at (or 2. I direct that the costs of the arbitration shall be assessed subsequently to the publication of this award on a date to be fixed by me on the application of eithor of the avove mentioned parties).

3. I direct that the costs of the arbitration and award be paid by the said $\frac{\text{(A.B.)}}{\text{(C.D.)}}$ and if such costs or any part thereof should be paid in the first instance by the said $\frac{\text{(C.D.)}}{\text{(A.B.)}}$ I direct that the said $\frac{\text{(A.B.)}}{\text{(C.D.)}}$ shall repay the amount thereof to the said $\frac{\text{(A.B.)}}{\text{(C.D.)}}$

Given under my hand the day of

(Signed) E. F.

Witness :

FOURTH SCHEDULE.

Award Stated as Special Case.

In the matter of an arbitration between A. B.

and C. D. have been appointed arbitrator in accordance
Whereas I, E. F., of with the Rules of the London Court of Arbitration to determine a dispute between the above-mentioned parties.

And whereas I have taken on myself the burden of the reference and have heard the evidence and arguments adduced by the parties and their representatives.

And whereas I have been requested by the said to state this my award in the form of a Special Case for the opinion of the High Court of Justice and have agreed to do so.

Now I, the said E. F. do hereby state my award as follows :

(a)
(b)
(c)

1. The following facts were admitted or proved in evidence before me.

2. On these facts the said A. B. contended that he was entitled to recover the sum of £ on the ground that (set out A. B.'s contention).

3. The said C. D. contended that the said A. B, was not entitled to recover any sum of money on the ground that (set out C, D.'s contention.)

4. 1 decided that the contention of the said A. B. was right, and I hereby award that the said C. D. do pay to the said A. B. the sum of £ together with £ the costs of the arbitration and of this award.

5. The question for this Honourable Court is whether my said decision is right in law.

6. If neither party sets down the Special Case for hearing within 14 days from the publication of this award, or if this Honourable Courts decides that my decision was right in law this award is to stand.

7 If this Honourable Court decides that my decision was wrong in law, then I award that the said A. B. is not entitled to recover any sum of money from the said C. D. and that the said A. B. do pay to the said C. D. £ together with the costs of the arbitration and of this award.

8. The documents set out in the Schedule hereto were proved in evidence before me and are to be treated as forming part of this case.

As witness my hand this day of

Witness : (*Signed*) E. F.

FIFTH SCHEDULE

Scale of Arbitration Fees.

(*The following represents the maximum scale of fees.*)

1. Where the amount involved does not exceed £50, and the time occupied is less than half an hour.

Office Fee, which includes Forms and attendance of Register (if any), but not Stamp Duties	31	1	0
For each Arbitrator or Umpire	£2	2	0

2. In other cases :

Office Fee	£1	1	0
Room (if any), each sitting	£1	11	6
For each Arbitrator or Umpire :			
For the first hour	£3	3	0
For each subsequent hour or part of an hour	£2	2	0

3. Where the amount involved exceeds £1,000 thc Fees to be double Scale 2, except that the charge for Room (if any) shall be, per day... ... £2 2 0

4. If case submitted under Rule 19, minimum fee £5 5 0

It shall be open to the parties in any particular case to enter into an agreement in writing to pay specified fees of a larger amount than those shown in the scheduled scale of the London Court of Arbitration.

Witness.—Scale of Fees not to exceed those allowed in the High Court.

Counsel and Solicitors.—Subject to the provisions of Rule 46, Fees and Costs to be on the same scale as those allowed between party and party in the High Conrt and to include such reasonable costs of the case and of its preparation as may be allowed .

BENGAL CHAMBER OF COMMERCE

Tribunal of Arbitration

Rules.

Interpretation.

1. *Interpretation clause.*—In these rules the following words have the following meanings ;—

(1) "CHAMBER" means the Beugal Chamber of Commerce.

(2) "COURT" means the Arbitrator or Arbitrators appointed for determining a particular dispute, or the Umpire where an umpire has been appointed.

(3) "MEMBER" means any member for the time being of the Chamber.

(4) "PARTY" includes an individual, firm and Company.

(5) "REFERENCE" means any agreement to refer a difference or dispute (present or future) to the Tribunal. Any agreement to refer more than one difference or dispute between the same parties which arise under seperate contracts shall be treated as a seperate reference in respect of each contract.

(6) "REGISTRAR"—The Registrar of the Tribunal shall be the Secretary for the time being of the Chamber or such other number of the Secretarial staff of the Chamber as shall be acting for him from time to time.

(7) "TRIBUNAL" means the Tribunal of Arbitration of the Chamber hereby constituted.

Objects and Constitution of Tribunal.

II. *Objects.*—The objects of the Tribunal are the determination, settlement and adjustment of disputes and differences relating to trade, business and manufactures, between one party and another, whether any such party resides or carries on business personally or by agent or otherwise in Calcutta or not and whether such party is a member of the Chamber or not.

III. *Constitution.*—(1) The Tribunal shall consist of such members or assistants to members, and of such other persons who are from time to time on the panel of Special Advisory Board to the Indian Jute Mills Association, as may from time to time be selected by the Registrar as hereinafter mentioned and be willing to serve on the Tribunal.

(2) The Registrar shall from time to time as he shall consider necessary select such persons from the classes mentioned in the proceeding rule, who are willing to serve, and shall circulate to all members from time to time a list of the persons so selected. He may also if he thinks fit supply a copy of such list to persons other than members applying for the same.

(3) The Registrar may at any time, if he thinks proper so to do, add to the said list the names of other persons whom he may consider qualified to serve on the Tribunal. It shall not be necessary in such case to print or circulate any list of the added names, but a list of the members of the Tribunal complete for the time being shall be kept by the Registrar, and shall always be open to inspection by members on application and, at the discretion of the Registrar, also by persons other than members.

(IV) *Registrar.*—The duties of the Registrar of the Tribunal shall ordinarily consist of or include the following :—

He shall, by himself or his subordinates, receive applications to the tribunal and receive payment of fees and costs, appoint the arbitrator or arbitrators and, where necessary, the umpire who will constitute the Court to deal with any dispute, receive all applications made to the Court by the parties, and communicate to them the orders and directions of the Court, keep a register of applications to the Tribunal and of awards made by any Court, and such other books and memoranda, and make such returns as the Chamber of the Tribunal shall from time to time require, and generally carry out the directions of any Court so constituted, and take such steps as may be necessary to assist any such Court in the execution of its functions.

Constitution of Court.

V. (1) *Applications for arbitiation.*—In every case where a dispute or difference has arisen between parties who have agreed that such dispute or difference shall be referred for decision to the Chamber or the Tribunal, an application for arbitration may be addressed by either party to the Registrar which application, in the case of disputes relating to piece-goods, shall be in such form as the Committee of the Chamber may from time to time prescribe.

(2) On receipt of such applications, the Registrar shall constitute a Court for the adjudication of the dispute.

(3) *Arbitrators or umpire to have practical knowledge.*—In constituting any Court the Registrar shall select, as arbitrator or arbitrators or umpire as the case may be, so far as possible, or a person having a practical knowledge of the subject-matter of the contract or contracts in question, and the Registrar shall not appoint any person who for any reason within his knowledge would not be a proper person to act as Arbitrator or Umpire in the particular matter, but no award shall be invalid nor shall any objection be taken thereto by any party, on the ground that any person so appointed did not possess such practical knowledge, or was not in fact a proper person to act as arbitrator or umpire.

(4) *Names of arbitrators or umpire.*—The names or name of the persons or person constituting a Court shall not ordinarily be disclosed to the parties nor shall the parties be entitled to such information as of right. In the event of any of the parties applying on special grounds (to be specified in writing to the Registrar) for the disclosure of the said names or name the decision as to whether such disclosure shall be made or not shall rest in the absolute discretion of the Registrar. The non-disclosure of the said names or name shall not in any case affect the validity of the arbitration proceedings. or of any award therein nor afford ground of objection to the filing of the award.

VI. *Appointment of arbitrators.*—Unless the agreement to refer the dispute or difference to the Chamber or Tribunal otherwise expressly provides the Court shall consist of two arbitrators, who shall be selected by the Registrar from the Tribunal and appointed in writing under his hand.

VII. *Expiry of time.*—If the Court have allowed the time or extended time to expire without making any award, and without having signified to the Registrar that they cannot agree, the Registrar shall constitute in manner aforesaid another Court which shall proceed with the arbitration and shall be at liberty to act upon the record of the proceedings as then existing and on the evidence, if any, then taken in the arbitration or to commence the arbitration *de novo.*

VIII. *Appointment of umpire.*—In the event of the Court originally appointed disagreeing the dispute shall be referred to an umpire and the Registrar shall appoint an umpire to be selected from the list aforesaid to constitute the Court for the adjudication of the said disputes and such umpire shall then proceed with the arbitration in accordance with these rules.

IX. *Consent to act.*—The consent to act of the arbitrator or arbitrators or umpire as the case may be shall be obtained by the Registrar.

X. *Arbitrators or umpire failing to act.*—If any appointed arbitrator or umpire neglects or refuses to act, or dies or becomes incapable of acting the Registrar shall substitute and appoint a new Arbitrator or Umpire as the case may be in manner aforesaid and the Court so reconstituted shall proceed with the arbitration with liberty to act on the record of the proceedings as then existing and on the evidence if any then taken in the arbitration, or to commence the proceedings *de novo.*

Conduct of Arbitrations.

XI. *Statement to be filed within specified time.*—The parties shall within such time as may be directed by the Court, prepare and submit to the Registrar in duplicate a written statement of their respective cases with copies of all relevant documents or other evidence on which they rely. A copy of each party's case shall be given to the other party who shall respectively be entitled to put in a rejoinder thereto within such time as may be directed. Normally no more than one rejoinder shall be filed but the Court shall have discretion if it thinks fit to allow more than one rejoinder, on such terms as it may impose.

XII. *Enlargement of time for submission of statement.*—The Court may at its discretion enlarge the time for submission of a written statement or rejoinder, but it shall not be bound to receive or to consider any written statement or rejoinder of either party tendered after the expiration of the original or subsequently extended time as the case may be.

XIII. *Communications to be made through the Registrar.*—All applications which the parties desire to make to the Court and all notices to be given to the parties before or during the course of the arbitration, or otherwise in relation thereto, shall be made through the Registrar who shall communicate the orders and directions of the Court thereon to the parties.

XIV. *Obligations of the parties.*—The said parties, respectively, shall do all the acts necessary to enable the Court to make just award, and shall not wilfully do or cause or allow to be done any act to delay or to prevent the Court from making an award, and if either party shall do or cause or allow to be done any such act that party shall pay to the other such costs as the Court shall deem reasonable.

XV. *Hearing.*—The dispute will normally be decided by the Court on the written statements of the parties and oral evidence will not be taken nor will the parties be entitled to appear or any formal hearing be held. The Court shall have power however if it thinks fit to appoint a time and place for the hearing of the reference and to hear oral evidence,

XVI. *Appearance of parties.*—In any case of a formal hearing no party shall, without the permission of the Court, be entitled to appear by counsel, attorney or other advocate or adviser, but the Court in its discretion may require the parties with or without witness to attend before it or before any Committee or Sub-Committee of the Chamber to be examined.

XVII. *Evidence.*—The parties to the reference and any witness on their behalf, shall, subject to the provision of any law for the time being in force—

(*a*) submit to be examined by the Court on oath or affirmation in relation to the matters in dispute ;

(*b*) produce before the Court all books, deeds, papers, accounts, writings and documents within their possession or power, respectively, which may be required or called for by the Court.

(*c*) comply with the requirements of the Court as to the production and selection of samples, and ;

(*d*) generally do all other things, which during the proceedings on a reference, the Court may require.

XVIII. The Court may :

(*a*) administer oath or affirmation to the parties or witnesses appearing ;

(*b*) state a special case for the opinion of the High Court, or give its award in the form of a special case for the opinion of the High Court ;

(*c*) make an award conditional or in the alternative ;

(*d*) correct in an award any clerical mistake or error arising from any accidental slip or omission, or

(*e*) administer to any party to the arbitration such interrogatories as it may consider necessary.

XIX. *Retention and for return of documents.*—The Court shall have full discretion to retain and/or return all books, documents or papers produced before it in any proceedings and may direct at any time that the books, documents or papers produced or any of them, are to be returned to the parties or either of them on such terms and conditions as the Court may decide.

XX. *Absence of parties,*—The Court may proceed with the reference notwithstanding any failure to file a written statement within due time and may also proceed with reference in the absence of any or both of the parties who, being entitled to appear before the Court, after due notice, refuse or neglect to attend.

XXI. *Application to Civil Court to issue process to parties or witnesses.*—If the Court shall at any stage of arbitration be of the opinion that it is desirable to examine either party or any witness who may not be willing to give evidence before the Court or may be resident outside the City of Calcutta the Court may apply to the Civil Court having jurisdiction in that behalf to issue process to such party or witness, including tha issue of summonses and commission for the examination of witnesses and summonses to produce documents and may at its discretion require one or both the parties to deposit such fee or fees to cover the cost of any such process as the Court shall consider necessary and in the event of any party who has been called on to deposit such fees failing to do so may dismiss snch party's case or deal otherwise with the matter in any way the Court may think just.

XXII. *Arbitrators empowered to consult Committees and solicitors or counsel.*—The Court may at its own instance at any time or times before making a final award, and at the expense of the parties consult, refer to, and act on and adopt the advice, recommendations or susgestions of any committee or Sub-Committee of the Chamber having or exercising special jurisdiction or power relating to the particular industry, commodity, produce or branch of trade concerned in the reference or of any experts whether members or not, and may also, at the like expense of the parties, consult and adopt the advice of solicitors or counsel upon any question of law, evidence, practice or procedure arising in the course of the reference.

XXIII. *Special Case.*—In any case where party wishes to have any question arising in any proceedings referred to the High Court of Justice at Fort William in Bengal* in the form of a special case for the opinion of the High Court he shall apply in writing to the Registrar, and with such application shall pay a requisition fee of Rs. 40. If the Court decides to accede to such request the party applying shall also be responsible for all legal or other costs, charges and expenses that may be incurred by the arbitrator or arbitrators or umpire of and incidental to the same and shall make such deposit on account thereof as the Court may decide.

Awards.

XXIV. *Decision of majority.*—In cases where the Court shall consist of more than two Arbitrators the award of the majority shall prevail and be taken as the decision of the Court.

XXV. *Time for making awards by arbitrator.*—The Court shall make its award in writing within four months after entering on the reference or on or before any later day to which the Court, with the consent of all parties concerned in the proceedings, by any

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* *Now called High Court at Calcutta.*

writing signed by them, may from time to time, enlarge its time therefor or any extension of time granted by the Court of Judicature at Fort William in Bengal* :

Provided that, if any commission for examination of witnesses shall at any time be issued under the provisions of Rule XXI or Section 43 of the Arbitration Act 1940 or any other provision in that behalf this Rule shall be read as if the above-mentioned initial time limit of four months were increased by a period of time equal to the time which elapses between the date when the Civil Court concerned shall make its order for the issuc of such commission and the date when the same small have been executed and returned to the Court, and all enlargements and extensions of time as above provided shall take effect as from the expiry of such increased initial time limit.

XXVI. *Extent of award.*—The Court may make an interim award, and may, by any award, order and determine what it shall think fit to be done by either of the parties, respecting the matters referred.

XXVII. *Signature to and issue of awards.*—Every award shall be signed by the Court and by the Registar. When completed, a copy of the award shall be sent by the Registar to each of the parties, but the name or names of the member or members of the Court shall not ordinarily be disclosed on such copy and such non-disclosure shall not affect the validity of the award nor afford any ground of objection to the same being filed.

XXVIII. *Filing of awards.*—The Court shall at the request of any party to the proceedings or of any person claiming under such party or, if so directed by the High Court of Judicature at Fort William in Bengal* and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges on filing the award, cause the award or a signed copy of it together with any depositions or documents, which may have been taken and proved before it, to be filed in the said High Court.

XXIX. *Award binding on all parties.*—The parties shall in all things abide by and obey the award, which shall be binding on the parties and their respective representatives notwithstanding the death of any party before or after the making of the award, and such death shall not operate as a revocation of the submission.

XXX. *Further award.*—Whenever an award directs that a certain act or thing shall be done by one party to the reference *e.g.*, delivering or taking (with or without allowance) delivery of goods and such party fails to comply with the award, the party in whose favour the award is made may make a fresh application for a further award determining the amount of damages or compensation payable by reason of such failure, and the Registrar, on receipt of such application, shall proceed to constitute a new Court, which may or may not consist of the same or of one more of the members constituting the Court who made the first award, and the new Court shall procced under these rulcs to arbitrate on the said application and the award thereon may be filed separately or together with the original award.

XXXI. *Costs, charges, fees, etc.*—The costs of the reference and award including the costs, charges, fees and other expenses provided for by these rules shall be in the discretion of the Court, which may direct to and by whom and in what manner and in what proportion such costs, charges, fees and other expenses or any part thereof shall be borne and paid, and may tax and settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

Fees.

XXXII. Subject to any limitations imposed by the rules following, the Court shall be entitled to allow fees and expenses of witnesses, expenses connected with the selection and carriage or samples, Licensed Measures' Department charges, conveyance hire, cost of legal or technical advice or proceedings in respect of any matter arising out of the arbitration incurred by the Court and, when goods are examined at premises other than those of the Chamber such additional fees not exceeding double the prescribed fees of any particular reference, for every attendance at such other premises, and any other incidental expenses and charges in connection with or arising out of the refercnce or award as the Court shall in its absolute discretion think fit.

XXXIII *Copies of proceedings.*—No party is entitled to copics of proceedings before arbitrators or an umpire. In case where the Tribunal is requested to make copies of cases or exhibits thereto, submitted by either party, for the purposes of sending such copies to the other party then the charge, for every copy made, shall be six annas a folio of 90 words (seven figures to one word).

XXXIV.* The fces, costs, charges and other expenses of and incidental to the reference and the award (if any) which are to be payble and which arc not otherwise provided for under these Rules shall be the following, viz, :

**Now called High Court at Calcutta.*

[†*As amended by the Committee on 25th February, 1947.*]

(1) *Certified copies of awards.*—A fee of Rs. 2/- is payable for each certified copy of an award.

(2) *Stamp Duties.*—Stamp duties are to be paid in all cases in accordance with the scale of stamp duties for the time being imposed by law.

(3) *Filing Awards.*—A fee of Rs. 8/- to the Chamber in addition to the Court fees on the scale for the time being in force is payable by the party requiring the award to be filed.

(4) *Single Arbitrator.*—A Single Arbitrator shall be paid double fees, namely the fees payable hereunder to two Arbitrators.

(5) *Piece-goods Arbitrations* :—

(*a*) For contracts involving inspection of only one quality of cloth :—
For quality, etc., Rs. 64/- for each Arbitrator or Umpire.
For Mildew, Rs. 64/- for each Arbitrator or Umpire.

(*b*) For contracts involving inspection of cloth :—
For quality, etc.
For first quality, Rs. 64/- for each Arbitrator or Umpire ;
For each additional quality, Rs. 8/- for each Arbitrator or Umpire.
For Mildew, Rs. 64/- for each Arbitrator or Umpire.

(*c*) In all piece-goods arbitrations involving measurement of lengths and or widths the fee for each Arbitrator or Umpire is hereby prescribed to be Rs. 80/- subject to the proviso that the Committee may in special cases at their absolute discretion prescribe and determine for the time being the amount of the fee payable to each arbitrator or Umpire in cases of this nature.

(*d*) In all other piece-goods arbitrations, whether involving examination of goods or not the amount of the fee payable to each arbitrator or umpire will be prescribed and determined for the time being by the Committee for cases of this nature.

(*e*) In addition to these charges an Institution Fee of Rs. 60/- is payable to the Tribunal in all cases where one or both parties is or are a member or members of the Chamber or of any Association working in connection with the Chamber under Article 56 (d) of the Articles of Association of the Chamber ; but where neither party is a member of the Chamber or of any Association working in connection with the Chamber, an Institution Fee of Rs. 80/- is payable provided that in any particular arbitration the Committee may in their discretion prescribe and determine that a fee exceeding the aforesaid figures but subject to a maximum of Rs. 250/- shall be payaqle.

(6) *Jute arbitrations involving inspection of jute*—A fee of Rs 80/- is payable in respect of each arbitrator or umpire and when more then two qualities or makes or deliveries of jute are examined under the same contract a fee of Rs. 40/- for each further quality, ar mark, or delivery, examined in excess of two quatities or marks, or deliveries, is payable in respect of each arbitrator or umpire in addition to the first fee of Rs. 80/-, and for each assorter engaged in sum of exceeding Re. 1/8/- will be charged together with such sum to cover all incidental expenses connected with selection and carriage of samples as may be prescribed and determined for the time being by the committee for cases of this nature.

(7) *Jute arbitration not involving inspection of jute.*—In all jute arbitrations not involving examination of juto a fee of Rs. 80/- is payable to each arbitrator or umpire provided that in any particular arbitration the Committee for cases of this nature may in their discretion prescribe and determine that a fee exceeding Rs. 80/- shall be payable to each arbitrator or umpire.

In addition to thsse charges an Institution Fee of Rs 80/- is payable to the Tribunal in cases where one or both parties is or are a member or members of the Chamber or of any Association working in connection with the Chamber under Article 56(d)* of the Articles of Association of the Chamber ; but where neither party is a member of the Chamber or of any Association working in connection with the Chamber an Institution Fee of Rs. 120/- is payable provided that in any particular arbitration the Committee may in their discretion prescribe and determine that a fee exceeding the aforesaid figures but subject to a maximum Rs. 250/- shall be payable.

(8) *Gunny Arbitration involving inspection of goods.*—Where gunnies are examined a fee of Rs. 80/- is payablo in respect of each arbitrator or umpire.

(9) *Gunny Arbitrations not involving inspection of goods.*—In all gunny arbitrations not involving examination of goods a fee of Rs. 80/- is payable to each arbitrator or umpire provided that in any particular arbitration the Committee for cases of this nature may in their discretion prescribe and determine that a fee exceeding Rs. 80/- shall be paid to each arbitrators or umpire.

**Now Article 65(d).*

In addition to these charges an Institution Fee of Rs. 80/- is payable to the Tribunal in cases where one or both parties is or are a member or members of the Chamber or of any Association working in connection with the Chamber under Article 56(d)* of the Articles of Association of the Chamber ; but where neither party is a member of the Chamber or of any Association working in connection with the Chamber, an Institution Fee of Rs. 120/- is payable provided that in any particular arbitration the Committee may in their discretion prescribe and determine that a fee exceeding the aforesaid figures but subject to a maximum of Rs. 250/- shall be payable.

(10) *Other Arbitrations.*—In all other arbitations whether involving the examination of goods or not, or in those involving consideration of documents only, the amount of the fee payable in respect of each Arbitrator or umpire will be prescribed and determined for the time being by the Committee for cases of this nature.

In addition an Institution Fee of Rs. 80/- is payable to the Tribunal in cases where one or both parties is or are a member or members of the Chamber or of any Association working in connection with the Chamber under Article 56(d)* of the Articles of Association of the Chamber ; but where neither party is a member of the Chamber or of any Association working in connection with the Chamber, an Institution Fee of Rs. 120/- is payable provided that in any particular arbitration the Committee may in their discretion prescribe and determine that a fee exceeding the aforesaid figures but subject to a maximum of Rs. 250/- shall be payable.

(11) *Settled or withdrawn cases.*—In cases where the party instituting a reference desires to withdraw it before a Court has been constituted the Institution Fee only will be charged but if a Court has been constituted before the application to withdraw the reference has been received by the Registrar then full Institution Fee and arbitrators' fee will be payable.

(12) *Returned cases.*—In cases in which the Court decides that it has no jurisdiction to act and refuses to proceed with a reference to it, one half of the Institution Fee together with arbitration fees and any legal or other costs and expenses incurred by them will be payable.

XXXV. The Committee of the Chamber shall have the power to alter, modify or vary the foregoiog table of fees from time to time.

Indemnity of Arbitrators,

XXXVI. No party shall bring or prosecute any suit or proceeding whatever against the Court, or any member thereof, for or in respect of any matter or thing purporting to be done under these rules nor any suit or proceeding (save for the enforcement of the award) against the other party.

Notices.

XXXVII. All notices required by these rules to be given, shall be in writing and shall be sufficiently given if left at the last known place of abode or bnsiness of the party to whom the notice is addressed, or if sent by registered post addressed to him by name at such place of abode or business. If sent by post such notice shall be deemed to have been given at the time at which the letter would in the ordinary course be delivered. In the case of any person who has no place of business in Calcutta but who is represented by an agent in Calcutta or elsewhere in India, the place of abode or business of the agent shall be deemed that of such person.

XXXVIII. The marginal notes shall not affect the construction hereof.

XXXIX. These rules shall come into operation as on and from the first day of March 1941 and shall apply to all applications made for arbitrations on and after the date. All references pending on the said first day of March 1941 shall be regulated by the rules at present in force,

BOMBAY CHAMBER OF COMMERCE

BY-LAWS OF THE BOMBAY CHAMBERS OF COMMERCE TO REGULATE THE ARBITRATION OF COMMERCIAL DISPUTES BY THE CHAMBER

as adopted at a Special General Meeting of Members of the Chamber held on Friday, 13th November, 1953. These By-laws surpersede those which were in existence up to that date.

1. In these By-laws and in Schedule annexed hereto—

(1) "The Chamber" means the Bombay Chamber of Commerce.

(2) "The Committee" means the Committee for the time being of the Chamber.

(3) "The Secretary" means the Secretary for the time being of the Chamber, or

Now Article 65(d).

such other member of the staff of the Chamber as shall be acting for him from time to time.

(4) The Act shall mean the Indian Arbitration Act, 1940 or any statutory amendment thereof or other Act or Acts for the time being in force in the Union of India containing the provisions of the Legislature relating to Arbitration.

2, The Committee shall, as and when necessary, make a list of such members, assistants to members, and other persons as shall, in the opinion of the Committee, be qualified and as shall have signified their willingness to act as arbitrators and or umpires, and may add to or withdraw names from such list at their discretion.

3. When two members of the Chamber, or when one member and a party who is not a member, or when two parties who are not members have agreed to refer any dispute between them to arbitration under the rules of the Chamber, the Committee will upon receipt of (1) the contract or true copy thereof under which the arbitration agreement is made and/or (2) a requisition on the form which may from time to time be prescribed by the Committee, forthwith appoint through the Secretary, two arbitrators and an umpire to act accordingly.

4. The Committee shall select, as arbitrators or umpire, as the case may be, so far as possible, persons or a person having practical knowledge of the subject-matter of the contract or contracts in question, and the Committee shall not appoint any person who for any reason within their knowledge would not be a proper person to act as arbitrator or umpire in the particular matter, but no award shall be invalid nor shall any objection be taken thereto by any party, on the ground that any person so appointed did not possess such practical knowledge, or was not in fact a proper person to act as arbitrator or umpire.

5. Prior to accepting appointment the arbitrators or umpire, as the case may be, shall not be given the names of the parties but only particulars of the dispute, in which they are invited to act as arbitrators or umpire.

6. The consent to act of the arbirators or umpire, as the case may be shall be obtained in writing by the Secretary on behalf of the Committee.

7. The appointment of the arbitrators and umpire shall be recorded on a form prescribed by the Committee and notice that the appointment has been made shall be given in writing to both parties by the Secretary on behalf of the Committee.

8, The names or name of the persons or person appointed as arbitrators or umpire, as the case may be, shall not ordinarily be disclosed to the parties nor shall the parties be entitled to such information as of right. In the event of any of the parties applying on special grounds (to be specified in writing to the Committee) for the disclosure of the said names or name the decision as to whether such disclosure shall be made or not shall rest in the absolute discretion of the Committee. The non-disclosure of the said names or name shall not in any case affect the validity of the arbitration proceedings or of any award therein nor afford ground of objection to the filing of the award.

9. The parties shall within two weeks from the date of the application for arbitration, prepare and submit to the arbitrators or umpire, through the Secretary, in duplicate a written statement of their respective cases with copies of all relevant documents and other evidence on which they rely. A copy of each party's case shall be given to the other party who shall respectively be entitled to put in a rejoinder thereto within such time as may be directed. Normally no more than one rejoinder shall be filed, but the arbitrators or umpire shall have discretion if they or he think or thinks fit to allow more than one rejoinder, on such items as they or he may impose.

10. The arbitrators or umpire, as the case may be, may at their or his discretion enlarge the time for submission of a written statement or rejoinder, but they or he shall not be bound to receive or to consider any written statement or rejoinder of either party tendered after the expiration of the original or subsequently extended time as the case may be.

11. If the arbitrators fail to make their award within the prescribed time or fail to agree upon their award, or if the arbitrators make an award, not being an interim award, upon part only of the subject-matter of the reference, then the umpire appointed by the Committee shall forthwith enter on the reference in respect of the matters which the arbitrators have been unable to agree upon and which do not form part of their award.

12. If either of the appointed arbitrators or the umpire neglects or refuses to act or is incapable of acting or dies the Committee shall substitute and appoint a new arbitrator or umpire as the case may be in accordance with the provisions of the Act.

13. Where the requisition for the appointment of arbitrators is signed by one party only under a contract which includes a clause referring diiputes to arbitration under the rules of the Chamber, the Committee shall give notice in writing of the receipt of such rcquisition to the other party, and if such other party shall fail for fifteen clear days after the service of such notice in accordance with by-law No. 29 to sign a requisition for the appointment of arbitrators the Committee will forthwith appoint, one arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had becn appointed by consent. During the said period of fifteen days the party in default shall be at liberty to submit particulars in writing of his contentions in regard to the dispute. The Committee may, at their discretion, enlarge the time for the appointment of a sole arbitrator or for submission of particulars.

14. Arbitrations under these rules shall be held in the rooms af thc Chamber or at such other place as the arbitrators or umpire, as the case may be, may decide and shall be conducted in accordance with the statutory provisions for the time beiug in force relating to arbitration, The arbitrators or umpire, as the case may be, shall, unless a different intention is expressed in the agreement, have power to—

(*a*) administer oath to the parties and witnesses appearing ;

(*b*) state a special case for the opinion of Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court ;

(*c*) make the award conditional in the alternative ;

(*d*) correct in an award any clerical mistake or error arising from any accidental or omission ;

(*e*) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitraters or umpire, be necssary.

15. The dispute will normally be decided on the written statements of the parties but either party may, with his submission or rejoinder, as the case may be, notice to the arbitrators that he wishes to produce oral evidence before the arbitrators and umpire, and in such case the arbitrators or umpire shall be bound to hear such evidence.

16. In any case of a formal hearing no party shall, without the permission of the arbitrators or umpire, as the case may be, be entitled to appear by counsel, attorney or other advocate or adviser, but the arbitrators or umpire, as the case may be, in their or his discretion may require the parties with or without witness to attend before them or him or before any Committee or Sub-Committee of the Chamber to be examined,

17. All applications which the parties desire to make to the arbitrators or umpire, and all notices to be given to the parties before or during the course of the arbitration, or otherwise in relation thereto, shall be made through the Secretary, who shall communicate the orders and directions of the arbitrarors or umpire thereon to the parties.

18. The parties to the reference and any witness on their behalf, shall, subject to the provision of any law for the time being in force—

(*a*) submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute :

(*b*) produce before the arbitrators or umpire all books, deeds, papers, accounts, w ritings and documents within their possession or power, respectivoly, which may be required or called for by the arbitrators or umpire ;

(*c*) comply with the requirements of the arbitrators or umpire as to the production and selection of samples, and

(*d*) generally do all other things, which during the proceedings on a reference, the arbitrators or umpire may require.

19. The arbitrators or umpire may proceed with the reference notwithstanding any failure to file a written statement within due time and may also proceed with the reference in the absence of any or both of the parties who, after due notice, refuse or neglect to attend.

20. The arbitrators or umpire, as the case may be, may at their or his own instance at any time or times before making a final award, and at the expense of the parties consult, refer to, and act on and adopt the advice, recommendations or suggestions of any Committee or Sub-Committee of the Chamber having or exercising special jurisdiction or powers relating to the particular industry, commodity, produce or branch of trade concerned in the reference or of any experts whether members or not, and may also, at the like expenses of the parties, consult and adopt the advice of solicitors or counsel upon any question of law, evidence, practice or produce arising in the course of the reference.

21. The arbitrators or mpire shall, wrthin four months after entering on the reference or on or before any later day to which they or he with the consent of all parties

concerned in the proceedings, by any writing signed by them, may from time to time extend their or his time therefore, make their or his award in writing as nearly as circumstances admit in forms prescribed by the Committee and shall sign it, and shall give notice in writing, through the Secretary, of the making and signing thereof and of the fees and charges payable in respect of the arbitration and award.

22. Upon receipt of an award of the arbitrators or of an umpire, as the case may be, the Secretary shall countersign it in token of the Chamber's authentication thereof. He shall forthwith supply to each pparty a copy of the award but the names or name of the arbitrators or umpire shall not be disclosed on such copy and such non-disclosure shall not affect the validity of award.

23. If either party to the submission requests, within thirty days from the date of service of the notice of the making of the award, that the award be filed in Court, and if the said party pay the costs and charges and the Chamber's fee for so filling the award the arbitrators or umpire shall cause the award or a signed copy thereof to be filed in Court together with any deposition and documents which have been taken and proved before them or him and the opinion pronounced by the Court on a special case submitted by them or him, if any, in accordance with Section 14 of Act, by forwarding the same under a sealed cover addressed to the Prothonotary and Senior Master of the High Court or the Registrar of the City Civil Court, Bombay, as the case may require with a letter requesting that the same be filed. They or he shall also send together with the award a copy of the notice given to the parties concerned and an affidavit of service of such notice and of attestation of their or his signature on the award.

24. The arbitrators or umpire shall also make an affidavit stating (1) the date on which the award was made and signed, (2) that all depositions taken and documents proved before them or him have been forwarded to the Court along with the award and (3) that no documents which came into their or his possession in the course of the arbitration proceedings have remained with them or him. Such affidavit shall be filed along with the award.

25. The parties shall in all things abide by and obey the award, which shall be binding on the parties and their respective representative notwithstanding the death of any party before or after the making of the award, and such death shall not operate as a revocation of the submission.

26. The fees payable to the Chamber in respect of any arbitration held under the foregoing By-laws shall be such as may be prescribed by the Committee of the Chambers from time to time.

27. The arbitrators or umpire, as the case may be, shall direct in their award by whom the fees or any part thereof payable in respect of any arbitration held under these By-laws shall be paid.

28. Neither of the parties shall bring or prosecute any suit or proceeding whatever against the arbitrators or umpire or the Chamber or any of them for or in repect of the matters in dispute or any of them or of the arbitration nor any such suit or proceeding (save the enforcement of the award) against the other party.

29, All notices required by these rules to be given, shall be in writing and shall be sufficiently given if left at the last known place of abode or business of the party to whom the notice is addressed, or if sent by registered post addressed to him by name at such place of abode or business. If sent by post such notice shall be deemed to have been given at the time at which the letter would in the ordinary course be delivered. In the case of any person who has no place of business in Bombay but who is represented by an agent in Bombay or elsewhere in India, the place of abode or business of the agent shall be deemed that of such person.

30. Subject to any limitations imposed by the Schedule, the arbitrators or umpire as the case may be, shall be entitled to allow fees and expenses of witness, expenses connected with the selection and carriage of samples, conveyance hire, cost of legal or technical advice or proceedings in respect of any matter arising out of the arbitration incurred by the arbitrators or umpire, as the case may be, and, when goods are examined at premises other than those of the Chamber, such additional fees not exceeding double the prescribed fees of any particular reference, for every attendance at such other premises, and any other incidental expenses and charges in connection with or arising out of the reference or award as the arbitrators or umpire, as the case may be, shall in their or his absolute discretion think fit.

SCHEDULE.

Scale of Fees.

1. The following fees will be charged :—

(a) A fee of Rs. 30/- per hour for each arbitrator and umpire. The Committee of

the Chamber reserves the right to charge a higher fee for the arbitrators or umpire in respect of any complicated or lengthy arbitration.

(*b*) When one or both parties to the dispute is or are a member or members of the Chamber an additional fee of Rs. 40/- will be charged for the Chamber's services.

Or

(*o*) When neither party to the dispute is a member of the Chamber an additional fee of Rs. 50/- will be charged for the Chamber's services.

(*d*) A further aum shall be paid to cover the cost of the stamp duty, according to the scale for the time being in force.

(*e*) A fee of Rs. 20/- shall be paid to the Chamber, in addition to the Court fees on the scale for the time being in force, in cases where an award is required to be filed.

2. A deposit of Rs. 200/- against the cost of the arbitration shall be forwarded by each party with the application for arbitration. If the deposit exceeds the total charge for the arbitration the excess amount will be refunded. If the deposit is inadequate, the balance must be paid before delivery of the award.

3. In the event of the arbitration not being proceeded with, the fees deposited will, with the exception of the Chamber's fee, be refunded.

THE MADRAS CHAMBER OF COMMERCE

Tribunal of Arbitration Rules

Passed at a General Meeting held on 5th September, 1952.

Interpretation.

I. *Interpretation Clause.*—In these rules the following words have the following meanings :—

(1) "CHAMBER" means the Madras Chamber of Commerce.

(2) "COMMITTEE" means the General Committee of the Chamber.

(3) "COURT" means the Arbitrator or Arbitrators appointed for determining a particular dispute, or the Umpire where and Umpire has been appointed.

(4) "MEMBER" means any member for the time being of the Chamber.

(5) "PARTY" includes an individual, firm or Company.

(6) "REFERENCE" means any agreement to refer a difference or dispute (present or future) to the Tribunal. Any agreement to refer more than one difference or dispute between the same parties which arise under separate contracts shall be treated as a separate reference in respect of each contract.

(7) "REGISTRAR"—The Registrar of the Tribunal shall be the Secretary for the time being of the Chamber or such other member of the staff of the Chamber as shall be acting for him from time to time.

(8) "TRIBUNAL" means the Tribunal of Arbitration of the Chamber hereby constituted.

Objects and Constitution of Tribunal

II. *Objects.*—The objects of the Tribunal are the determination, settlement and adjustment of disputes and differences relating to trade, business and manufactures, between one party and another, whether any such party resides or carries on business personally or by agent or otherwise in Madras or not and whether such party is a member of the Chamber or not.

III. *Constitution.*—(1) The Tribunal shall consist of such members of assistants to members as may from time to time be selected by the Registrar as hereinafter mentioned and be willing to serve on the Tribunal.

(2) The Registrar shall from time to time as he shall consider necessary select such persons from the classes mentioned in the preceeding rule, who are willing to serve, and shall circulate to all members from time to time a list of the persons so selected. He may also if he thinks fit supply a copy of such list to persons other than members applying for the same.

(3) The Registrar may at any time, if he thinks proper so to do, add to the said list the names of other persons whom he may consider qualified and who are willing to serve on the Tribunal. It shall not be necessary in such case to print or circulate any list of the added names, but a list of the members of the Tribunal complete for the time being shall be kept by the Registrar, and shall always be open to inspection by members on application and, at the discretion of the Registrar, also by persons other than members.

IV. *Registrar.*—The duties of the Registrar of the Tribunal shall ordinarily consist of or include the following :—

He shall, by himself or his subordinates, receive applications to the Tribunal and receive payment of fees and costs, appoint the arbitrator or arbitrators and, where necessary, the Umpire who will constitute the Court to deal with any dispute, receive all applications made to the Court by the parties, and communicate to them the orders and directions of the Court, keep a register of applications to the Tribunal and awards made by any Court, and such other books and memoranda, and make such returns as the Chamber or the Tribunal shall from time to time require, and generally carry out the directions of any Court so constituted and take steps as may be necessary to assist any such Court in the execution of its functions.

Constitution of Court

V. *Applications of Arbitration.*—(1) In every case where a dispute of differnce had arisen between parties who have agreed that such dispute or difference shall be rferred for decision to the Chamber or the Tribunal, an application for arbitration may be addressed by either party to the Registrar.

(2) Such application shall contain :—

(*i*) the names aud addresses of the parties ;

(*ii*) a copy of the agreement between the parties to submit to arbitration under these rules ;

(*iii*) a short preliminary statement of the nature of the dispute and of the claim made,

(3) On receipt of such application, the Registrar shall constitute a Court, approved by the Committee for the adjudication of the dispute.

(4) *Arbitrators or Umpire to have practical knowledge.*—In constituting any Court the Registrar shall select, as Arbitrators or Umpire as the case may be, so far as possible, perons or a person having a practical knowledge of the subject-matter of the contract or contracts in question, but no award shall be invalid nor shall any objection be taken thereto by any party, on the ground that any person so appointed did not possess such practical knowledge, or was not in fact a proper person to act as Arbitrator or Umpire.

(5) *Names of Arbitrators or Umpire.*—The names of the persons or person constituting a Court shall not ordinarily be disclosed to the parties nor shall the parties be entitled to such information as of right. In the event of any of the parties applying on special grounds (to be specified in writing to the Registrar) for the disclosure of the said names or name the decision as to whether such disclosure shall be made or not shall rest in the absolute discretion of the Registrar. The non-disclosure of the said names or name shall not in any case affect the validity of the arbitration proceedings, or of any award therein, nor afford ground of objection to the filing of the award.

VI. *Appointment of Arbitrators.*—Unless the agreement to refer the dispute or difference to the Chamber or Tribunal otherwise expressly provides the Court shall consist of one Arbitrator, who shall be selected by the Registrar from the Tribunal and appointed in writing under his hand, subject to the provisions of Rule V (3).

VII. *Expiry of time.*—If the Court have allowed the time or extended time prescribed by Rule XXV to expire without making any award, and without having signified to the Registrar that they cannot agree, the Registrar shall constitute in manner aforesaid another Court which shall proceed with the arbitration and shall be at liberty to act upon the record of the proceedings then existing and on the evidence, if any, then taken in the arbitration, or to commence the arbitration *de novo.*

VIII. *Appointment of Umpire.*—Subject to the provisions of Rule XXIV, in the event of the Court originally appointed disagreeing the dispute shall be referred to an umpire and the Registrar shall apoint an umpire to be selected from the list aforesaid and approved by the Committee, to constitute the Court for the adjudication of the said dispute ; and such umpire shall then proceed with the arbitration in accordance with these rules.

IX. *Consent to act.*—The consent to act of the arbitrator or arbitrators or umpire as the case may be shall be obtained by the Registrar.

X. *Arbitrators or Umpire failing to act.*—If any appointed arbitrators or umpire neglects or refuses to act, or dies or becomes incapable of acting, the Registrar shall substitute and appoint a new Arbitrator or Umpire as the case may be in manner aforesaid and the Court so reconstituted shall proceed with the arbitration with liberty to act on the record of the proceedings as then existing and on the evidence, if any, then taken in the arbitration, or to commence the proceedings *de novo.*

Conduct of Arbitrations

XI. *Statement to be filed within specified time.*—The parties shall within such time as may be directed by the Court, prepare and submit to the Registrar in duplicate written statements of their respective cases with copies of all relevant documents or other evidence on which they rely. A copy of each party's case shall be given to the other party who shall respectively be entitled to put in a rejoinder thereto within such time as may be directed. Normally no more than one rejoinder shall be filed, but the Court shall have discretion if it thinks fit to allow more than one rejoinder on such terms as it may impose.

XII. *Enlargement of time for submission of statements.*—The Court may at its discretion enlarge the time for submission of a written statement or rejoinder, but it shall not be bound to receive or to consider any written statement or rejoinder of either party tendered after the expiration of the original or subsequently extended time as the case may be.

XIII. *Communications to be made through the Registrar.*—All applications which the parties desire to make to the Court and all notice to be given to the parties before or during the course of the arbitration, or otherwise in relation thereto, shall be made through the Registrar who shall communicate the orders and directions of the Court thereon to the parties.

XIV. *Obligations of the parties.*—The said parties, respectively, shall do all the acts necessary to enab'e the Court to make a just award, and shall not wilfully do or cause, or allow to be done any act to delay or to prevent the Court from making an award, and if either party shall do or cause or allow to be done any such act that party shall pay to the other, such costs as the Court shall deem reasonable.

XV. *Hearing.*—The dispute will normally be decided by the Court on the writteen statements of the parties and oral evidence will not be taken nor will the parties be entitled to appear nor any formal hearing be held. The Court shall have power, however, if it thinks fit to appoint a time and place for the hearing of the reference and to hear oral evidence.

XVI. *Appearance of parties.*—In any case of formal hearing no party shall, without the permission of the Court, be entitled to appear by counsel, attorney or other advocate or adviser, but the Court in its discretion may require the parties, with or without witnesses, to attend before it to be examined.

XVII, *Evidence*—The parties to the reference and any witness on their behalf, shall subject to the provisons of any law for the time being in force :—

((*a*) submit to be examined by the Court on oath or affirmation in relation to the matters in dispute ;
(*b*) produce before the Court all books, deeds, papers, accounts, writings, and documents within their possession or power, respectively, which may be required or called for by the Court ;
(*c*) comply with the requirements of the Court as to the production and selection of samples, and ;
(*d*) generally do all other things, which during the proceedings on a reference, the Court may require.

XVIII, The Court may ;

(*a*) administer oath or affirmation to the parties or witnesses appearing ;
(*b*) state special case for the opinion of the High Court, or give its award in the form of a special case for the opinion of the High Court ;
(*c*) make an award conditional or in the alternative ;
(*d*) correct in an award any clerical mistake or error arising from any accidental slip or omission, or
(*e*) administer to any party to the arbitration such interrogatories as it may consider necessary-

XIX, *Retention and or return of documents*,—The Court shall have full discretion to retain and/or return all books, documents or papers prduced before it in any proceedings and may direct at any time that the books, documents or papers produced or any of them, are to be returned to the parties or either of them on such terms and conditions as the Court may decide.

XX. *Absence of parties.*—The Court may proceed with the reference notwithstanding any failure to file a written statement within the time prescribed under Rule XI and may also proceed with the reference in the absence of any or both of the parties who, having been required to appear before the Court, refuse or neglect to attend.

XXI. *Application to Civil Court to issue process to parties or witnesses.*—If the Court shall at any stage of an arbitration be of the opinion that it is desirable to examine either party or any witness who may not be willing to give evidence before the Court or may be resident outside the City of Madras, the Court may apply to the Civil Court having jurisdiction in that behalf to issue process to such party or witness, including the issue of summonses and commission for the examination of witnesses and summonses to produce documents and may at its discretion require one or both the parties to deposit such fee or foes to cover the cost of any such process as the Court shall consider necessary and in the event of any party who has been called on to deposit such fees failing to do so may dismiss such party's case or deal otherwise with the matter in any way the Court may think just.

XXII. *Court empowered to consult Committees, and solicitors, etc.*—(*a*) The Court may at its own instance at any time or times before making a final award, and at the expense of the parties, consult, refer to act on, and adopt the advice, rocommendations or suggestions of any Committee or Sub-Committee of the Chamber having or exercising special jurisdiction or powers relating to the particular industry, commodity, produce trade or branch of trade concerned in the reference or of any person whether a member of the Chamber or not, and may also, at the like expense of the parties consult and adopt the advice of solicitors or counsel upon any question of law, evidence, practice or procedure arising in the course of the reference.

(*b*) Notwithstanding anything in these Rules, where in any arbitration a question arises as to the price of goods at a particular date in some place other than that in which the arbitration is held, it shall be competent to the Court to invite the Chamber of Commerce of such other place, or any trade organisation of Government official to furnish it with a certificate of such price on such date and it may receive the said certificate as conclusive evidence of such price,

XXIII. *Special case.*—In any case where a party wishes to have any question arising in any proceedings referred to the High Court of Judicature at Madras in the form of a Special case for the opinion of the High Court he shall apply in writing to the Registrar, and with such application shall pay a requisition fee of Rs. 40. If the Court decides to accede to such request the party applying shall also be responsible for all legal or other costs, charges and expenses that may be incurred by the arbitrator or arbitrators or umpire of and incidental to the same and shall make such deposit on account thereof as the Court may decide.

XXIV. *Decision of majority.*—In cases where the Court shall consist of more than two Arbitrators the award of the majority shall prevail and be taken as the decision of the Court.

XXV. *Time for making awards by arbitrators.*—The Court shall make its award in writing within four months after entering on the reference or on or before any later day to which the Court, with the consent of all parties concerned in the proceedings, by any writing signed by them, may from time to time enlarge its time therefor or any extension of time granted by the High Court of Judicature at Madras.

Provided that, if any commission for examination of witnesses shall at any time be issued under the provisions of Rule XXI or Section 43 of the Arbitration Act 1940 or vny other prevision in that behalf, this Rule shall be read as if the above-mentioned initial time of four months were increased by a period of time equal to the time which elapses between the date when the Civil Court concerned shall make its order for the issue of such commission and the date when the same shall have been executed and returned to the Court, and all enlargements and extensions of time as above provided shall take effect as from the expiry of such increased initial time-limit.

XXVI. *Extent of Award*—The Court may make an interim award, and may, by any award, order and determine what it shall think fit to be done by either of the parties, respecting the matters referred.

XXVII. *Signatures to and issue of awards.*—Every award shall be signed by the Court and by the Registrar when completed, a copy of the award shall be sent by the Registrar to each of the parties, but the name or names of the member or members of the Court shall not ordinarily be disclosed on such copy and such non-disclosure shall not affect the vaiidity of the award nor afford any ground of objection to the sma being filed.

XXVIII *Filing of awards.*—The Court shall at the request of any party to the proceedings or of any person claiming under such party or, if so directed by the High Court of Judicature at Madras and upon the payment of fees and charges due in respect of the arbitration and award, and of the costs and charges on filing the award cause the award or a signed copy of it together with any depositions or documents, which may have been taken and proved before it, to be filed in the said High Court.

XXIX. *Award bindings on all parties.*—The parties shall in all things abide by and obey the award, which shall be binding on the parties and their respective representatives notwithstanding the death of any party before or after the making of the award, and such death shall not operate as a revocation of the submission,

XXX. *Further award*·—Whenever an award directs that a certain act or thing shall be done by one party to the reference *e. g.*, delivering or taking (with or without allowance) delivery of goods and such party fails to comply with the award, the party in whose favour the award is made may make a fresh application for a further award determining the amount of damages or compensation payable by reason of such faliure, and the Registrar, on receipt of such application, shall proceed to constitute a new Court, which may or may not consist of the same or of one or more of the members constituting the Court who made the first award, and the new Court shall proceed under these rules to arbitrate on the said application and the award thereon may be filed separately or together with the original award.

XXXI. *Costs, charges, fees etc.*—The costs of the reference and award including the costs, charges, fees end other expenses provided for by these rules shall be in the discretion of the Court, which may direct to and by whom and in what manner and in what proportions such costs, charges, fees and other expenses or any part thereof shall be borne and paid, and may tax and settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

Fee

XXXII. Subject to any limitation imposed by the rules following, the Court shall be entitled to allow fees and expenses of witnesess, expensss connected with the selection and carriage of samples, survey charges, conveyance hire, cost of legal or technical advice or proceedings in respect of any matter arising out of the arbitration incurred by the Court and, when goods are examined at premises other than those of the Chamber, such additional fees not exceeding double the prescribed fees of any particular reference, for every attendance at such other premises, and any other incidental expenses and charges in connection with or arising out of the reference or award as the Court shall in its absolute discretion think fit.

XXXIII. *Copies of proceedings,*—No party is entitled to copies of proceedings before arbitrators or an umpire. In case where the Tribunal is requested to make copies of cases or exhibits thereto, submitted by either party, for the purposes of sending such copies to the other party then the charge, for every copy made, shall be six annas a folio of 90 words (seven figures to one word.)

XXXIV. The fees, costs, charges and other expenses of and incidental to the referenca and the award (if any) which are to be payable and which are not otherwise provided for under these Rules shall be the following, *viz.* :—

(1) *Certified Copies of awards*—A fee of Rs. 2 is payable for each certified copy of an award.

(2) *Stamp duties*—Stamp duties are to be paid in all cases in accordance with the scale of stamp duties for the time being imposed by law.

(3) *Filing awards*—A fee of Rs 8 to the Chamber in addition to the Court fees on the scale for the time being in force is payable by the party requiring the award to be filed.

(4) *Scale of Arbitration Fees* :—

(i) Institution fee : Rs. 40 in cases where one or both parties is or are a member or members of the Chamber.

Rs. 80 in cases where neither Party is a member of the Chamber.

(ii) *Arbitrators* :—

(*a*) A flat fee of Rs. 50 per arbitration per Arbitrator and/or Umpire.

(*b*) In the case of a single Arbitrator, the fee will be Rs, 100.

(*c*) Committee to haoe power to increase the fees in special cases up to a maximum of Rs 200, to be apportioned between the Chamber and the Arbitrators as they see fit.

It shall be open to the parties in any particular case to enter into an agreement in writing to pay specified fees of a larger amount than those shown above.

(5) The Institution fee and the Arbitration fees shall be deposited with the Registrar at the time of application. The Committee shall have power to direct that such further sum of money asythey may think fit shall be deposited with the Registrar as security for the fees, costs and expenses of the arbitration.

(6) *Settled or withdrawn cases.*—In cases where the party instituting a reference desires to withdraw it before a Court has been constituted the Institution Fee only will be charged but if a Court has been constituted before the application to withdraw the reference has been received by the Registrar then full institution fee and arbitrators' fee will be payable.

(7) *Returned cases.*—In cases in which the Court decides that it has no jurisdiction to act and refuses to proceed with a reference to it, one half of the Institution Fee together with arbitration fees, and any legal or other costs and expenses incurred by them, will be payable.

XXXV. The Committee of the Chamber shall have the power to alter, modify or vary the foregoing table of fees from time to time.

Indiemnity of Arbitrators

XXXVI. No party shall bring or prosecute any suit or proceedings whatever against the Court, or any member thereof, for or in respect of any matter or thing purporting to be done under these rules nor any suit or proceeding (save for the enforcement of the award) against the other party.

Notices

XXXVII. All notices required by these rules to be given. shall be in writing and shall be sufficiently given if left at the last known place of abode or business of the party to whom the notice is addressed, or if sent by registered post addressed to him by name at such place of abode or business. If sent by post such notice shall be deemed to have been given at the time at which the letter would in the ordinary course be delivered. In the case of any person who has no place of business in Madras, but who is represented by an agent in Madras or elsewhere in India, the place of abode or business of the agent shall be deemed that of such person.

XXXVIII. The marginal notes shall not affect the oonstruction thereof.

XXXIX. These rules shall come into operation as on and from the fifth day of September 1952 ond shall apply to all applications made for arbitrators on and after that date. All references pending on the said fifth day of September, 1952 shall be regulated by the rules at present in force.

BY-LAWS MADE BY KARACHI CHAMBER OF COMMERCE

BY-LAW No 1.

Surveys

When Members of the Chamber or parties who are not Members of the Chamber have a dispute as to the quality or condition of merchandise and both parties desire the Chamber to appoint a Surveyor or Surveyors for the settlement of such disputes, the Committee shall undertake to nominate a surveyor or surveyors for such purpose under the following regulations :—

(*a*) That on nomination of the surveyor or surveyors the parties interested will sign a reference of the dispute to the same on form 'A' and agree to accept their decision as final.

(*b*) That if two surveyors disagree. they shall have the right to nominate and appoint an umpire whose decision shall be final.

(*c*) Where one or both parties to the dispute are Members of the Chamber, a fee of Rs. 15/- for each surveyor and Rs. 15/- for the umpire (if any) will be paid by the parties in such proportion as the surveyors or umpire may direct, Where none of the parties to the dispute are Members of the Chamber, the fee payable will be double the above fee.

(*d*) That a fee of Rs. 15/- in the case of Members and Rs. 30/- in the case of Non-Members be paid to the Chamber with the first application for the nomination of surveyors under this By-Laws.

(*e*) That in all cases of Surveys, unless the surveyors themselves otherwise decide, samples will be jointly drawn and sealed by both the parties to the dispute themselves, or their representatives. and shall be submitted to the surveyors.

(*f*) That in cases where parties to the survey cannot agree to draw samples, the surveyors shall be at liberty to have such samples drawn by their own

godown establishment or by other men especially appointed by them to do so, and a charge not exceeding Rs. 5/- shall be made for each sample so drawn to be paid to the surveyors.

(*g*) That in cases where the surveyors consider it expedient to draw samples themselves cr where the nature of the survey necessitates that the surveyors themselves shall inspect goods in godowns or yards or where it is necessary to examine a consignment in bulk, the surveyors shall be at liberty to levy survey fee at their option not exceeding Rs. 30/- each per hour spent on such examination.

(*h*) The surveyor or surveyors and the umpire (if any) shall be selected from amon° Members of the Chamber of Managers and Assistants in firms who are Members of Chamber, and the Managing Committee have discretion to appoint such surveyors as they consider competent.

(*i*) That it shall be in the discretion of the Managing Committee to appoint surveyors on the requistion of one party only, provided satisfactory reasons are given and provided such party is a Member of the Chamber.

(*j*) That all survey reports on surveys held under this By-law shall be in form ‚B.'

Form A.

Whereas a dispute has arisen and is still subsisting between us regarding the quality and
—— condition of the following goods.....
or
and whereas we have jointly and severally asked the Committee of the Karachi Chamber of Commerce to appoint a duly qualified surveyor or surveyors for the settlement of the same under By-Law I of the Chamber By-Laws and whereas the Committee of the Chamber have appointed.....
and.....
to act in this matter as Surveyors, now we hereby agree to abide by the decision of the said.....
and.....
or of the Umpire to whom under the Chamber By-Law the said Surveyors may refer the dispute in case they should disagree.

Dated, Karachi, 19 .

Form B.

Having been appointed by the Committee of the Karachi Chamber of Commerce at the request of.....
and.....
under the provisions of By-Law 1 of the Karachi Chamber of Commerce By-Laws to survey.

Etcetra.....

BY-LAW No. 2

By-Law to regulate procedure with regard to Arbitration under the control of the Chamber.

When two Members of the Chamber, or when a Member of the Chamber and a party who is not a Member of the same. have agreed to refer disputes to the arbitration of the Chamber, or to an arbitrator or arbitrators nominated by thu Chamber as provided for in Chapter II Sec. 4 of the Arbitration Act (X of 1940), the Committee of the Chamber will undertake to nominate an arbitrator or arbitrators under the following regulations :—

(*a*) That the contract in which the Arbitration agreement is contained be placed before the Committee.

(*b*) That if both parties agree to the appointment of an arbitrator or arbitrators by the Committee of the Chamber, a rcquisition to that effect bc signed by them on form 'C.'

(*c*) That where one of the parties to sign such requisition, the other party alone shall sign the requisition form 'D.'

(*d*) That thereupon the Committee of the Chamber shall duly appoint an arbitrator or arbitrators (as provided for in the Arbitration agreement) in form 'E.' and shall give due notice in writing of such appointment to each party and to the arbitrator or arbitrators by letter registered for acknowledgment.

(*e*) That where arbitration agreement does not specify whether one or two arbitrators shall act the reference shall be to two arbitrators.

(*f*) That where nothing to the contrary is contained in the Arbitration Agreement the arbitrators shall appoint their own umpire as provided for in the first schedule af the Arbitration Act (X of 1940) *vide* section 3 of that Act.

(*g*) That where the arbitration agreement provides that the umpire shall also be appointed by the Chamber, the Committee will so appoint him on a requisition signed by the two arbitrators.

(*h*) That all awards in arbitrations held under the control of the Chamber shall be made in form 'F.'

(*i*) That only Members of the Chamber or Assistants of firms who are Members of the Chamber, shall be eligible to act as arbitrators.

(*j*) That all arbitrations shall be held in the Chamber Rooms or such other places of which the arbitrators may specially approve, and that all arbitrations shall be held in accordance with the provisions of the Arbitration Act (X of 1940).

(*k*) That the arbitrator or arbitrators and umpire, if any, shall fix their own fees as provided for in Article 8 of the First Schedule pertaining to Section 3 of the Arbitration Act (X of 1940).

(*l*) That a fee of Rs. 30 shall be paid to the Chamber funds for each arbitrator or umpire appointed under this By-Law, in addition to such fees as may be charged by the arbitrators and umpire. The Chamber's fee shall be payable when the requisition for the appointment is sent in.

When two parties neither of whom are Members of the Chamber have agreed to refer disputes to arbitration of the Chamber or to an arbitrator or arbitrators nominated by the Chamber as provided for in Section 4 of the Arbitration Act (X of 1940), the Committee of the Chamber will undertake to nominate an arbitrator or arbitrators under the regulations above laid down, with the following *additional conditions* notwithstanding anything which may have been stated to the contrary under the foregoing regulations, (*a*—*l*).

(*m*) Both parties must agree to the appointment of an arbitrator or arbitrators by the Committee of the Chamber, and must sign a requisition to that effect on Form 'C', Form 'D' not being acceptable as a requisition.

(*n*) That a fee of Rs. 50 shall be paid to the Chamber funds for each arbitrator or umpire appointed under this By-Law, in addition to such fees as may be charged by the arbitrators and umpire. The Chamber's fee shall be payable when the requisition for the appointment is sent in.

Form C.

IN THE MATTER OF ARBITRATION ACT

Whereas by a contract / an agreement ———— between..... .....

and.....

dated.....it has been agreed that differences arising thereunder shall be referred to the arbitration of the Karachi Chamber of Commerce or an arbitrator / two arbitrators ———— appointed by the Karachi Chamber of Commerce and whereas such differences have arison and are still subsiting between us, now we the nndersigned parties to the above contract / agreement ———— hereby refer all the differences between us to the arbitration of the arbitrator or arbitrators so appointed by the Karachi Chamber of Commerce and agree ro accept their award or the award of the umpire they may appoint as final.

To be signed by both parties.

Dated, Karachi, 19 .

1 Re. Stamp.

Form D.

IN THE MATTER OF ARBITRATION ACT (X OF 1940).

Whereas by a contract / an agreement ———— between.....

and.....
dated.....it has been agreed that differences arising thereunder shall be referred to the arbitration of the Karachi Chamber of Commerce or to an arbitrator / two arbitrators appointed by the Karachi Chamber of Commerce and whereas such differences have arisen and are still subsisting and whereas the other party..... has failed to request the Chamber to appoint an arbitrator after fifteen clear days of the service of a notice by the undersigned in writing calling upon them to do so now we hereby refer all such differences to the arbitration of the arbitrator or arbitrators so nominated by the Karachi Chamber of Commerce, whose award or the award of the umpire whom they may appoint shall be binding on both parties.

(Signed)

Karachi, Dated 19 . Re. 1/- Stamp.

Form E.

IN THE MATTER OF ARBITRATION ACT
(X of 1940)

Whereas by a contract / an agreement between.....
and.....
dated.....it has been provided that any differences or dispute arising thereunder shall be referred to the arbitration of the Karachi Chamber of Commerce or an arbitrator / two arbitrators apointed by the Karachi Chamber of Commerce and whereas from a reference hereto attachod it appears that such differencs have arisen and are still subsisting and are to be referred to arbitration as provided for in the said contract / agreement

now I, the undersigned, Chairman of the Karachi Chamber of Commerce, on behalf and by order of the Managing Committee of the Karachi Chamber of Commerce and under the provision of the By-Laws of the Karachi Chamber of Commerce do hereby refer all the said differences and disputes to the award of.....
.....
Chairman.
both of Karachi.
Secretary.
Dated, Karachi,————1 Re. Stamp.

Form F.

Arbitration Award.

In the matter of arbitration Act (X of 1940) and an Arbitration between.....
and.....

Whereas in pursuance of an agreement / a contract in writing dated.....the matters in difference between the two parties above named are to be decided by an arbitration of the Karachi Chamber of Commerce or an arbitrator / two arbitrators appointed by the Karachi Chamber of Commerce.....and whereas by references dated.....and.....
dated.....we the undersigned.....
have been duly appointed by the Chairman and Committee of the said Karachi Chamber of Commerce to arbitrate in the said dispute.

Now we the said.....
and.....
carefully considered all the evidence laid before us award as follows :—

BY-LAW No. 3.

Committee's opinion on questions of Custom of Trade or Port.

If any Member or non-Member of the Chamber should submit to the Committee a question regarding the Custom of the trade or of the Port of Karachi, the Committee will

take the same into consideration and express its opinion thereon. The Committee may refer the question to a special Sub-Committee for report or may take evidence with it may consider necessary before expressing its opinion. The Committee may decline to express an opinion on the plea that points of law are involved.

Should the Members of the Committee be unanimous in their opinion, the same shall be forthwith comunicated to the firm who submitted the question ; should opinions differ, the opinion of the majority shall be communicated to the applicant who should be informed of the number of votes for and against the same.

A fee of Rs. 15 to the Chamber funds shall be leviable in advance for an expression of the Committee's opinion under this By-Law in the casc of Members. In the case of Non-Members a fee of Rs. 25/- will be charged.

BY-LAW No. 4.

Tonnagc Scale and Measurement.

The Karachi Tonnage Scale issued by the Chamber (published seperately) and the Rules for measurement contained in By-Law No 5 shall be observed in regulating the trade of Karachi in the absence of any special agreement to the contrary-

BY-LAW No. 5.

Measurement fvr Tonnage of Bales, Cases and Packages of Merchandise ;—

(*a*) A Public Measurer shall be appointed, under the authority of the Karachi Chamber of Commerce, to measure all merchandise, freight on which is ordinarily payable on measurement. Such measurement shall be taken at the Native Jetty, Keamari and the Thole Produce Yeard. For measurement in private premises special arrangements must be made with the Secretary of the Chamber.

(b) No measurements shall be held good except such as are taken by a Public Measurer. and with instruments bearing the stamp of the Chamber.

(*c*) Such instruments shall be supplied and issued to the Measurers by the Chambers.

(*d*) All instruments shall be submitted to the Secretary of the Chambor at duly prescribed intervals and a register of such inspections shall be kept.

(*e*) The Public Measurer shall be responsible for the good order of his instruments and for the prompt return to the Secretary of the Chamber of such as are defective or doubtful.

(*f*) The Chamber's stamp borne by instruments that are found by the Secretary to be defective shall be defaced by him.

(g) Instruments on which the Chamber's stamp has boen defaced may be re-stamped under the direction of the Secretary when they are in good order.

(*h*) Certificates of measurement shall be issued in such form and in such manner as the Committee for the time being shall, from time to time, approve.

(*i*) A fee, the amonnt of which shall in no case exceed one anna per bale, oase or package, but which may be regulated by the Chamber Committee from time to time, shall be levied on all merchandise measured by the Public Measurer.

(*j*) No Measurement Slip for merchandise measured shall be issued unless—

(i) there has been produced to the Measurement Department the relative Customs House Pass or a requisition in writing by the Exporter or his Agent which must detail—

(*a*) Name of Shipper.
(*b*) Namo of veosel.
(*c*) Number of bales, cases or packages and marks thereon.
(*d*) Destination of the goods measured.

(ii) Such Slip bears an endorsement to the effect that th fee has been paid.

Provided that Members of the Chamber, and such other non-Mombers as may be approved by the Managing Committee, shall be permitted to run monthly accounts provided they give an understanding in writing to pay such monthly accounts within five days of prosentation of bills.

(*k*) In measuring a bale, the Measurer should take care that the legs of the calipers touch the ground.

For length the callipers should be placed over the greatest length with all projections doubled under and the callipers parallel to the side of the bale.

For width and depth the callipers should be placed over the greatest width and depth—over the lashing as near the centre as possible, but not over the knots.

(*l*) The following proportion of total shipments of bales or packages shall be measured ;—

Skins and Tannad Hides.—One hundred (100) per cent.

Raw Hides.—Fifty (50) per cent.

All other bales and pocages of uniform dimensions.

The Measurer shall use his judgment as to the proportion to be measured, but in no case shall such proportion be less than 5 per cent.

In all cases of pressed bales.—If lots from various presses aro tendered for measurement, such lots must be stored according to their dimensions before measurement.

(*m*) Bales, cases or paekages not of uniform dimensions shall be measured individually.

(*n*) The Measurcr shall give a certificate of measurement and furnish the Shipper with a copy thereof. The certificate shall state :

Name of Shipper, name of vessel, number and marks of bales, cases or packages, destination, dimensions, date, time and place of measurement.

(*o*) Goods measured shall be sent alongside the vessel within 36 hours of the measurement (whether permitting) or the certificate shall be void. and the packages shall be remeasured, written notice however, in such case, being given to the Shipper ; but should the goods be shut out or transferred to another steamer for any valid reason, the Measurer shall substitute the name of the on-carrying for the original steamer in the certificate free of charge. provided that not more than a week's interval between the date of the certificate and shipment be allowed.

(*p*) In cases of import, cargo for which measurement is required it shall be incumbent upon the party requiring such measurement to advise the Public Measurer when the cargo is ready for measurement. to send a representative. with transport for the Measurer and Callipers, to the Public Measurer's Office, and actually to conduct the Measurer to the place where the cargo awaiting measurement lies.

(*q*) Fees for measurement of Timber shall be arranged with the Secretary and the Rules for measurement shall be .—

Length in feet and inches and found with tape.

Breadth—The mean of two measurements taken with callipers at thickest and thinnest portions.

Depth do. do. do. do.

(*r*) The salaries of the Measurers and all other expenses connected with this scheme of measurement shall be paid by the Chamber.

(*s*) All matters pertaining tn measurements, as defined above, including the appointment of the Measurer, the fixing of fees, the payment of the same, and the doing of all things necessary for a proper and economical working of the scheme. shall be placed in the charge of the Committee of the Chamber.

(t) All goods shipped by measurement, or import cargo measurements which may be required for purposes of check, shall be measured by the Public Measurer. and any complaints against the Public Measuror shall be made to the committee of the Chamber of Commerce.

BY-LAW No 6.

Weighment and sampling.

(*a*) The Public Measurer, if required, shall weigh bag cargo and other goods and issue certificate of such weights, all labour and other expenses in connectiun with such weighment to be borne by the applicant, The charge of weighing 5% of the bags to be Rs. 10 for each five hundred tons or part thereof, and the charge for weighing 10% of the bags to be Rs 12-8-0 for each five hundred tons or part thereof.

(*b*) For drawing samples from 2% thc charge to be Rs. 5 for each five hundred tons or part thereof, and euch samples shall be sealed with the chamber seal.

(*c*) The fee for analysing each sample drawn and for expressing an opinion re : "Fair Average Quality" for such samples shall be Rs 15/- for each 500 tons or part thereof. The fee for expressing an opinion for "Fair Average Quality" only shall be Rs. 5/. for each 500 tons or part thereof with a minimum fee of Rs. 15/-. A registration fee of Rs. 5/- shall be charged by the Chamber for each certificate of analysis and/or "Fair Average Quality."

(*d*) The weighment fee for cargo not otherwise provided for to be Rs. 2/8/- for every 25 packages or part thereof if the weighment takes place in the Port Trust Areas, the North Western Railway Yards or in the immediate vicinity thereof. Elsewhere the fee to be Rs. 5/- for every 25 packages or part thereof-

(*e*) Cotton

(*i*) Supervision of weightment and certificates of weight notes ... 1-1/2 annas per bale.

(*ii*) Drawing and Despatching samples from 5% of Cotton shipments including drawing, sealing and despatching according to instruc-

tions but excluding the payment of freight, postage and other charges on samples ... ... Rs. 7/ 8/; per. 100 bales.

BY-LAW No. 7.

Contract

Contracts for produce made by Members of the Chamber shall. in the absence of anv express stipulatian to the contrary, be understood to mean fair merchantable quality, and any disputes arising out of such contracts shall be referred to two merchants, Members ef the Chamber.

BY-LAW No. 8.

Coal.

Engine shunting of the weighment of coal in trucks at Keamari shall be taken to be the custom of the Port of Karachi.

BY-LAW No. 9.

Sterling Freight.

All freight stated in Sterling payable in Karachi (in the absence of stipulation to the contrary) shall be converted into Pakistan Currency at the Bank's best selling rate for demand on London ruling at the close of the first day on which the steamer commences to discharge or load respectively and such rate shall be for all Bills of Landing presented for that steamer.

BY-LAW No. 10.

Delivery of goods.

Goods falling due for delivery on a Sunday, or on a Charter Party Holiday, must be delivered on the previous day.

BY-LAW No. 11.

General Average.

General Average deposits called for shall be deposited in a Bank in Karachi in the names of two Trustees of whom one shall be a consignee (the largest it possible), and the other the Agent of the steamer under General Average, The rate of exchange for such deposits shall be that for Bank Bills on London payable on demand, current on the date of the steamer's arrival, refunds being made at the same rate. In the case of transhipped goods landed at Karachi (when the General Average collections are made on account of the origional stsamer) such collections may be remitted to the destination of the said original steamer there to be deposited under the names of the two Trustees properly appointed and in such Bank there as they shall decide. In the case of steamers under General Average at Bombay (or other port) proceeding to Karachi to complete discharge of balance of cargo, deposite colleted in Karachi may be remitted to the first port of discharge to be property lodged with the funds collected there. All General Average deposit receipts shall centain the following stipulations :—

The refund will be made only to the bearer of snd in exchange for the original receipt and will be the whole balance of the deposit after satisfying the General Average claim without reduction or set off or any other claims of the ship-owner against the shipper or consignee.

BY-LAW No. 12.

Imports.

The following shall be considered the customary ex-godown terms on imports into Karachi :—

For Piece-goods and Yarns—

Discount 1/2% (temporarily suspended.)

Due Date—Date of arrival. *Interest* 6% per annum for six months. thereafter 9% per annum.

All other goods except Metals—Discount *Nil.*

Due Date—Date of arrival. *Interest* 6% per annum for six months, thereafter 9% per annum.

The above stipulations regarding interest shall not interfere with the contract right of all firms to resell goods, on dealer's account, which have not been cleard "on arrival," should they consider it expedient to do so.

BY-LAW No. 13.

Discharging and Loading Cargo.

A customary day's work for steamers discharging or loading at the Port of Karachi shall be as follows :—

(a) *For steamers at the wharves* ;

(1) Loading and discharging :			*4 hatches.*	*5 or more hatches.*
(*i*) Grain. tons	...	...	1,600	1,750
(*ii*) Cotton, tons	...	...	800	1,750
(2) Discharging :				
(*i*) General cargo, tons	...	...	320	400
(*b*) *For steamers in the stream* :				
(1) Loading :				
Salt	...	...	1,000	1,200
(2) Discharging :				
Coal	...	...	800	900

(*c*) Figures for Grain and Cotton can be increased by 10% if the supply in the jetty is regular and plentiful.

(*d*) Timber and merchandise requiring special handling excepted.

(*e*) Wcights shown are deadweight tons.

BY-LAW No. 14.

Regulations to be observed for the election of tne Chamber's representatives on the Karachi Port Trust, the Karachi Municipal Corporation, and ihe North Western Railway Karachi Advisory Committee ,

(*a*) The names of those who wish to become candidates shall be sent in to the Secretary of the Chamber seven clear days before the election takes place.

(*b*) Not more than one representative of any one Member of the Chamber shall serve at one time on the Karachi Port Trust, the Karachi Municipal Corporation, or the North Western Railway Karachi Branch Advisory Committee as Chamber representative,

(*c*) The Secretary shall circulate the names of the candidates to Members three clear days before election.

(*d*) Only thc representatives (as set forth in clause 27 of the Articles of Association or the Chamber) of Ordinary Members shall be eligiblc for election.

Only Ordinary Members of the Chamber shall be eligible to vote. Votes shall be in writing signed by the Members votlng. No proxies shall be allowed.

(*e*) The Committee shall appoint two days, which shall be duly notified to Members, during which the votes shall be received at the office of the Chamber, between the hours of 10 a.m. and 5 p.m. each day.

(*f*) Elections of Port Trustees by the Chamber to succeed Trustees whose term of office expires shall be held not earlier than the fifteenth and not later than the last day of February next procceding the first day of April from which the term of office of the new Trustees is to commence, in accordance with the Karachi Port Trust Act 1886, Section 12.

(*g*) The Committee shall appoint two Scrutineers who within 24 hours of the closing of the ballot on the second day, shall examine the votes and declare the result in writing.

(*h*) The candidates who have the largest number of votes shall be declared duly electcd.

(*i*) In the event of an equality of votes preventing the due election of any of the candidates, the Members of the Chamber shall vote afresh in the manner above laid down.

(*j*) The above course shall be followed in the appointment of a representative to fill any vacancy, whether of a permanent or acting nature . provided always that in the event of a representative being temporarily absent from Karachi, or unable to attend meeting of the body on which he is a rcpresentative of the Chamber, the Committee may appoint a substitute for a period which shall not exceed three monthes in place of the representative who is unable to attend.

BENGAL NATIONAL CHAMBER OF COMMERCE

Tribunal of Arbitration

RULES

1. *Interpretation Clause.*—In these rules the following words have the following meanings :—

(1) "Chamber" means the Bengal Chamber of Commerce.

(2) "Committee" means the Committee of the Chamber.

(3) "Court" means the Arbitrator or Arbitrators appointed for determining a particular dispute, or the Umpire where an umpire has been appointed.

(4) "Member" means any members for the time being of the Chamber.

(5) "Party" includes an individual, firm or Company.

(6) "Reference" means any agreement to refer a difference or dispute (present or future) to the Tribunal. Any agreement to refer more than one difference or dispute between the same parties which arise under seperate contract shall be treated as a seperate referenee in respect of each contract.

(7) "Registrar" means the Registrar of the Tribunal who shall be the Secretary for the time being of the Chamber of such other member of the Secretarial staff of the Chamber as shall be acting for him from time to time.

(8) "Tribunal" means the Tribunal of arbitration of the Chamber hereby constituted.

OBJECTS AND CONSTITUTION OF THE TRIBUNAL

II. *Objects.*—The obieets of the Tribunal are the determination, settlement and adjustment of disputes and differences relating to trade, business and manufactures between one party and another, whether such party is a member of the Chamber or not.

III. *Constitution.*—(1) The Trlbunal shall consist of and be constituted by such persons as may, from time to time, be selected bv the Committee of the Chamber as hereinafter mentioned and be willing to serve on the Tribunal.

(2) The Committee shall, from time to time as they shall eonsider necessary, select and make a list of the persons (whether members of the Chamber or not) who may be willing to serve to constitute the Tribunal for the time being.

(3) The Committee may at any time, if they think proper so to do, add to the said list the names of other persons qualified as aforesaid. A list of the members of the Tribunal complete for the time being shall be kept by the Registrar, and shall always be open for inspection by members on application and, at the discretion of the Registrar, also by persons other than members.

IV. *Registrar.*—The duties of the Registrar of the Tribunal shall ordinarily consist of or include the following ;—

He shall by himself or his subordinates, receive applications to the Tribunal and receive payment of fees and costs, appoint the arbitrator or arbitrators and, where necessary, the umpire who will constitute the Court to deal with any dispute, receive all applications made to the Court by the parties, and communicate to them the orders and directions of the Court, keep a register of applications to the Tribunal and of awards made by any Court and such other books and memoranda, and make such returns as the Chamber er the Tribunal shall from time to time require, and generally carry out the directions of any Court so constituted, and take such steps as may be necessary to assist any such Court in the execution of its functions.

CONSTITUTION OF COURTS

V. *Applieations for arbitration,*—(1) In every case where a dispute has arisen either in relation to contract which provides for a decision thereof by the Chamber or the Tribunal or where the parties to a dispute agree in writing to refer it for settlement by the arbitration of the Chamber or of the Tribunal, and application for arbitration may be addressed by either party to the Registrar ; a statement of the case may be submitted along with the application.

(2) *Appointment of arbitrators and umpire.*—The Registrar, on receipt of such application or at such time thereafter as he may think convenient, shall constitute the Court for the adjudication of the dispute by appointing and nominating in writing arbitrators who shall be selected by the Registrar from the Tribunal constituted as aforesaid.

(3) In the event of and upon the arbitrators disagreeing, the dispute shall be referred to an Umpire, and the Registrar shall appoint and nominate an Umpire, to be selected from the list aforesaid, to constitute the Court for the adjudication of the said dispute, and such Umpire shall then proceed with the arbitration in accordance with these rules.

(4) The consent to act as the Arbitrator or Arbitrators or Umpire, as the case may be shall be obtained by the Registrar, and the arbitration shall proceed in accordance with these rules.

(5) The selection made by the Registrar shall be final and shall not be questioned on any ground.

(6) *Names of arbitration or umpire.*—The name or names of the person or persons constituting the Court shall not ordinarily be disclosed to the parties nor shall the parties be entitled to such information as of right. In the event of any of the parties applying on special ground (to be specified in writing to the Registrar) for the disclosure of the said

name or names, the decision as to whether such disclosure will be made or not shall rest in the absolute discretion of the Registrar. The non-disclosure of the said name or names shall not in any case affect the validity of the arbitration proceedings, or of any award therein nor afford ground of objection io the filing of the Award.

(7) *Arbitrators or umpires to have practical knowledge.*—In making any appointment and nomination as afosesaid, the Registrar shall select, as far as possible, a person or persons having practical knowledge of the subject-matter of the contract or contracts in question and the Registrar shall not appoint any person who for any reason within his knowledge would not be a proper person to act as Arbitrator or Umpire in the particular matter, but no award shall be invalid nor shall any objection be taken thereto by any party, on the ground that any person so nominated and appointed did not possess such practical knowledge, or was not in fact a proper person to act as Arbitrator or Umpire.

(8) *Expiry of time.*—If the Court has allowed the time or the extended time to expire without making any award, and without having signified to the Registrar that it cannot agree, the Registrar shall constitute in manner aforesaid another Court which shall proceed with the arbitration and shall be at liberty to act upon the record of the proceedings as then existing and on the evidence, if any, then taken in the arbitration or to commence the arbitration *de novo.*

(9) *Arbitrators or umpire failing to act.*—If any Arbitrator or Umpire declines or fails to act or dies or becomes incapable of acting, the Registrar may substitute and appoint a new Arbitrator or Umpire, as the case may be, in manner aforesaid, and the Court so reconstituted shall proceed with the arbitration with the liberty to act on the record of the proceedings as then existing and on the evidence, if any, then taken in the arbitration, or to commence the arbitration *de novo.*

CONDUCT OF ARBITRATIONS

VI. *Statements to be filed within specified time.*—The parties shall within such time as may be directed by the Court prepare and submit to the Registrar in duplicate a written statement of their respective cases with copies of all relevant documents or other evidence on which they rely. Provided that when the applicant has filed a Statement of the case along with the application for arbitration, the Registrar may forward, without waiting for the constitution of the Court, the necessary papers to the other party calling upon them to submit their reply within such time as the Registrar may allow. A copy of each party's case shall be given to the other party who shall respectively be entitled to put in a rejoinder thereto within such time as may be directed. Normally no more than one rejoinder shall be filed, but the Court shall have discretion, if it thinks fit, to allow more than one rejoinder, on such terms as it may impose,

VII. *Enlargement of time for submission of statement.*—The Court may at its discretion enlarge the time for submission of a written statement or rejoinder, but it shall not be bound to receive or to consider any written statement or rejoinder, of either party tendered after the expiration of the original or the subsequeutly extended time as the case may be.

VIII. *Communications to be made through the Registrar.*—All applications which the parties desire to make to the Court and all notices to be given the parties before or during the course of the arbitration, or otherwise in relation thereto, shall be made through the Registrar who shall communicate the orders and directions of the Court thereon to the parties

IX. *Obligation of the parties.*—The said parties, respectively shall do all the acts necessary to enable the Court to make a just award, and shall not wilfully do or cause or allow to be done any act to delay or to prevent the Court from making an award, and if either party shall do or cause or allow to be done any such act that party shall pay to the other such costs as the Court shall deem reasonable,

X. *Hearing.*—The dispute will normally be decided by the Court on the written statements of the parties and oral evidence will not be taken nor will the parties be entitled to appear, or any formal hearing be held. Provided that the Court shall have power, if it thinks fit, to appoint a time and place for the hearing of the reference and to hear oral evidence.

XI. *Appearance of parties.*—In any case of a formal hearing no party shall, without the permission of the Court, be entitled to appear by counsel, attorney or other advocate or adviser, but the Court in its discretion may requre the parties with or without witness to attend before it or before any Committee or Sub-Committee of the Chamber to be examined.

XII. *Evidence.*—The parties to the reference and any witness on their behalf, shall. subject to the provision of any law for the time beiug in force—

(*a*) submit to be examined by the Court on oath or affirmation in relation to the matters in dispute ;

(*b*) produce before the Court all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for by the Court ;

(*c*) comply with the requirements of the Court as to the production and selection of samples, and

(*d*) generally do all other things which, during the proceedings on a reference, the Court may require.

XIII. The Court may :—

(*a*) administer oath or affirmation to the parties or witnesses appearing ;

(*b*) state a special case for the opinion of the High Court, or give its award in the form of a special case for the opinion of the High Court ;

(*c*) make an award conditional or, in the alternative ;

(*d*) correct in an award any clerical mistake or error arising from any accidental slip or omission, or

(*e*) administer to any party to the arbitration such interrogatories as it may consider necessary.

XIV. *Retention or return of documents.*—The Court shall have full discretion to retain and/or return all books, documents or papers produced before it in any proceedings and may direct at any time that the books, documents or papers produced or any of them, are to be returned to the parties or either of them on such terms and conditions as the Court may decide

XV. *Absence of parties.*—The Court may proceed with the reference notwithstanding any faliure to file a written statement within due time and may also proceed with the reference in the absence of any or both of the parties who- being entitled to appear before the Court after due notice, refuse or neglect to attend.

XVI. *Application to Civil Court to issue process to parties or witnesses* —If the Court shall at any stage of an arbitration be of the opinion that it is desirable to examine either party or any witness who may not be willing to give evidence before the Court or may be resident outside the City of Calcutta, the Court may apply to the Civil Court having jurisdiction in that behalf to issue process to such party or witness, including the issue of summonses and commission for the examination of witnesses and summonses to produce documents, and may at its discretion require one or both the parties to deposit snch fee or fees to cover the cost of any such process at the Court shall consider necessary and, in the event of any party who has been called to deposit such fees failing to do so, may dismiss such party's case or deal otherwise with the matter in any way the Court may think just.

XVII. *Court empowerd to consult Committees and solicitors and Counsel.*—The Court may at its own instance, at any time or times before making a final award, and at the expense of the parties, consult, refer to, and act on and adopt the advice, recomendations or suggestions of any Committee or Sub-Committee of the Chamber having or exercising special jurisdiction or powers relating to the particular industry, commodity, produce or branch of trade concerned in the reference or of any experts, whether members or not, and may also, at the like expense of the parties, consult and adopt the advice of solicitors or counsel upon any question of law, evidence, practice or procedure arising in the course of the referenee.

XVIII. *Special case.*—In any case where a party wishes to have any question arising in any proceedings referred to the High Court of Judicature at Fort William in Bengal in the form of a special case for the opinion of the High Court he shall apply in writing to the Registrar, and with such application shall pay a requisition fee of Rs. 40/-. If the Court decides to accede to such request the party applying shall also be responsible for all legal or other costs, charges and expenses that may be incurred by the arbitrator or arbitrators or umpire of and incidental to the same and shall make such deposit on account thereof as the Court may decide.

AWARDS

XIX. *Decision of majority.*—In cases where the Court shall consist of more than two Arbitrators the award of the majority shall prevail and be taken as the decision of the Court.

XX. *Time for making awards by arbitrators.*—The Court shall make its award in writing within four months after entering on the reference or on or before any later day to which the Court, with the consent of all parties concerned in the proceedings, by any writing signed by them, may from time to time enlarge its time therefor or any extension of time granted by the Conrt of Judicature at Fort William in Bengal. Provided that, if any commission for examination of witness shall at any time be issued under the provisions of Rule XVI or Section 43 of the Arbitration Act 1940 or any other provision in that behalf, this Rule shall be read as if the above-mentioned initial time limit of four months were increased by a period of time equal to the time which elapses between the date when the Civil Court concerned shall make its order for the issue of such commission and the date when the same shall have been executed and returned to the Court, and all enlargements and extensions of time as above provided shall take effect as from the expiry of such increased initial time limit.

XXI. *Extent of award.*—The Court may make an interim award, and may, by any award, order and determine what it shall think fit to be done by either of the parties, respecttng the matters referred.

XXII. *Signatures to and issue of awards.*—Every award shall be signed by the Court and by the Registrar. When completed, a copy of the award shall be sent by the Registrar to each of the parties, but the name or names of the member or members of the Court shall not ordinarily be disclosed on such copy and such non-disclosure shall not affect the validity of the award nor afford any ground of objection to the same being filed.

XXIII. *Filing of awards,*—The Court shall at the request of any party to the proceedings or of any person claiming under such party or, if so directed by the High Court of Judicature at Fort William in Bengal and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges on filing the award, cause the award or a signed copy of it together with any depositions or documents, which may have been taken and proved before it, to be filed in the said High Court.

XXIV. *Award binding on all parties.*—The parties shall in all things abide by and obey the award, which shall be binding on the parties and their respective representatives notwithstanding the death of any party before or after the makiug of the award, and such death shall not operate as a revocation of the submission.

XXV. *Further award.*—Whenever an award directs that a certain act or thing shall be done by one party to the reference, *e.g*,, delivering or taking (with or without allowance) delivery of goods and such party fails to comply with the award, the party in whose favour the award is made may make a fresh application for a further award determining the amount of damages or compensation payable by reason of such failure and the Registrar, on receipt of such application, shall proceed to constitute a new Court, which may or may not consist of the same or of one or more of the members constituting the Court who made the first award, and the new Court shall proceed under these rules to arbitrate on the said application and the award thereon may be filed separately or together with the original award.

FEES

XXVI. *Table of fees and charges etc.*—(1) The parties shall pay as and when demanded by the Registrar all fees, charges and expense incident to the reference and the award thereon according to the scale fixed in the Schedule to these Rules and all further fees, charges and expenses falling under the following three rules (*i.e.*, Rules XXVII, XHVIII and XXIX). Provided that the scale of fees as mentioned in the Schedule may from time to time be altered, modified or varied by the Committee.

(2) Any party making such payment may recover the whole or any part of the sum so paid from any other party ultimately held by the Court to be liable to pay the same,

(3) Unless the Court shall otherwise direct, no rebate or refund shall be claimed or made in respect of fees, charges or expenses when once incurred or paid.

XXVII. The fees, costs, charges and other expenses of and incidental to the reference and the award (if any) which are to be payable and which are not otherwise provided under these rules shall be the following, *viz.* :

(1) *Certified copies of awards.*—A fee of Rs. 2/- is payable for each certified copy of an award.

(2) *Stamp duties.*—Stamp duties are to be paid in all cases in accordance with the scale of stamp duties for the time being imposed by law.

(3) *Filing awards.*—A fee of Rs. 8/- to the Chamber in addition to the Court fees on the scale for the time being in force is payable by the party requiring the award to be filed.

(4) *Single arbitrator.*—A single arbitrator shall be paid double fees, namely, the fees payable hereunder to two arbitrators.

XXVIII. *Costs, charges, fees etc.*—The costs of the reference and award including the costs, charges, fees and other expenses provided for by these rules shall be in the direction of the Court, which may direct to and by whom and in what manner and in what proportion such costs, charges, fees and other expenses or any part thereof shall be borne and paid, and may tax and settle the amount of cost to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

XXIX. *Copies of proceedings.*—No party is entitled to copies of proceedings before arbitrators or an umpire. In cases where the Tribunal is requested to make copies of cases or exhibits thereto, submitted by either party. then the charge, for every copy made, shall be six annas a folio of 90 words (seven figures to one word).

INDEMNITY OF ARBITRATOR

XXX. No party shall bring or prosecute any suit or proceeding whatever against the Court, or any member thereof, for or in respect of any matter or thing purporting to be done under these rules nor any suit or proceeding (save for the enforcement of the award) against the other party.

NOTICES

XXXI. All notices required by these rules to be given shall be in writing and shall be sufficiently given if left at the last known place of abode of business of the party to whom the notice is addressed, or if sent by registered post addressed to him by name at such place of abode or business. If sent by post, such notice shall be deemed to have been given at the time at which the latter would in the ordinary course be delivered. In the case of any person who has no place of business in Calcutta but who is represented by an agent in Calcutta or elsewhere in India, the place of abode or business of the agent shall be deemed that of such person.

XXXII. The marginal notes shall not effect the construction hereof.

XXXIII. These rules shall come into operation as on and from the first day of August, 1942, and shall apply to all applications made for arbitration on and after that date.

SCHEDULE

Scale of fees.

(1) *General* : In all arbitrations the arbitration fee shall be prepaid. The arbitration fee in each single dispute is Rs. 64/- out of which 25% shall be paid as fees to the Chamber and the balauce as fees to the Arbitrators or/and the Umpire as the case may be. The Court shall be entitled to allow fees and expenses of witnesses, expenses connected with selection, sorting and carriage of samples conveyance hire, cost of legal or technical advice or proceedings in respect of any matter arising out of the arbitration and, when goods are examined at premises other than those of the Chamber, such additional fees for every attendance at such other premises, and any other incidental expenses and charges in connection with or arising out of the reference or Award as the Court shall in its absolute discretion thinks fit.

(2) *Settled or withdrawn cases* : In the cases where the party instituting a reference desires to withdraw it before a Court has been constituted, the institution fee (Rs. 16/-) only will be charged. But if a Court has been constituted before the application to withdraw the reference has been received by the Registrar, then full fees will be charged. In cases in which the Tribunal decides that it has no jurisdiction to act and accordingly refuses to proceed with the arbitration a charge equal to half of the institution fee will be made for the examination of papers.

(3) *Special cases stated for the Court* : In all cases where a request for a special case to be stated is made and the Court decides to accede to the request, there shall be payable to the Tribunal a requisition fee of Rs. 32/- and, in addition thereto, there shall be further payable, by the party or parties requiring the case to be stated, all legal or other charges that may be incurred by the arbitrator or arbitrators or umpire in preparing the same.

(4) The above scale of fees will apply to the piecegoods sugar, tea, salt, jute and gunny arbitration as also to other arbitrators, whether involving the examination of goods, or not or in those involving consideration of documents only ; but the Committee may in their absolute discretiou, prescribe special fees for specific case, if they think fit.

APPENDIX P

Rules of the High Court Court at Calcutta

Original Side

CHAPTER XXIII

Arbitration

Awards on Reference to Arbitration in suits

1. *On Submission of award Registror to give notice to the parties*—Where an award in a suit has been made and the porsan who made it have signed it, they shall cause it to be filed in Court together with any deporitions and document which have been taken and proved before them in accordance with Rule 10 of the second schedule of the Code, by forwarding the same (together with necessary court fees for filing) under a sealed cover addressed to the Registrar, with a letter requesting that the award be filed.

1A. —*Form*—When the provisions of Rule 10 of the second schedule of the Code and of Rule 1 have been duly complied with, the Registrar shall forthwith file the award and give notice thereof to the parties, which notice shall be in Form No. 1 informing the parties that the Court will proceed to pass judgment on such award on a date to be fixed in the notice, which date shall not be less than 10 days from the date of the filing of the said award.

No award shall be submitted to the Court otherwise than by being filed in accordance with there rules.

2. *Submission of draft decree according to award : Disposal of such draft at hearing*—A person desirous of applying to the Court under the provisions of the second schedule of the Code for judgment in terms of an award may, at least two days befor the date fixed for judgment, lodge with the Registrar, for submission to the Court, the draft decree which he considers the award warrants, and shall at the same time sue a copy thereof on a any party or parties intershed in the said award. At the hearing of the application the Court may adopt, modify or correct snch draft, and the decree shall be drawn up accordingly.

Rules under section 20 of the Indiarn Arbitration Aet, IX of 1899

3. *Title of application, etc.*—All application, affidavits and proceedings under the Aot shall be instituted in the matter of the Act and in the matter of the arbitration.

4. *What applications shalt be by petitions.*—All applications under the Act shall except as hereinafter othetwire provided, be made by petition. The person making any application shall be called the petitioner, any person served with notice thing a respondent.

5 *Application under section 12 of the Act may be by Summons.*—An application under section 12 of the Act may be made to a Judge or to the Registrer or Master upon summons to all parties interested. Every application under rule 11 shall be to a Judge, All other applications shall be to the Court.

6. *Contents of petitions*—Every petition shall be divided into paragraphs numbered consecutively, and shall contain, in a summary form, a statement of the material facts, and the nature of the relief asked for, and shall specify the persons liable to affected thereby.

7. *Upon application other under Section 12 of the Act notice to be given*—Upon any application under the Act, other than an application under section 12, the Court of Judge, as the case may be, shall, except as provided in rule 15, direct notice thereof to be given to all person specified in the petition, as directed in rule 6, and to such other person as

may seem to the Court of Judge to be liable to be affected by the procedings, requiring, when necessary, such persons to show cause, within the time specified in the notice, why the relief sought should not be granted.

8. *Statement of special Case for Courts opinion*—Tho arbitrator or umpire may execise the power concerned by section 10, clause (*b*) of the Act, to state a special case for the opinion of the Court, either before the Conclusion of any reference or by their or his award.

9. *Contents of such special case*—Every special case stated under rule 8 shall contain only a statement, in a summary form, of material facts and the points for the opinion of the Court.

10. *Procedure therefore*—When the arbitrators or umpire state special case for the opinion of the Court before the conclueden of a reference, they shall transimit the same or a sign copy thereof, to the Registrad, and shall at the some time give notice of such transmission to the parties.

11. *Application for Cour'ts opinion on spacial case-Setting down of special case*—Any party interested may apply for the opinion of the Court upon such special case. The application shall, in the first instance, be to a Judge. Upon the return of the notice to be issued under rule 7, the special case shall be set down before the Court on the day fixed by notice, on the special pereomptory list, for the opinion of the Court on the points stated.

The opinion of the Court may be filed by any party to the application, and an office copy there taken in the usual way for transmission to the arbitration or umpire. Such office copy shall be added to and shall from part of the award.

12. *Procedure for submitting award to be filed*—Where the arbitrators or umpire have been requested to file the award, they shall cause the award or a signed copy thereof, duly stamped, to be filed in the Court in accordance with section 11 (2) of the Act, by forwarding the same (together with the necessary courtfees for filing, and in care of awards in languages other than English, Rs 2 a folio of 90 words as translation fees) under a sealed cover addressed to the Registrar with a letter requesting that the award be filed.

13. *Registrar to file award and give notice*—When the provisions of the Act and of the rule 12 appear to have been duly complied with, the Registrar shall forthwit file the award, and give notice that to the arbitrators or umpire who shall thereupon notify the parties as required by section 11 (2) of the Act.

14. *Preedure when special case for opinion is stated in the award*—When special case for the opinion of the Court is stated in the award, the Registrar shall, on receipt of the award, place the matter on the special peremptory list before Court No. 1, on the next motion day after the expiry of one week from the receipt of the award, and issue notice thereof to the parties, The Court shall deliver its opinion on such special case, and such opinion shall be added to and from pat of the award and shall then be filed.

15. *Stay of proceedings under section 19 of the Act*—The Court may stay proceedings under section 19 of the Act on such term as it thinks fit but not without notice to the opposite party, except when it appears that the object of granting a stay would be defeated by the delay occassioned by the notice.

16. *Fees*—The fees in respect of proceedings undor the Act shall be according to the tables of fees for the original side of the Court, as near as the circumstances will permit.

17. *Form*—The form to which reference is made in this chapter is in Appendix.

(N. B.—For rules made under section 44 of the Arbitration Act, see page lv—lxi supra)

APPENDIX H

Form No. 1

(Chapter XXIII, rule 1A)

Suit No. of 19

In the High Court at Calcutta

Ordinary Original Civil Jurisdiction

.....Plaintiff Versus.....Defendant

Notice of submmission of award—Take notice that the award of the Arbitrator appointed in this suit under an order of Court, dated the.....day.....19..., has this day

been filed and that the Court will proceed to pass judgement on such award on..... the day of.....

Dated the.....day of.....19... *Registrar*

Rules under section 10 of the Indian Arbitrrtion (Protocol and Convention) Act 1937

(VI of 1937)

Notificatian dated the 6th December 1938—With the approval of His Excellency the Governor it is ordered by the High Court of Judicature at Fort William in Bengal that the following Rules framed under section 10 of the Arbitration (Protocol and Convention) Act, 1937, do take effect from the first day of January. 1939.

The new rules will be inserted in the Book of the Rules and Orders of the original side and shall appear in such book after tee Admiralty Rules set out therein. These new rules shall be intituled "Rules under section 10 of the Arbitration (Protocol and Convention) Act, 1937."

1. *Title of application etc.*—All applications, affidavits and proceedings under the Act shall be intituled in the matter of the Act, and in the matter of the Arbitration.

2. *What applications shall be by petition.*—Application under section 3 and 5 of the Act shall be made by petition : applications under section 3 shall be made to the Court, and application under section 5 shall be presented to the Registrar or Master for admission.

3. *Contents of petition*—Every petition shall .be divided into paragraphs, numbered consecutively. and shall contain in a summary from a statement of the material facts relied on, and the nature of the relief asked for, and shall specify the parties liable to be affected thereby.

4. *Stay of proceedings under section 3 of the Act*—Upon an application for stay of proceedings under section 3 of the Act being filed, the Court shall direct to be given to the party or parties to the legal proceedings, other than this applicant, requiring him or them to show cause, within a time specified, why the order should not be made, unless Court is satisfied that the object of the application would be defeated by the delay occasioned by the notice.

5. *Documents to be produced with the petition for enforcement of a foreign award*—The party seeking to enforce a foreign award shall produce with his petition :—

(a) The document specified in section 8 (1) of the Act and, when such document is in a language, the translation thereof into English, certified in the manner prescribed in sub-section (2) of the said section 8 ;

(b) The original agreement for arbitration or an authenticated copy thereof and, when the same is in a foreign language, the translation thereof into English certified in the manner prescribed in sub-section (2) of the said section 8 ;

(c) An affidavit or affidavits showing that the agreement was valid under the law by which it was governed and that the award was made in conformity with the law governing the arbitration procedure and that it has become final in the country in which it was made ; and

(d) Other document or documents in support of his application.

6. *Procedure to be followed in case of non-production of documents with petition for enforcement of award*—If the application under section 5 of the Act be presented for admission without the document specified in Rule 5 (a) above, it shall fortwith be returned to the party preventing it. If such application is unaccompanied by the documents specified in Rule 5 (b) and (c) above the Registrar or Master may allow time within such documents must be filed or may place the application papers before the Court for orders.

7. *Execution of decree and order*—The provisions of the Code of Civil Procedure and the Rules and orders of this Court relating to execution of decrees and orders shall, *mutatis mutandis*, be applicable to the execution of decrees and orders under the Act.

8. *Fees payable on proceedings*—The fees in respect of proceedings under the Act shall be according to the table of fees for the Original side of the Court, so far as the same are applicable.

SUBJECT INDEX

(Reference are to paragraphs unless pages mentioned by putting p.)

A

Actio personalis mortiur cum persona history of. 381
., scope of, 379
Appeal against award, waiver of right etc. 960
,, against award, when lies, 960
., cost of, 1553
,, failure to file, if resjudicata 1549
,, forum of, 1534
,. grounds of, 953
.. if lies against award stated in the form of a special case, 1539
,, if lies against order filing or refusing to file arbiiration agreement- 1542
,. if lies against order giving leave to revoke, authority of arbitrator, 1535
., if lies against orders passed under the Arbitration Act 1532, 1537
,, if lies against order holding arbitration clause not applicable, 1530
,,if lies against order in respect of reconstruction of record, 1547
,, if lies ogainst arder refusing instalment 964
,, if lies against order remitting award for reconsidera on, 909, 910
,, if lies against order rejecting application changing validity of arbitration 1400
,, if lies against order modifying or correcting an award, 1540
,, if lies against order remitting an award, 952, 1545
,, if lies against order setting aside or refusing to set aside order. 1544, 1546
,, if lies against order staying or refusing to stay legal proceedings, 1543
,, if lies against order superseding arbitration 1538
,. letter patent old law 1554
,, Letters Patent, where order not appealable, 1526
,, limitation in, 954, 1551, 1586
,, objection not taken in trial court if can be taken in, 1548
,, power of court of, 1550
,, second appeal against decree based in award, 1555
,, second appeal if lies, 970, 1536
,, second appeal if lios from an order recording award, 1594
,, to Privy Council 1556
,, to Supreme Court, applicatica for leave, for under 1557
,, valuation of, 1533
,, when Court acts as arbitrator, 962
Appealable order under the Arbitration Act, 1522, 1524, 1525, 1527 1528
Appellate Court, power of, to refer matter, 1048 1108
Application challenging validity of Articles of Agreement, procedure regarding, 1370
Arbitration Act, application of, 79
,, commencement of, 76
,, extent of, 75
,, if applies to Revenue Court, 77
,, if has got retrospective effect, 78
,, if to apply to all arbitrations, 1590
,, if to apply to other proceedings, 1065
,, if to apply to foreign awards, 91
,, introductory of p. 39
,, origin of, 21
,, scope of, 90
,, short title, extent and commencement of, p. 39
,, stay of, in foreign Courts, 81
Arbitration admission as regards foreign properties in, 89
,, against a firm, 683
Arbitration Agreement application challenging validity procedure in, 1364
.. application in appeal for contesting amendment of, 1400
., application for contesting, appeal against order rejecting, 1400
,, application for contesting of, 1367
,, application for contesting, forum of, 1396
,, application for contesting, limitation for, 1399, 1402
,, application for contesting, primary jurisdiction of Court for , 1397
,, application for declaration as invalid nature of enquiry in, 1376
,, application to file in Court, 991, 993
., authorising party to nominate arbitrator for the other, 281
,, by Court of Wards, 487
.. by guardian of minors, 171, 172, 173, 174 175, 176, 177, 178
,, by minor, 169
,, clause in the contract 112, 113, 114, 133, 985, 1005
.. clause stipuiating forum in England but not contemplating protocol, 822
,, consideration for, 248
.. construction of, 136, 419, 999, 1004, 1014, 1169
,, contract referred to in another document containing 126
.. denial of factum or validity of, 560
,, different intention dxpressed in, 253
,, effect of contract becoming void, 138
,, effect of, in case of insolvency of party, 406
,, effect of repudiation of, 153
,, effect of, on right to sue, 119
,, effect of, when a party becomes lunatic, 364
.. effect of, when time stipulated is barred, 1442
,, essentials of, 809
,, evidence to vary or alter terms of, 100, 309
,, express conditions of, 144

O

Arbitration Agreement for reference in pending suit, 1006
,, form of, 104, 141
.. form, where can be filed, 1009
,, form different types of, under old law, 96
,, frustration of contract if to be applied to, 152
, giving fnll powers to arbitration, 1103
,, if can be enforced by third party, 399
,, if decision by third parties not named in, allowed, 110
,, if parties can resile from, 354
,, if to be discharged by death of party, 359
,, if to be in writing under old law, 96
,, if can be contested by application, 1363, I364
,, if can be oral, 1015
,, if enforceable in case of new contract, 341
,, implied conditions of, 255
.. implied provision in, 93
,, in authors' agreement, 1438
,, in Article of Association, 113
,. contract, 6, 116, 117
,. in contract if assignable, 157
,, in indent form, 115
,, in pending suit, 1006
,, incorporation of. 112
,, interpretation of, 559, 1197
,; leave of courtf or revocation, 312, 317. 318, 319
,, leave to revoke, law regarding, 313, 314, 315
,, legality, 482
,, meaning of, 98, 260
,, mutuality of, 484
,, nature of, 112, 418, 482, 999
,, not superseded, effect of, 1002
,, on unstamped or insufficiently stamped power, 262
,, optional agreement, 125
,, oral agreement and revocation, 97
,, oral submission void to be enforced 1015
,, oral agreement if valid, 483
., order filing or refusing to file, if appealable, 1035.
,, persons who have entered into, 1000
,, parties to, 118, 140, 264
,, parties to in Bombay Oil Seeds Exchange, 212
,, power of Court where there is, 621
,, power of executor to enter into, 102
,, provisions implied in, 249, 250
,, refusal to enforce, if liable to set aside award, 1003
,. registration of, 149, 263
,, remedy of a party, when suit filed by the other, 1448
,, revocation by mutual convent, 336
,, revocation of, ground for, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349
,, revocation of, in case of apprehension of bias, 340
,, in case of excess of jurisdiction by arbitration, 342
,, revocation of, in case of fraudulent collusion of arbitrator, 338

Arbitration Agreement, revocation of, in case of insolvency of party, 339
,, revocation of, in case of misconduct of arbitrator, 343
,, revocation of, in case of refusal of jurisdiction, 337
,, Second reference, 124
,, stamp duty on, 148, 261
,, supersession of, 142
,. suit challenging validity of, if maintainable, 1370
,, terms to be used in, 147
,, to be by all interested, 264
,, to be filed in court, 1013
,, vagueness, 145, 332
Arbitration, application of Evidence Act in, 640
,, basis of, effect of, absence, difference as to, 1301
,, basis of, if different between the parties 723
,, before Bengal Chamber of Commerce, 579, 580
,, business terms providing, 282
,, burden af proving just or sufficient cause for obtaining leave to revoke, 331
,, civil matter in dispute to be referred to, 150
,, clause, construction of, 1441
,, clause in contract officer referring to, 285
,, clause, Court's power to make declaration about, 357
,, clause, dispute arising out of contract, 128
,, clause, effect of, 1005
,, clause, effect on, by outbreak of war, 308
,, clause, form of, 330
,, clause in contract, 133
,, clause in contract, effect of, 6
,, clause, petition to Court for declaration of validity, 1359
,, clause procedure as to, 665, 666, 667, 668 669, 670, 671, 672, 674
,, clause, power of Court in case of ambiguity, 748
,, clause, when void, effect of, 1171
,, conditions, relating to, 1422
,, consolidation and amendment of law relating to, p. 1
,, extension of time for,
,, failure of, duty of Court in, 334
,, foreign arbitration, notice of, 829
,, foreign tribunal, application of section, 34 of the Act, 1439, 1440
,, granting of adjournment in, 680
,, hearing of Counsel in, 688
,, if a condition precedent to action, 1430
,, if assignee can apply for, 470
,, if can be revoked without cause shown, 333
,, in Ancient India 4
,, in suits, 1038, 1039
,, in pending suits, non-service of notice of effect of, 820
" injunction against, 356
,, International Chamber of Commerce Rules as to, 211
,, hearing of counsel in, 688

Arbitration, leave for revocation to be obtained by application, 352
„ legal proceedings when render arbitration void, 1490, 1491, 1492, 1493
„ matters in guardianship proceedings, if can be referred to, 1056
„ matters illegal and purely criminal if can be the subject-matter of, 158
„ notice of filing application for revecation, 351
„ notice of, to parties to adduce evidence in, 678
„ notice of, to parties to enable them to put their case in, 679
„ origin of the rules relating to 3
„ (Protocol and Convention) Act, p. 869
„ parties interested not comenting to effect of, 140
„ party's right to know the details of claims, 1266
„ power of Appeal Committee in Commercial, 735
„ present and future difference, scope of, 127
„ proceeding, appointment of Receiver in, 1008
„ proceeding conduct of, 631, 1193
„ proceeding, procedure as to, 577
„ procedure of, 148
„ provision applicable to, 1126, 1127, 1132. 1133
„ questions of limitation, 682
„ questions relating to, 1331
„ reference to. by document in recital, 220
„ reference to, by pardanashin lady, 201
„ revocation of, effect of, 619
„ revocation of, in case of arbitrator's interest, 346
„ revocation of, in case of charges of fraud, 349
„ revocation of, in case of failure of justice, 345
„ revocation of, in case of improper appointment of umpire, 347
„ revocation of, order if appealable, 355
„ revocation or withdrawal from, 1110
„ revocation of, when third party signs the agreement, 348
„ revocation of, when should not be made 350
„ Rules of, by Madras Kirane Merchant Association, 765
„ scope of reference in partnership deed, 199
„ securing the attendance of witness in, 639
„ special case when question of law is involved, 646
„ Subject matter of decision and procedure by, 674
„ supersession by Court, parties to be heard before, 467
„ supersession by Court, procednre to be followed, 466
„ supersession of, when, 1150
„ to refer through Court, 1106
„ under Bombay Industrial Relation Act, 1589
„ under early British Rule, 5
„ under influence coercion, fraud, effect of, in 168

Arbitration, valid agreement, characteristic of, 252
„ vagueness of, 145
„ when bad for uncertainty, 111
„ when corfirmed by legislation, 135
„ when contract *ultra vires*, 153
„ when contract vague, 159
„ when contract void, 156, 633
„ when contract viodable, 156
„ when determined, 307
„ when not signed by parties, 145
„ when minor a party, 486
„ when revocable, 310
„ when without jurisdiction, if there can be, 606
„ with intervention of Court when no suit pending, 991
„ who may enter into, 167
„ written agreement, if to be signed by both parties, 106
„ written agreement, condition of it can be collected from several documents, 108
„ written agreement, if essential 103
„ written agreement, if to be signed, 105
„ writing why necessary, 107
„ Arbitration (Protocol and Convention) Act, 1937, 86, pages 869-879

Arbitrator, act of, not amounting to misconduct, 1219
„ acceptance by, 671
„ admission of inadmissible evidence by, 696
„ admission of inadmissible evidence which are fundamental, 697
„ admission of unstamped document, 700
„ agreeing to be bound by the opinion of third parties, 581, 1230
„ and umpire duties of, 571
„ applying for filing award in Court, nature of, 1520
„ appointed, 88
„ appointed by parties if entitled to any remuneration, 609
„ appointed agreed to be by third party, 259
„ appointment of, 271, 1102
„ appointment of by Court, if discretionary, 458
„ appointment of by Court, notice for, 456
„ appointment of by Court, service of notice, 454
„ appointment of, by Court when neglects to act, 444
„ appointment of, new arbitrator, notice in, 503, 505
„ appointment of new arbitrator, parties in proceedings, 506
„ appointment of, subject to acceptance, 267
„ appointment of time and place of meeting by, 1268
„ appointment of, when complete, 435
„ appointment of, with consent of parties, 473
„ arbitration agreement giving full power of, 1103
„ as a witness, 574, 1128
„ assessment of compensation by, 768
„ authorised to make enquiries in any manner, 1210

Arbitrator, authority of, appointed arbitrator, except by leave of Court, 295
,, authority of, confined by terms of reference, 558
,, authority of, if irrevocable, 30
,, authority of, to call for particular of claim, 681
,, authority of, when revoked, 378
., basis of, nature of, 1201
,. broad allegation of misconduct if sufficiene, 604
,, cases when Court appoint, 422
,, change of intention by, if misconduct, 1261
,, charge against, to be proved, 1263
,, choice of, 270
,, confined to terms of submission, 127
,. construction of will, if can be referred to, 1054
,, convenor to be appointed in case of two, 491
,, corruption if implies misconduct of, 567
,, court when can appoint another, 459
,, court's inherent power to decide misconduct of, even before award, 603A
,, decision taken by some arbitration irregularity if can be waived, 750
,, delegation of powers by, 597
,, depositions and documents before, 802
,, discovered to be indebted to one of the parties if amount to misconduct, 1203
,, disqualification for, when interest is known 290
,, disqualification of, by probable bias, 288
,, disqualification of, by relationship, 293
,, disqualification of, by subsequent acquisition of interest in the subject enacted, 291
,. duty if to decide according to law, 564
,, duties of, 120
,, duty of all to act, 588
,, duty of, pending proceeding for revocation, 353
,, duty of, to hear witness produced by the party, 690
,, duty of, to look into and examine all accounts and papers, 1260
,, duty of, to submit questions of law, 648
., duty of when minor's interest is concerned, 1271
,, effect of failure to solve difference by, 306
,, effect of giving false evidence or fabricating false evidence, 708
,, enquiry by, behind back of the parties, 582, 1232, 1233
,, enquiry by in the absence of parties, 1244
,, enquiry by court, as to what passed in the minds of,
,, examination of witness on commission, 705
,, examination on oath by, 638
,, legal misconduct of, 1209
,, first duties of, 672
,, foreign court as, 278
,. fraudulent concealment of fact as regards monetary transaction if amounts to misconduct of, 590

Arbitrator, history of the law as to authority of, 296, 297
,. how far bound by rules of evidence, 576
,, it becomes *functus officio* with pronouncement or award, 759
,, if can re-open award, 662,
,, if committees are, 729
,, if have greater latitude than court, 575, 1224
,, if himself can call for witness, 639
,, if must act together 732
,, if retained lawyer can be an, 289
,, if subject to territorial jnrisdiction, 228
,, if to act after frustration of contract of arbitration, 305
,, if to be named 205
,, if to decide according to law, 1217
., if to give reasons for drcisions, 1288
,, if to keep notes of proceedings, 704, 1269
,, if to record evidence in the presence of parties, 695
', implied authority of, to get professional assistance of, 712
,, in case of difference between Arbitrators, court may decide, 534
,, in case of non-appointment of new arbitrators and failure of sole arbitrator to proceed, effect of. 508
,, increasing the number of,1245
,, indebtedness, effect of 599
,, indebtedness of, to the estate, if amounts to misconduct, 1208
,, interest of amounting to miscondmct, 1206
,, joint arbitration, duty of, 492
,, judge in the cause as, 279
,, jurisdiction of, 1189
,, jurisdiction of, if depend on the existence of custom,
,, jurisdiction of, to decide question of estoppel, 731
,, knowledge of parties if disqualification, 1382
,, making secret enquires, 1257
,, misconduct of, 213
,, misconduct of, in holding enquiry behind the back of the party, 595
,, misconduct of, if implies fraud, 568
,, misconduct of, illustrative cases of 1311
,, misconduct of, perversity of, 1293
.. misconduct of what amounts to, 561
,, misconduct himself or the proceedings, meaning of, 562
,, nature of enquiry before, 677
,, necessary witness if can be, 294
,, neglect to act, 496
,, non-disclosure of relationship if amounts to misconduct of, 1205
,, non-filing of certain document by, 803
,, nominations of, without prejudice, 268
,, notice of meeting not given, if amounts to misconduct, 594
,, not examining witness if guilty of misconduct, 1290
,, notification to, 670
,, not to have interest in party and subject-matter, 122
,, number of, 280

Arbitrator, objection to appointment of, when to be taken, 462
,, omission to file in court deposition and documents it amounts to misconduct of, 1267
,, omission to give notice of award by if amounts to misconduct of, 1227
,, or umpire when misconducted himself of the proceedings, 1192
,, other interest of, ground for setting aside award, 1206
,, outside legal advice taken by, effect of 583
,, party taking part with full knowledge of misconduct of. if waiver, 605
,, party to appoint new, procedure, 500, 501, 502
,, party or appoint new when, 494
,, personal knowledge if can be imputed, 1229
,, personal misconduct or interest of, 287
,, power and duties of, 665, 1200
,, power of, 626, 634
,, power of, as to costs, 707
,, power of court to appoint, 412
,, power of court to appoint against the wishes of parties, 463
,, power of court to appoint when comes to end, 464
,, power of, court to remove, 542, 543
,, power of ,delegation by 1243
,, power of, to administer oath if discretionary, 637
,, power of, to administer special oath, 636
,, power of, to alter amend and modify award, 703
,, power of, to award interest and costs, 770
,, power of, to call for proceedings and to allow amendment, 685
,, power of, to decide validity of arbitration agreement, 1173
,, power of, to delegate, 709
,, power of, to delegate ministerial duties, 710
,, power of, to determine validity of contract, 632
,, power of, to make interim award, 1134, 1135
,, power of minor's guardain to allow arbitrator in proceeding on his information, 596
,, power of party to appoint new, 478, 480
,, power of party to appoint sole, 476, 479
,, power of, to order for security for costs, 706
,, power of, to take evidence of parties and witness, 699
,, power of when award remitted, 900
,, power to state a special case if discretionary with arbitrator, 641
,, provision as to appointment of three or more, 510, 511, 512
,, proceeding with reference dispute of private notice of revocation, 1226
,, procedure of, if opposed to natural justice, 570
,, procedure to be adopted by, 1213
Arbitrotor procedure to be followed by, 565, 665, 1191
,, procedure to be followed in making award 669
,, receiving fees from one party before award if amounts to misconduct, 1204
,, receipt of fees in advance by, 1216
,, refusal to act, 498
,, refusal to act, effect of, 445
,, rejection of some part of evidence by, if misconduct, 1291
,, rejection of tendered evidence by, 573
,, removal of, for misconduct, 602, 1292
,, remuneration, dispute as to, 1515, 1516
,, revocation of authority in case of excess of jurisdiction, 342
,, revocation of authority in case of interminable delay, 344
,, revocation of authority in case of misconduct, 343
,, revocation of effect of, 328
,, rules as to appointment of, 292
,, rules of, Bengal Chamber of Commerce, 764
,, rules to be followed, in deciding cases, 566
,, sole arbitrator when can be appointed, 507
,, specific question of law to be referred to, 774
,, statements of plaintiff and defendant taken separately, 1285
,, supreme Judge of law and fact, 218
,, taking assitance from third party, 1231
,, taking money from one side if amounts to misconduct, 591
,, taking outside legal advice, 1233
,, taking position of an advocate of the parties, 572
,, technical expert as 284
,, tendering resignation,
,, to be appointed in accordance with the terms of agreement, 272
,, to disclose the relationship with the parties, 589
,, to give notice to each party, 463
,, treating if amounts to misconduct, 1215
,, unreasonable delay by, if amounts to misconduct, 1221
,, using personal knowledge, 578
,, want of jurisdiction, 101
,, when becomes *functus officio*, 661
,, when can proceed *ex parte*, 592, 701
,, when party can appoint sole, 439
,, when party can exercise his power to appoint new, 478
,, when proceed *ex parte*, 1238
,, when receives evidente and prefers one side without knowledge of the other, 1284
,, when some absent during enquiry, 1279
,, whether should decide according to law, 121
,, where points of law have been referred to, 898
,, without intervention of court 248A
,, who can apply appointment of, 469
,, who can be appointed, 286
,, who has not entered into reference, effect of, 622

Arbitrator, who may be appointed, 274
,, wrong decision by, if amounting to mistake, 1274
Architect as arbitrator, 1213
Article 141 of the Constitution 42
Assignee if bound by valid agreement 1445
Award absence of objection by parties to, duty of court, 894
,, according to agreement valid though incomplete, 1081
,, additions made in,
,, affecting the rights of strangors, 1248
,, affirmed in Letters Patents appeal, finality of 1344
,, against a party not party to the reference, 888
,, alternative award, nature of, 656
,, a nullity, procedure when, 921
,, application by party to enforce limitation of, 794
,, application for an order about the existence, how can be made. 1383
,, application for challenging validity of arbitration agreement, if to be filed before filing of, 1329
,, application for declaration of award invalid question to be decided, 1273
,, application for declaration of award invalid when to be filed, 1377
,, application for setting aside as time barred, 969
,, application to set aside, 1352
,, application to set aside, to be filed in which court, 1325
,, application to set aside, when barred, 928
,, arbitration, if can file award, 797
,, as adjustment in pending suits, 1587
,, as costs, setting aside by court. 813
,, authority of. when comes to amend, 805
,, award by, after death of one, if valid, 451
,, based on hearsay and conjectures, 1248
,, based on insufficient evidence, 1258
,, based on legal and moral grounds, 1247
,, based on misapprehension of legal position of one of the parties. 1272
,, beyond time, 1614
,, by acceptance, if becomes an agreement, 208
,, by drawing lots if legal, 1264
,, by judge appointed *quasi*-arbitrator, 214
,, by person not authorized to make, 734
,, by Bengal Chamber of Commerce, where court not duly consitituted, 1214
,, charges against, to be proved, 1263
,, characteristic of, 219
,, clerical mistake or error arising from accidental slip or ommission, 660
,, conditional award, 655
,, conditions enforceability 85
,, construction of, 787
,, containing a clerical mistake, 861
,, contents of 767
,, contents of, leaking out before pronouncement, 1262
,, court if can compel arbitrator to file award, where fees not paid, 812
Award court if can raise objection to, *suo motu*, 808
,, court's power to extend time for application to set aside, 930
,, court's power to remit on its own motive, 871
,, court to fix time for submitting, 905
,, dealing with matters involving status, 215
,, dealing with property of strangers, binding effect of, 940
,, deciding disputes forming subject-matter of several suits without order of reference, 1185
,, decree based on, not properly stamped, 785
,, decree passed on, before expiry of time, 842
,, dismissal of application for revision against, if bar fresh application, 1308
,, dismising plaintiff from partnership if ultrovers 1112
,, effect of, 210, 1342, 1386
,, effect of, not signed by all arbitrators, 747
,, effective from which date, 1327
,, embodying agreement of the parties, 1278
,, enforcement of, by successful party, 823
,, error apparent on the face of, 846, 1256
,, error in date of, 1275
,, execution of, 973
,, execution of, if executing court can go behind decree, 974
,, filed, application for setting aside, 848
,, filed in court, 758
,, filed in court, whether becomes a decree 867
,, filing of, 1283
,, filing of, by parties, 827
,, filing of, court fees for, 850
,, filing of, decree, if necessary, 856
,, filing of, if compulsory, 798
,, filing of, decree if necessary, 856
,, filing of, in court, limitation for, 831, 832
,, filing of, in which court, 1315, 1316
,, filing of, procedure of. 796
,, filing of, when beyond pecuniary jurisdiction of the court, 801
,, finality of, 216
,, Foreign award. enforcement of, procedure for, 741
,, Foreign award. when final, 87
,, Foreign award, meaning of, 84
,, form of, 762
,, future interest in, 1161
,, grounds for settting aside, 1162. 1163, 1164, 1165
,, grounds for remission of, under English law, 872
,, grounds on which award could be remitted, 872
,, how to be set aside, 1187
,, how to enforce under English Arbitration Act, 972
,, if a plaint, 997
,, if appealable, 840
,, if can be challenged by the other party by suit, 822

Award if case be contested by application, 1364, 1366, 1367, 1368
,, if can be set aside on probability or basis of arbitrators, 1207
,, if can incorporate admission as to title of foreign properties, 844
,, if collateral writings, part of, 766
,, if may be stated in form of a special, 654
,, if revision lies against, 841
,, if subject to decision of a committee, 806
,, if to be certain, 209
,, if vitiated by mistake, 1275
,, illegality of, when does not appear on the face of it, 897
,, in arbitration pending suit, without order of reference, 943
,, incapable of execution, 893
,, in case of majority award, if minority refuses to sign, 746
,, in commercial arbitration in violation of natural justice. 1310
,, improperly procured. 1296
,, interest on, 1157. 1158, 1159
,, interim award by arbitrators, 1134. 1135, 1136
,, invalid, 842
,, judgment in terms of, 912, 913, 914
,, judgment in terms of, in mandatory, 920
,, judgement in terms of, when no objection, 944
,, jurisdiction of court to entertain, 810
,, letter to the court by arbitratrix filing award, limitation for, 826
,, limitation for correction of, 862
,, making of the award, 1116
,, made after arbitration proceedings have become invalid, 1297
,, made after order of the court superseding arbitration, 1294
,, made beyond time, jurisdiction of court to accept, 1148
,, made but filed not in time, extension of time by court, 824
,, making of, after statutory period, 1222
,, making of, and delivery of judgment, 744
,, making of, by arbitrators, 726
,, making of, what amounts to, 755
,, meaning of, 757
,, mistake of law on the face of, 1257
,, modified award, if final, 959
,, modified by a single Judge of Small Cause Court, if a decree, 864
,, nature and effect of, 760
,, non-registration of, effect of, 784
,, not acted upon, 780
,, not duly stamped, 1250
,, not filed, application for setting aside, if maintainable, 814
,, not technically perfect, 1280
,, not to be set aside except on what grounds, 1180
,, notice ef fillng of, 815
,, notice of filing of, time for, 816
,, notice ef making and signing of, or publication of, 789
,, objection as to, procedure to be followed in, 847, 848
,, objection as to validity of, 925
Award objection to jurisdiction of, 788
,, objection to the legality of, if to be apparent on the face of, 896
,, objection to, limitation for filing, 1313
,, objection to, question of fact raised in High Court, 1309
,, omission in, by court of notice, if filing, 825
,, onus of proof, in challenging the validity of. 1199
,, opportunity if party to be heard before, 1332
,, oral award, 217
,, oral award, if valid, 751
,, order declining to file, 821
,, order modifying, if appealable, 863
,, order remitting, if appealable, 909, 910
,, order remitting, if revision lies against, 911
,, or agreement to compromise, 936
,, partial validity of, 781
,, partitioning joint family property in reference by only some member, 1321
,, party to, how can challenge validity of reference, 1303
,, passed considering all the circumstanes 1249
,, piecemeal awards, if valid, 776
,, piecemeal award, in partition suit, 777
,, plea of non-service of notice of filing,
,, pleading of part of award, 1529
,, when to be raised. 820
,, meanings if the part of award 1529
,, portion of, when void, 448
,, power of court to modify, 853, 854
,, power of court to remit, 867, 868, 869, 870, 876
,, prepared by legal adviser, 771
,, procedure after filing of 800
,, procedure of filing of. agsinst minor, 811
,, publication of, effect of, 804
,, recital in, 772
,, registration of, 783
,, relief in quite different form, the subject-matter, 1276
,, remission of, 881
,, remission of amended award, time for, 882
,, remission of, on the ground of corruption by English Courts, 875
,, remission of, or of any of the matters referred to arbitration, 923
,, remission or setting aside of, proper remedy, 879
,, remission of, to new arbitrator, 877
,, remission of when arbitrators decided matters not referred to, 886
,, revision against order confirming, 350
,, requisites of a valid, 723
,, rewriting of an, 435
,, scope of sections 32, 33 and 34; 1355
,, scrutiny of, 830
,, separation of valid from invalid portion of, 410
,, signed by all but assignee of one at the time of registration, 785
,, setting aside of, application for. 859
,, setting aside of if disputed facts can be decided in, 1175
,, setting aside of, on decision against

Award written statement, 1265
,, setting aside, of, on ground of adjudicatien on matters not included in the submission, 1211
., setting aside on ground of interest of arbitrator, 1206
,, setting aside of, an ground of improper rejection of evidence, 1259
,, setting aside of, when parties participated in arbitration proceedings without protest, 1167
,, so indefinite as incapable of execution, 893
., stamp duty in, 782
,, suit to declare award invalid for want of valid reference, 1371
,, suit for decree in terms of, if barred, 1357
,, suit to enforce, if maintnable, 1345, 1358
,, suit to enforce, parties in, 837
,, suit to enforce right against one not party to, 1358
,, suit to cnforce, parties in a, 756
,, time for application to set aside when expired, 927
,, time for making. 256
,, time for taking copies if to be excluded in computation of time for application to set aside, 929
,, to be by majority, 540
,, to be certain, 778
,, to be final, 773
,, to be in writing, 742
,, to be signed and filed, 716, 717, 718, 719. 720
,, to be signed by arbitrator, 743
,, to follow submission, 769
,, two awards, 740
,, two awards in a single reference, 1154
,, under English Arbitration Act, if can be set aside under Arbitration Act, 92
,, unfiled award if nullity 754
Award unregistered award, 1324
,, validity of, 721, 1343
,, validity of, if affected by non-service of notice, 728
,, validity of, outside reference, 1253
,, validity of, presumption of 931
,, validity of, where some of the parties join, 1069
,, when a petition for setting aside lies, 1166
,, when can be set aside or remitted for remuneration, 899
,, when complete, 1282
,, when contract is denied, 243
,, when inseparable, if can be modified by court, 890
,, when is imperfect in form, 860
,, when not executable for want of registration, setting aside of, 1305
,, when remitted, 877
,, when separable as regards extraneous matter, court may modify or remit, 889
,, when should not be set aside, 1184
,, when to seperate awards are contemplated by bye-laws of the Association, 1307
,, when vague, 1281
,, where arbitrators have gone beyond the scope of reference, 1252
,, where damages given for breach of contract on wrong basis, if bad, 1347
,, which is orherwise invalid, 1297
,, within four months, how calculated, 1617
, without notice, 95I
,, without intervention of Court, objection as to non-registration filed after limitation, 932
,, without intervention of Court, procedure to be followed, 761
,, who can file, 1326

B

Bar to suits contesting arbitration agreement or award, 1338, 1349, 1340
Bengal Chamber of Commerce, arhitration of, 579
,, rules of the, 580

C

Contract Act, provision to agreement, 132
Contract, conflict of law as regards formation of, 85
,, frustration of, 152, 1032, 1432
,, repuditation of, effect of, 1431
,, ultravires 154
,, whether plaintiff is a party to the, 1426
,, which are not binding in Executors, 396
,, void or voidable, 155, 156
Cost of reference and award by umpire, 1625
Court, Appellate Court if is included within 226
,, City Civil Court if can stay proceedings, 1421
,, discretion, if can bo controlled by agreement between the parties, 1183
,, duty of appointing arbitrator, 461
Court frustration of contract is a difficult question of law, 1432
,, if can pass interim order after award is filed, 977, 978
,, discretion of, if can be controlled by agreement of parties,
,, having territorial jurisdiction, 1010
,, if can go to the merits of the dispute, 1177
,, if can pass that matters have been referred to arbitrators, 939
,, Insolvency Court, if Civil Court. 224
,, interim ordoa passed by, if appealable, 986
,, jurisdiction of, agreement choosing court, 1436
,, jurisdiction of, for, filing award, 1315, 1316

Court, jurisdiction of, how far may be ousted, 1424
,, jurisdiction of, in case referred to by arbitrator, 648
,, jurisdiction of, in respect of foreign arbitrator, 851
,, jurisdiction of, to appoint arbitrator only in case of arbitration agreement. 431
,, jurisdiction of, to interfere award, 835
,, jurisdiction of,, to order for instalment before passing of decree, 964
,, jurisdiction of, waiver of, 1912
,, jurisdiction of, when property in juaisdiction of two courts, 1011
Court of Appeal when can interfere in the matter of stay of suit, 1488
,, opinion of if binds Arbitration, 651
,, opinion of, taking of, 657
,, power of, 1626
,, power of, after order of reference, 1118
,, power of, if to decide question of liability, 994
Court of Wards, if a legal representative. 377
Court, power of. if affected by the fact that award has been made. 1152
-, power of, in deciding objection against award. 918
,, power of, only to enlarge time for making award, 1139, 1140, 1141. 1142, 1143, 1144
,, power of, stay of legal proceedings where there is an arbitration agreement, 1403, 1405 1406, 1407
,, power of, to accept award made beyond time, 1148
,, power of, to act *suo motu* in setting aside award, 934
,, power of, to appoint arbitrator or umpire, 412, 413, 414, 415
,, power of, to appoint arbitrator when arises, 425, 428
,, power of to call arbitrator as a witness, 1179
,, power of, to give effect to matters agreed upon, 1408
Court, power of, to issue process for appearance before arbitrator, 1572. 1573
,, power of, to make shifting investigation 1178
,, power of. to modify order of 1090
,, power of, to pass an order affecting subject-matter of suit, in reference to arbitration, 1099
,, power of, to pass interim order, 977, 978
,, power of to refer when parties have agreed for arbitration, 1107
,, power of to remit award, 878
,, power of, to remove arbitrator or umpire, when, 542, 543, 544
,, power of, to revoke arbitration, 303
,, power of, to set aside award, *suo motu*, 1174
,, power of, to stay proceedings 1421
,, power of, to supersede arbitration when award void or ss set aside, 982, 984
,, power of to take evidence in application for declaration of award invalid, 1372
,, power of, to withdraw proper reference. 1091
,, power of, where arbitration agreement ordered not to apply to a particular defence, 1503, 1504, 1505
,, power of, while dismissing application for setting aside award, 1181
,, procedure and power of, 1562, 1563, 1564
,, proceedings in, commencement of 1442
,, Revenue Court, if Civil Court, 223
,, Small Causes, if Civil Court, 225
,, superseding arbitration if appealable, 986
,, when can cancel arbitration 1092
,, when can exercise power for passing interim order, 978
,, when can supersede arbitration. 466
,, when frustration of to be held, 1032
,, when to proceed to pronounce judgment, 944
,, which can grant stay of proceedings, 1421

D

Death of party if revokes arbitration agreement, 359
,, of party what right is extinguished by, 380
Decree based on award, appeal against on what grounds, 953
,, based on award, binding effect of, 950
,, based on award, if can be challanged in suit, 1361
Decree, finality of, in accordance with award, 948
,, passed without waiting for 30 days in an award. 947
,, setting aside of *ex parte*, 944
,, to follow judgment in terms of award, 946
Definitions in the Act, 93
Dispute if includes time barred, 131

E

Enactments amended, 1626
,, repealed, 1626
English Arbitration Act, foreign awards, 82
English Arbitration Act, English decisions, applicabilty of, 1405
Ex-delicto, English law as to. 391
Executor, powers of, 367

F

F

Fire Insurance Policy, rofosenco to arbitration, 146
Foreign Arbitral awards, convention on the execution of, 2nd Schi. Arbitration (Protocol) Act
Foreign awards effect of. s. 4 Arbitration (Protocol) Act
,, award enforcement of, s. 6 Arbitration (Protocol) Act
,, award, enforcement of conditions for, s. 6 Arbitration (Protocol) Act
Foreign, award. onforcement of, ovidence in, s. 8 Arbitration (Protocol) Act
,, award, essential conditions of, s. 2 Arbitration (Protocol) Act
Foreign award, filing in, in court, s. 5 Arbitration (Protocal) Act
,, awerd in England, enforcement of, s. 1 Arbitration (Protocol) Act
Full Bench decisions, conflict of, 45

G

Geneva Protocol of 1923, provision of, 83
Government if bound by the provision of the Arbitration Act, 1577, 1578

H

Heirs, who are, 368
High Court, power of, to make rules, 1576
,, power of, to stay proceedings, 1421

I

Interim award, when can be made, 1136
Interest in award, 1157, 1158, 1159, 1160, 1161
Insolvency of party, effect of, in suits by or against party, 404
Insolvency, of party, if the receiver adopts the arbitration agreement, 406
,, power of liquidator to refer to arbitration, 408

J

Judge as arbitrator, 1093
Judgment in terms of award if revision lies, 966
Jurisdiction on the ground of valuation when can be challenged, 1320

L

Legal Proceedings if *ipso facto* render arbitration void, 1495
,. proceedings on arbitration, effect of, 1490, 1491, 1492
,, representative in a representative suit, 375
legal, representativo of Hindu joint family, 376
,, representative who are, 362, 368, 378
Limitation Act if to apply to arbitration, 1506, 1507, 1508, 1509
,, for a claim, relevent date, 1514
,, of few months, how calculated, 1613

M

Misconduct of arbitrator, nature of, 1204

N

Notice, service of, by party of arbitration, 1569, 1570, 1571
,, of amount of fees and changes for arbitration, 793
Notice, of making, signing or public of award, if can be given through attorney, 792
,, of marking signing or publication of, award with reasonable time, 790

P

Protocol on arbitration clause, 1st Sch.
rocedure, irrigularity of, relating to arbitration if can be waived, 1186

R

Reference, agreement for, absence of leave, 1097
,, agreement for reference, if distinguished from submission, 241
,, agreement for reference, if to be mistaken, 240
Reference, Agreement for reference on behalf of minor, 935
,, agreement for reference throughtout ordinary agreement, 1106
,, agreement for reference, signed on behald of minor by person having adverse interest, 975

Reference, amendments altering terms of, principle to be followed in, 686
„ bogus reference, effect of, 839
„ by agent, 188
„ by appellate court, 1048
„ by arbitrator to Court, English law and Indian law distinguished, 653
„ by certified guardian of Mahomedah minor, 172
„ by companies, 202
„ by corporation, 204
„ by counsel, 159
„ by *le facto* guardian of Hindu Minor, 186
„ by *de fact* guardian of Mahomedan minor, 171
„ by executor' 194, 195, 196
„ by father or manager of joint Hindu family, 183
„ by Hindu widow, if binding on reversioner, 200
„ by lunatic, 186
„ by natural guardian for benefit of the minor, 174
„ by natural guardian of Hindu minor, 185
„ by natural guardian in pending suit, 174
„ by next friend in pending suit, law as to, 176, 177, 178
" by office 71
„ by partners, 193
„ by persons with joint interest, 192
„ by properly constituted guardian, 173
„ by solicitors, 190
„ by some of the parties, 1124
„ by some of the parties when interest not separable, 1120, 1121
„ by testamentary guardian of Hindu minor, 186
„ by trustee. 197
„ by vakil or pleader, 191
" cause for revoking submission when to be urges, 109
„ capacity of person to refer to, 166
„ condition of, 273, 676
„ effect of incomplete, 308A
„ form of, 650
„ fresh reference, 244
„ if can be abandoned by consent of „ parties, 327
„ if distinct from "agreement, 985
„ if irrevocable when made through Court, 304
„ if pure question of law may be referred to 157
" in case of bankrupt's estate, 198
" in criminal cases, 1062
" in execution proceedings, 1055
" in guardianship proceedings, 1056
" in mater outside suit, 1051
" in matrimonial dispute, 1058
" in proceedings under U. P- Agriculturist Relief Act, 1064
" in *quasi* criminal matters, 1063
" in suit and outside suit, 1052
" in suit for mandatory injunction, 1044
" in suit under S.92 of the C.P. Code, 1057
" interpretation of, 247
" jurisdiction, if can be refrred to, 643

Reference, limitation for, 246
" matters agreed for, 1111, 1428
" meaning of, 245
" means to sole arbitrator, 471
" nature of, 1330
" objection as to validity of, 1302
" order of, 1067, 1104, 1105
" order of necessity of 1067
" order for, in pending suit, 1117
" parties to suit for order for, 1038, 1039
" powers of Court after underof reference, 1118
" power of court to pass order affecting subject-matter of suit, 1099
" power of court to withdraw proper, 1091
" power of liquidator to refer to, 408
" terms to be used in, 147
" rules of a body referred to, 129
" saving of pending, 1595
" second reference to, 124
" through Court, application by only some of the interested persons, 1068
" through Court, application for order, to be signed by all interested, 1076
" through Court and subsequent compromises between paties, 1119
" through Court, arbitrator misconducting, 1129
" through Court by agent, 1074
" thorough Court by attorney, pleader or counsel, 1075
" though Court by companies, 1072
" through Court by karta of joint family, 1079
" through Court by partner, 1073
" through Court by one of the trustees, 1070
" through Court in partnership suit, 1071
" through Court in pending suit beyond scope of suit, 1082
" through court in pending suit, parties in, 1083
" through Court, party to, 1077
" through Court, when all parties interested agree, 1066
" through Court when matters in difference between the parties, 1054
" through Court, where consent of parties subsequently given, 1080
" to arbitration in pending suit without intervention of Court, 1098
" to arbitrator, 266
" to even number of arbitrators,
" to fluctuating body, customs governing, 276
" to fluctuating body, if binding, 275
" to personal rights between parties in, 488
" to three, but enquiry by two 587
" to two arbitrators, 489
" to under Religious Endowment Act, 203
" validity of if can be enquired of 1171
" what matters may be referred to, 43, 986
" when submission can be revoked, 1020
" when all parties interested didnot join, revision it bis, 1125

Reference, whether reference includes a reference regarding test, 1429
" without intervention of Court in pending suit, 1098
Remission of case to arbitrations, 882
Repeal, effect of, 1599, 1627
Revision, when no appeal lies, 1557
Right, of action if survive in case of, preemption, 133
" of action if survives in suit for breach of betrothal contract, 388
" of action if survives in suit for breach of implied contracts, 394
" of action, if survives in suit for custody of minor, 387
Right, of action if survives suit for damages for illegal restraint, 385
" of action if survives in suit for injunction, 381
" of action if survives in suit for loss for breach of fiduciary relationship, 389
" of action if survives in suit for malicious arrest, 382
" of action if survives in suit for malicious prosecution, 382, 390
" of action if survives in suit for malicious search, 383
" of action if survives in suit on contract, 392
" of action, ex-delicto, survival of. in English law, 391

S

Small Cause Court if to have jurisdiction over arbitration, 1560, 1561
Special case when referred, duty or each party, 648
Statutes construction of Act ousting jurisdiction of High Court, 34
" construction of, arbitrators and commissioner difference between, 64
" construction of, arbitration to fluctuating body, 70
" construction of, arbitration and appraisement distinguished, 56
" construction of, arbitrator and commissioner difference between, 64
" construction of, arbitrator and mediator difference between, 64
" construction of, arbitrator and referee distinguished, 52
" construction of, arbitrator, function of, 68
" construction of, arbitrator, meaning of, 51, 67
" construction of, arbitration, meaning of, 50
" construction of, arbitrator, who may be appointed, 69
" construction of, architect and engineer when decision is final. 57
" construction of, building contract architect's certificate in, 55
" construction of. cardinal rulcs, 9
" construction of, codifying and consolidating statutes, distinction between 8
" construction of, conflicting of ruling of two Division Benches, 47
" construction of, consolidating Act interpretation of, 7
" construction of contract construction of one in reference to another, 49
" construction of definitions, 21
" construction of, deeming provisions in a statute, 3
" construction in duty of Court, 20
" construction of duty of Subordinate Courts in, 37
" construction of *ejusdem generis* in, 35
" construction ef, Federal Court decision and Privy Council decision in conflict, 39
" construction of, foreign Court as arbitrator, 74
Statutes construction of, Full Bench case in, 44
" construction of, fundamental principles of, 10
" construction of grammatical or literal construction, 19
" construction of, heading of chapters, 27
" construction of, High Court, jurisdiction of, 43
" construction of harmonious construcion, 33
" construction of, illustration, 30
" construction of, implied decision on point not taken, 46
" construction of, in favour of valididy, 17
" construction of intention of the Statute, 32
" construction of, International Laws, English rules, if applicable in India 13
" construction of, interpretation clause, 93
" construction of, lottery, agreement to decide by, 63
" construction of. mandatory provisions of 24
" construction of, marginal notes, use of, 26
" construction of, meaning of words, 18
" construction of, one party agreeing by the decision of the other 61
" construction of, parties agreeing to abide by advocate's statement, 62
" construction of, preamble, use of, 25
" construction of. Privy Council decision and House of Lords, decision incomplete, 39
" construction of, Privy Council decision, binding effect after independence, 41
" construction of, Privy Council ruling, if binding, 38
" construction of, proviso, function and nature of, 14
" construction of, quasi-arbitrator, meaning of, 54
" construction of, reference to English Cases, 48
" construction of, reference to presiding Judge. 73
" construction of, reference to procedings of the legislature, 27

Statutes, construction of, retrospective operation of, 11
" construction of, retrospective operation of law of procedure, 12
" construction of, rules and bye-laws, 16
" construction of, Rules of Arbitration of the Bengal Chamber of Commerce and other association, if binding, 129
" construction af statute, if directory or mandatory, 23
" construction of, statutory rules, powers of Court in, 15
" construction of, stewards of races, if arbitrator, 60
" construction of, three essential elements of arbitration, 66
" construction of, valuation and arbitration, remedy in case of. 59
" construction of, valuer if arbitrator, 53
Statutory arbitrator, application of Arbitration Act to, 1579, 1581
" arbitrations, classification of, 1585
" arbitration what is, 1023, 1582
Stay of legal proceedings, conditions for, 1415
" of legal proceedings, history and applications of the provisions for, 1413
" of legal proceedings, where there is arbitration agreement, 1403, 1411, 1414 1415
,, of proceedings, conditions for 1432
" of proceedings in respect of matters referred to arbitration Arbitration Protocol Act S-3
" of proceedings interference by Court in ,, case of difficult question of law, 1420
,, of proceedings, scope of the provisions ;, relating to, 1416
;, of proceedings, who can apply for, 1447
" of suit after stops in the proceedings, 1453
" of suits after stops in the proceedings continued, 1454
" of suit applicant, if to be ready and willing for arbitration, 1457
" of suit, application for, scope of enquiry 1471
" of suit, appeal against order in the matter of, 1486
" of suit, appeal against order in, procedure to be followed in, 1489
" of suit, discretionery power of Court to, where agreement attacked on ground of fraud, 1464
" of suit when difficult question of law involved in arbitration, 1465
" of suit effect of delay in application for. 1479
" of suit, effect of not staying suit, 1474
" of suit, grounds for refusal to, 1451
" of suit, illussrative cases if, 1455
Stay, of suit, in case of misconduct of arbitra-.tor, 1472
" of suit, judicial authority before whom proceedings are pending, 1456
" of suit, knowledge of the person taking step, if required, 1457
" of suit, nature of application for, 1473
" of suit, notice to be given to arbitrators or umpire. 1499
" of suit on ground of fraud against party proof required, 1463
" of suit, party asking for appointment of receiver, if stay to be referred, 1477
" of suit, power of Court discretionary, 1458
" of suit, power of Court to call upon the defendant to put in written statement, 1483
" of suit, power of Court to remove and proceed with the suit, 1484
" of suit, refusal to justifiable ground for 1470
" of suit, revlsion against order in the matter of, 1437
" of suit, steps in the proceedings construction, laches. waiver, effect of, 1456
" of suit, sufficient cause for refusing, 1469
" of suit, time for applying for, 1450
,, of suit, when application to be made for, 1452
" of suit, when first contract contains arbitration clause and subsequent contract create new rights, 1468
" of suit, when named arbitrator not available, 1482
" of suit, where suit framed is independent of contract, 1481
" ot suit, where co'plaintiff not party to arbitration agreement, 1480
Submission, cause for revocation, when to be urged, 1019
" construction of, 221
" oral submission how to be enforced, 97
" to arbitration scope of, 1425
" when can be revoked, I020
Suit against several defendants if to be stayed when one is a party to arbitration, Arbitration Protocol Act s- 3
" contesting arbitration agreement or award, if barred, 1338, 1339
" for declaration that arbitration agreement is void if maintainable, 1346
" instituted, but withdrawn or dismissed effect of, 1444
" on award declaring it to be null and void, if can be stayed 1434
" stay of suit, effect of 1475
" to be stayed when reference is in respect of the subject-matter 1496
" to declare award invalid for want of valid reference,

T

Time, court may enlarge for making award 1145
" court refusing to extend, if appealable, 1156
" extension of clause in contract, 1212
Time, extension of for making award bp mutual consent, 1146
" refund by arbitrator after giving opportunity ror evidence, if misconduct 1289
Third Party, if can enforce arbitration agreement, 399

U

Umpire, appointment of, 673
" appointment of, acquiscence in, 442
" appointment of, by arbitrator, 1220
" appointment of, by Association, 516
" appointment of, by lot 519
" appointment of, how made, 1605
" appointment of, if exhausts power, 523
" appointment of, if mandatory, 1604
" appointmont of, in pending suits, 524
" appointment of, when completed, 440
" authority of, if irrevocable, 301
" award by, in case of expiry of appointed time by arbitrators, 527
„ award of, to be final and binding, 1623
„ commencement of authority, 528, 1606
„ death of, 474
„ decision by, 533
„ duties of, 531
„ duty of impartiality, 739
„ duty of, to hear evidence of the parties, 691
„ extension of time to, 1151
„ if can sit with arbitrators and hear evidence, 738
„ if to state a case, 1286
„ meaning of, 300
„ misconduct of, 601, 1224
„ non-appointment of, 517
Umpire, power of, 472
„ power of, if discretionary, 645
„ power of Court, to appoint, 412, 415, 525
„ power of Court, to remove, 542. 543
„ proceedings before, 1607
„ procedure to be followed by, in making award, 665
„ proof of appointment, 521
„ refusal to act, 522
„ refusal to act, appointment of another by Court in case of, 535
" removal of, for misconduct, 602
" sitting with arbitrators, 530
" taking outside legal advice, effect of, 1231
" to decide on what matters, 529
" time for appointment of, 520
" time for award by, 1619
" what matters are to be decided by, 736
" when and how should be appointed, 515
" when appointment becomes effectual, 733
" when can arbitrate in lieu of arbitrators, 526
" when enters on the reference, 616, 1620
" written appointment of, if requires stamp, 518

W

Words and phrases, "administration de son tort", meaning of, 230
" "agreement", meaning of, 1362, 1388
" "all the parties do not concur", meaning of, 429
" "any matter in difference", meaning of, 880
" "any party to an arbitration agreement", meaning of. 1374
" "apply in writing", meaning of, 1087
", "arbitration", meaning of, 98, 1388
" "arbitration agreement", meaning of 260
" at any stage before the judgment is pronounced,' meaning of, 1044
" "award", meaning of, 207, 1318, 1362, 1388
" 'benamdar", meaning of, 27
" "Court" meaning of, 222, 228, 807, 1047, 1088, 1323
" disputes and differences", meaning of, 130
" "donee's legal representative" meaning of 232
" either meaning of 495
" entering on the reference meaning of 1611
" executor de son tort, meaning of 374
" existence, meaning of 1341
" filed, meaning of 1031
" heirs, meaning of 370
" heirs of Parsi, meaning of 234
" heirs or legatee, meaning of 233
" intermeddler meaning of 236
" Joint Hindu Family, meaning of 235
" judgment, meaning of
Words and phrase, legal representative, meaning of 228 237, 365
" making of the award, meaning 1116 1149
" "make their award" meaning of 1610
" made their award, meaning of 752
" matter in dispute, meaning of 1111, 1122
" may, meaning of 1007 1085
" means and includes, meaning of 36
" misconduct, meaning of 561
" misconduct of arbitrator, meaning of 1198
" month, meaning of 1612
" or otherwise invalid, meaning of 1297
" party in a representative character, meaning of 238
" parties, meaning of 1388
" person who intermeddles, meaning of 373
" refernce, meaning of 240
" removes, meaning of 615
" stay of proceedings what amounts to an application for 1449
" steps in the proceedings, meaning of 1453
" sufficient cause, meaning of 1021
" suit, meaning of 1047
" to enter on or proceed with reference, meaning of 541 550
" umpire, meaning of 300, 514
" unless there is anything repugnant in the subject or context, meaning of 94
" vacancy, meaning of 433
" when the arbitrators or umpires who made their award, meaning of 725
" when a difference has arisen to which the agreement applies, meaning of 1001

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